

**PHIA**

*Personal Health Information Act*

**TOOLKIT FOR CUSTODIANS:  
A GUIDE TO THE  
*PERSONAL HEALTH INFORMATION ACT***



Department of Health and Wellness  
Privacy and Access Office  
1894 Barrington Street  
P.O. Box 488  
Halifax, Nova Scotia  
B3J 2R8

Phone: 902-424-5419  
Phone (toll-free in Nova Scotia): 1-855-640-4765  
Fax: 902-428-2267

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# Toolkit Updates

## JUNE 1, 2013

- Chapter 1 Complying with PHIA
- Chapter 2 PHIA and PIPEDA
- Chapter 3 Duties of a Custodian
- Template 3-1 Compliance Checklist
- Template 3-2 Notice of Purposes
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## NOVEMBER 1, 2013

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# PERSONAL HEALTH INFORMATION ACT TOOLKIT FOR CUSTODIANS

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# DISCLAIMER

## TOOLKIT FOR CUSTODIANS

This Toolkit is intended to provide general commentary, templates and resources for individuals and organizations designated as “custodians” under the *Personal Health Information Act*.

It is not intended to provide advice or to replace the advice that a custodian would normally seek on legal or regulatory matters.

It should be used in conjunction with the official text of the *Personal Health Information Act* and its regulations. If there is any discrepancy between references in this document to the *Personal Health Information Act* and its regulations and the official text of the *Personal Health Information Act* and its regulations, the official text should be considered the authoritative document.

The Department of Health and Wellness encourages custodians to consult their own legal counsel for advice specific to their circumstances.

The Province of Nova Scotia holds copyright over the chapters in this Toolkit; therefore, the information in the chapters may be referenced with appropriate attribution. However, the Department encourages each custodian to review the templates in the Toolkit and determine whether they may be useful to modify and use as they implement the *Personal Health Information Act*.

# INTERPRETATION NOTE

Unless otherwise specified in the legislation or regulations, any reference to a time period in the *Personal Health Information Act* shall read as the time starting on the day referenced in the provision. If a time period expires on a Saturday or holiday, it shall be considered to have expired on the next day which is not a Saturday or holiday. <sup>1</sup>

## EXAMPLE

*PHIA Section 84 (1) A custodian who receives a request from an individual for access to or correction of a record of personal health information shall, as soon as possible in the circumstances but no later than thirty days after receiving the request...*

If the request was received by the custodian on Friday, March 1<sup>st</sup>, 2013, the thirty day time period would start running on March 1<sup>st</sup>.

However, since the thirty day time period would expire on a Saturday (March 30<sup>th</sup>), the time period would be considered to have expired on the next day (Sunday, March 31<sup>st</sup>).

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<sup>1</sup> *Interpretation Act*, section 19 (k) and (l)

# COMPLYING WITH THE *PERSONAL HEALTH INFORMATION ACT*

The *Personal Health Information Act*, S.N.S. 2010, c.41 (referred to as “PHIA” or “the Act”) was passed by the Nova Scotia government on December 10, 2010. It was proclaimed on December 4<sup>th</sup>, 2012, and came into force on June 1<sup>st</sup>, 2013.<sup>1</sup> The PHIA regulations were also approved on December 4<sup>th</sup>, 2012, and were effective on June 1<sup>st</sup>, 2013.

The *Personal Health Information Act* is a new act developed by Nova Scotia’s Department of Health and Wellness. PHIA governs the manner in which personal health information may be collected, used, disclosed, and retained within the health care system in Nova Scotia.

The purpose of PHIA is to provide a framework that strikes a balance between the protection of personal health information and the collection, use and, disclosure of personal health information within (or by) the health care sector to deliver and improve health care services.

The goal of the Act is to have comprehensive, consistent, and clear rules to help personal health information flow efficiently and effectively in the health sector.

## BACKGROUND TO PHIA

Since the late 1970s, provinces have enacted legislation to protect personal information held by public bodies. Since that time, provinces and the federal government have introduced legislation that governs the collection, use, disclosure and retention of personal information in both public and private organizations.

In Nova Scotia, personal health information has been governed by a mix of federal and provincial legislation, health profession codes, and organizational policies and procedures.

This includes the *Hospitals Act*, the *Health Protection Act* and the *Freedom of Information and Protection of Privacy Act (FOIPOP)*, which regulates access to and privacy of personal information held by public bodies, including the Department of Health and Wellness and administrative records belonging to the district health authorities.

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<sup>1</sup> A statute may be proclaimed on one date (the proclamation date), and come into force on another date or dates (the effective date). The proclamation document outlines when the statute will come into force.

In 2004, the federal government introduced the *Personal Information Protection and Electronic Documents Act (PIPEDA)* to regulate the collection, use, and disclosure of personal information in the course of “commercial activity” in the private sector. While the *Act* was not designed to address the specifics around personal health information,<sup>2</sup> *PIPEDA* currently applies to the activities of health care providers in private practice including physicians, dentists, optometrists, pharmacies, and to long-term care services (e.g. nursing homes and home-care agencies). *PIPEDA* does not apply to core activities of hospitals.

*PHIA* was developed specifically for health care in Nova Scotia, including direct patient care, public health, planning and management of the health system, and research.

Once *PHIA* is in force, the province will seek an order from Industry Canada (the federal government department responsible for *PIPEDA*) to declare that *PHIA* is “substantially similar” to *PIPEDA*. If the order is granted, commercial health care providers in Nova Scotia would be covered under *PHIA* rather than the federal legislation (*PIPEDA*).

See Chapter 2: *PHIA and PIPEDA* for information on the application of each piece of legislation during the time between *PHIA* coming into force and the province receiving the order that *PHIA* is substantially similar to *PIPEDA*.

## APPLICATION AND SCOPE OF THE ACT

In general, *PHIA* applies to custodians when they collect, use, disclose, retain, or destroy personal health information in the course of providing or supporting health care. Exceptions to this general statement are discussed on page 6 of this chapter.

## WHAT IS “PERSONAL HEALTH INFORMATION”?

The *Act* regulates how custodians and their agents may collect, use, retain, disclose, provide access to, and dispose of an individual’s personal health information. Personal health information is defined in section 3(r) as identifying information about an individual, whether living or deceased (in both recorded and unrecorded forms), if the information:

- relates to the physical or mental health of the individual, including information that consists of the health history of the individual’s family;

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<sup>2</sup> *PIPEDA* defines “commercial activity” as “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists” (section 2).

- relates to the application, assessment, eligibility and provision of health to the individual, including the identification of a person as a provider of health care to the individual;
- relates to payments or eligibility for health care in respect of the individual;
- relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance;
- is the individual's registration information, including the individual's health-card number; or
- identifies an individual's substitute decision-maker.

Identifying information is information that identifies an individual, or where it is reasonably foreseeable could identify an individual when used alone or with other information.

#### EXAMPLE

If Record A contains an individual's full name and health card number and Record B contains an individual's health card number, the two records together would identify the individual by name.

#### WHAT IS HEALTH CARE?

For *PHIA* to apply, the personal health information that is collected, used, or disclosed must be in relation to the provision of health care or for the planning and management of the health system (section 6(1)). Therefore, *PHIA* does not apply to every piece of personal health information in Nova Scotia; it only covers the management of personal health information which is collected, used, or disclosed for health care-related purposes.

Specifically, *PHIA* does not apply to identifying information in a record of a custodian where:

- (a) the identifying information contained in the record relates primarily to an employee or agent of the custodian; and
- (b) the record is created or maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employee or agent (section 4(2)).

“Health care” is defined very broadly under the legislation (section 3(k)). Health care means an observation, examination, assessment, care, service or procedure in relation to an individual that is carried out, provided or undertaken for one or more of the following health-related purposes:

- the diagnosis, treatment or maintenance of an individual’s physical or mental condition;
- the prevention of disease or injury;
- the promotion and protection of health;
- palliative care;
- the compounding, dispensing or selling of a drug, health-care aid, device, product, equipment or other item to an individual or for the use of an individual, under a prescription, or
- a program or service designated as a health-care service in the regulations.

The *PHIA* regulation adds the following services to the definition of “health care”:

- (a) an assessment under the *Adult Protection Act*; and
- (b) the taking of a donation of blood or blood products, bodily parts or other bodily substances from an individual (Regulation - section 4).

## CUSTODIANS

*PHIA* applies to a variety of individuals and organizations within the health care sector that are defined in the *Act* as “custodians.” Categories of custodians are named under the *Act* in section 3(f), or through regulation.

The following individuals and organizations are custodians under *PHIA*:

- a regulated health professional or a person who operates a group practice of regulated health professionals;

- the Minister of Health and Wellness;<sup>3</sup>
- a district health authority under the *Health Authorities Act*;
- the Izaak Walton Killam Health Centre;
- the Review Board under the *Involuntary Psychiatric Treatment Act*;
- a pharmacy licensed under the *Pharmacy Act*;
- a continuing-care facility licensed by the Minister under the *Homes for Special Care Act* or a continuing-care facility approved by the Minister;
- Canadian Blood Services; and
- any other individual or organization prescribed by regulation as a custodian.

The *PHIA* regulation adds the following to the definition of “custodian”:

- (a) a Nova Scotia Hearing and Speech Centre;
- (b) a home care agency that is approved by the Department of Health and Wellness and has a service agreement with a district health authority under the *Health Authorities Act* or with the Izaak Walton Killam Health Centre; and
- (c) a home oxygen agency that is approved by and has a service agreement with the Department of Health and Wellness (Regulation – section 3).

*Note: A “regulated health professional” is licensed or registered to provide health care under an act of the Province specific to his/her profession and who provides health care.<sup>4</sup> For example, a physician or a dentist is a regulated health professional. To be a custodian under PHIA, those individuals or organizations listed in section 3(f) must also have “custody or control of the personal health information.”*

<sup>3</sup> The Department of Health and Wellness also includes provincial programs (including Cancer Care Nova Scotia, the Reproductive Care Program of Nova Scotia, and Legacy of Life), and HITS-NS. See [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) for a full list of programs.

<sup>4</sup> See Appendix 4 for a list of current regulated health professions.



It is important to determine and understand who is a custodian under *PHIA* because custodians have specific responsibilities to the individuals whose information they hold. These responsibilities are set out in Chapter 3 - *Duties of a Custodian*.

## AGENTS

The Act also applies to an “agent” of a custodian. An agent is someone who, with the authorization of the custodian:

- acts for the custodian; or
- acts on behalf of the custodian

when collecting, using or disclosing personal health information.

The agent must have the authorization of the custodian to carry out these activities, and will only be carrying them out for the custodian’s purposes, not the agent’s purposes.

The following are examples of agents under *PHIA*:

- an employee of a custodian
- a volunteer with a custodian
- a custodian’s insurer
- a lawyer retained by the custodian’s insurer
- a liability protection provider for a custodian
- a shredding company retained by a custodian

### EXAMPLE

Angela operates a small company that provides technical support to dentists who use an electronic information system for their patient records. Angela would be an *agent* of the dentist when she uses the dental records in the course of her work, and not a *custodian*.

A person can be an agent of a custodian whether or not they:

- have the authority to bind the custodian;
- are being paid; or

- are employed by the custodian or are an independent contractor.

A custodian, through its “contact person” (see Chapter 3 – *Duties of a Custodian*, at page 11) must appropriately inform its agents of their duties under the *Act* (section 67(1)(b)).

The *Act* also sets out requirements that agents must fulfill. They include the following:

- the agent must not use the custodian’s personal health information for its own purposes (section 3(a)); and
- the agent must inform the custodian at the first reasonable opportunity if personal health information handled by the agent is stolen, lost or accessed by unauthorized persons (section 28(3)).

When determining whether a regulated health professional is deemed a “custodian” or an “agent of a custodian” under the *Act*, it is important to remember that by definition a “custodian” has custody or control of personal health information.

The following examples demonstrate the distinction between:

- 1) a regulated health professional not subject to *PHIA*;
- 2) a regulated health professional as a custodian under *PHIA*; and
- 3) a regulated health professional as an agent of a custodian under *PHIA*.

#### EXAMPLE

##### **Example 1: Jim - a physiotherapist employed by a fitness centre.**

Although Jim is a regulated health professional, he would not be subject to *PHIA*. The fitness centre, not Jim, has custody or control of the personal health information collected by the physiotherapist. A fitness centre is not listed as a “custodian” in section 3(f) of the *Act*. Jim is an employee of a non-custodian, and therefore not subject to *PHIA*.

##### **Example 2: Kelly - a physiotherapist in private practice renting space in a fitness centre.**

Kelly is a physiotherapist, a regulated health professional as listed in section 3(f) of *PHIA*. She has custody or control of the personal health information related to her practice. Her relationship to the fitness centre is as a tenant. Therefore, Kelly is a custodian and is subject to the *Act*.

### Example 3: Liam - a physiotherapist working for a hospital

Liam works for a custodian as listed in section 3(f) of *PHIA*. But the hospital, not Liam, has custody or control of the personal health information. Liam is an agent of the hospital and therefore is subject to *PHIA*, but is not subject to requirements in *PHIA* specific to custodians e.g. naming a contact person for *PHIA* as required in section 67.

## WHEN *PHIA* DOES NOT APPLY

### PERSONAL HEALTH INFORMATION THAT IS EXCLUDED

The Act does not apply to:

- statistical, aggregate, or de-identified health information (section 5(2)(a)); and
- personal health information about an individual, the earlier of 50 years after his/her death or 120 years after a record containing the information was created (section 5(2)(b)).

### PERSONAL HEALTH INFORMATION OUTSIDE OF THE HEALTH SECTOR

As a general rule, personal health information collected, used or disclosed outside of the health sector is not covered by *PHIA*. For example, insurance companies, employers, and regulatory bodies of health care professionals collect and use personal health information about individuals. However, they are not governed by *PHIA* because they did not have personal health information for the purposes of health care or the planning and management of the health system. Therefore, the organization or person collecting personal health information in these scenarios would not be considered a custodian under *PHIA*.

### EXAMPLE

Karen and Yvon are pursuing an adoption. Their adoption agency requires that they each provide comprehensive medical reports from their family physician.

Adoption agencies collect personal health information during the process of approving prospective adoptive parents. However, the purpose is to determine whether an individual meets the requirements to be an adoptive parent, not to provide the individual with health care. Therefore, these agencies are not subject to *PHIA*, and have not been designated as custodians under section 3(f).

PHIA does provide rules that govern third party recipients outside of the health sector who receive personal health information from a custodian (section 45).

**Note:** *the fact that a third party receives personal health information from a custodian does not make the third party a custodian (section 45(1)).*

The third party recipient has a duty under the *Act* to not use or disclose the personal health information for any purpose other than:

- the purpose for which the custodian was authorized to disclose the information under the *Act*; or
- for the purpose of carrying out a legal duty.

The recipient shall not use or disclose more of the information than is reasonably necessary to meet the purpose of the use or disclosure, unless the use or disclosure is required by law (section 45(3)).

## WHEN DOES ANOTHER PROVISION PREVAIL OVER PHIA?

Section 7(1) of *PHIA* states that where this *Act* is in conflict with another *Act* or regulation, *PHIA* will prevail unless the other *Act* or regulation more completely protects the privacy of an individual's personal health information.

However, there is no conflict if it is possible to comply with both *Acts*

If there is a provision where:

- access to a record is prohibited or restrict by;
- a right of access to a record of provided in; or
- a requirement or authorization to disclose is imposed upon (e.g. mandatory reporting)

a provision in regulation shall prevail over this *Act*.

The following provisions prevail over *PHIA* for the purposes of section 7(3):

Act or Regulations	Designated Provision
<i>Any enactment governing a regulated health-</i>	<i>Any provision that grants a person the power,</i>

<i>profession body</i>	privileges and immunities of a commission under the <i>Public Inquiries Act</i>
<i>Adoption Information Act</i>	Section 5
<i>Adult Protection Act</i>	Section 5
<i>Auditor General Act</i>	Section 14
<i>Child Pornography Reporting Act</i>	Section 3
<i>Children and Family Services Act</i>	Sections 23, 24, 25, 26, and 61
<i>Day Care Regulations</i> under the <i>Day Care Act</i>	Subsections 30(1), (2), (3) and (4)
<i>Fatality Investigations Act</i>	Sections 7, 9, 10, 11, 12, subsection 13(3), subsection 14(2), and Section 23
<i>Gunshot Wounds Mandatory Reporting Act</i>	Section 3
<i>Health Act</i>	Section 101
<i>Health Protection Act</i>	Section 15, subsection 16(2), Section 31, subsections 32(1) and (2), clause 32(3)(g), Sections 40, 42 and 50, clause 58(1)(e) and Sections 62 and 65
<i>Homes for Special Care Act</i>	Sections 10 and 11
<i>Homes for Special Care Regulations</i> under the <i>Homes For Special Care Act</i>	Subsections 25(1), (2), and (3)
<i>Juries Act</i>	Section 8
<i>Juries Regulations</i> under the <i>Juries Act</i>	Section 4
<i>Mandatory Testing and Disclosure Act</i>	clause 9(1)(b) and Section 10

<i>Prescription Monitoring Act</i>	Sections 18, 20 and 23
<i>Protection for Persons in Care Act</i>	Sections 4, 5, and 6
<i>Sharing of Health Information Regulations under the Correctional Services Act and the Court Houses and Lockup Houses Act</i>	Sections 1, 2, 3 and 4
<i>Victims' Rights and Services Act</i> <i>Criminal Injuries Compensation Regulations under the Victims' Rights and Services Act</i>	Section 11A Section 3

## AT WHAT POINT DOES *PHIA* APPLY TO A CUSTODIAN'S RECORD OF PERSONAL HEALTH INFORMATION ?

*PHIA* applies to the collection, use and disclosure of personal health information by custodians as of the date the *Act* comes into force. There is no obligation for custodians to seek consent for personal health information that was collected prior to this date.

However, after the *Act* is in force, when a custodian wants to use or disclose information collected prior to the coming into force of the *Act* for a different purpose other than the purpose outlined in the original consent, the custodian must comply with *PHIA* (section 5(1)).

This means that if a custodian wishes to use or disclose information:

- for a purpose other than the purpose for the information was initially collected; or
- for a purpose not covered within the initial consent for collection, use and disclosure,

the custodian is required to follow the use and disclosure provisions of *PHIA*, which may include seeking consent from the individual.

## LIMITING OR REVOKING CONSENT GIVEN BEFORE *PHIA*

Custodians must also make reasonable efforts to comply with a request from individuals to limit or revoke their consent to the collection, use and/or disclosure of any personal health information in the custody or control of the custodian (section 17).

This request may apply to any personal health information collected prior to the coming into force of the *Act*, but only in relation to a current or future use or disclosure.

The limitation or revocation is not retroactive; it only applies to future uses and disclosures. This means that a custodian is not required to ask other custodians or organizations to which the custodian disclosed the information prior to *PHIA* to return the personal health information.

### EXAMPLE

Helen has been receiving services from a psychologist for the several months. Initially, she was comfortable having the report be sent to her family physician. However, she now wants to keep information private.

Under *PHIA*, she can request that the psychologist no longer send the reports to her family physician. The psychologist does not have to request the return of the previous reports, but must take reasonable steps to comply with Helen's request.

# 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*.

# DUTIES OF A CUSTODIAN

## SUMMARY OF CUSTODIAN DUTIES UNDER THE *PERSONAL HEALTH INFORMATION ACT*

Custodians have legislated duties as outlined in the *Act*. A custodian is required to:

1. prepare and make readily available a *notice of purposes*. This is a notice or poster describing the purpose of the custodian's collection, use and disclosure of personal health information (section 15);
2. have a written *retention and destruction* schedule for personal health information (section 50);
3. put in place *information practices* that:
  - a. meet the requirements of the *Act* and the regulations;
  - b. are reasonable in the circumstances; and
  - c. ensure that personal health information in the custodian's custody or under its control is protected against
    - i. theft or loss of the information, and
    - ii. unauthorized access to or use, disclosure, copying or modification of the information. (section 62(1))<sup>1</sup>
4. implement, maintain and comply with a *complaints policy* for an individual to make a complaint under this *Act* (section 62(2));
5. have the ability to create and maintain a *record of user activity* for any electronic information system it uses to maintain personal health information (section 63);
6. designate a *contact person* to perform the functions set out in the *Act* (section 67).

**Note: If the custodian is a “natural person” (i.e. an individual health care practitioner), the practitioner may act as the contact person;**

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<sup>1</sup> “Information practices” defined on page 8

7. prepare and make available a *written privacy statement* about the custodian's information practices, how to reach the contact person, how to request access and correction of the individual's record, and how to make a complaint (section 68).

Items 1-3 and 6-7 are described in detail below. Item 3 (complaint policy) is described in detail in Chapter 9: *Complaints under PHIA* and Item 5 (record of user activity) is described in detail in Chapter 8: *Electronic Health Records/Electronic Information Systems*.

Custodians may review Template 3-1 *Compliance Checklist*, a list of high-level requirements in the legislation to assess their readiness for *PHIA*.

## 1. NOTICE OF CUSTODIAN'S PURPOSES

Under section 12 of *PHIA*, unless the *Act* requires express consent or makes exception to the requirement for consent, a custodian may accept knowledgeable implied consent as consent for the collection, use and disclosure of personal health information. Knowledgeable implied consent is the consent required for the provision of health care.

(See also Chapter 4 of the Toolkit – *Consent, Capacity and Substitute Decision-Making*).

A component of knowledgeable implied consent is the ability for a custodian to reasonably infer that the individual understands the custodian's purpose for collecting, using or disclosing the individual's personal health information.

Section 15(1) outlines the requirement to reach that inference. The custodian may either:

- a) make readily available a notice describing the purpose in a manner that the purpose is likely to come to the individual's attention ("notice of purposes"); or
- b) explain the purpose(s) to the individual.

The use of the term "readily available" suggests that a notice of purposes should be placed in a location where an individual would easily be able to locate and read it.

Posters and notices in waiting rooms are options for the posting of a notice of purposes.

## CONTENT OF A NOTICE OF PURPOSES

A notice of purposes must provide enough information for the individual to understand:



- why their personal health information is being collected;
- how it will be used;
- why it would be disclosed;
- the individual's rights under the *Act*;
- where the individual can obtain more information about the *Act*; and
- how the individual can make a complaint or ask for a review under the *Act*.

The Ontario Information and Privacy Commissioner and the Ontario Bar Association (Health and Privacy Law sections) have jointly produced what they have called “short notices” for custodians covered by the Ontario *Personal Health Information Protection Act*.<sup>2</sup> The information they have produced is generally applicable to Nova Scotia's *PHIA*.

In summary, a notice of purposes under *PHIA* should include:

1. A statement about the purpose of the *Act*:
  - The purpose is stated in *PHIA* as “to govern the collection, use, disclosure, retention, disposal and destruction of personal health information in a manner that recognizes both the right of individuals to protect their personal health information and the need of custodians to collect, use and disclose personal health information to provide, support and manage health care”.
  - A statement that includes a reference to the balance between the two objectives – privacy rights and use – would be sufficient.
2. A general statement about how the information will be used and disclosed, including:
  - to provide the individual with health care
  - to communicate with or consult with other providers about the individual's health care
  - to communicate with students in training with the custodian to support the individual's health care
  - to obtain payment for the individual's health care, including payment through the Medical Services Insurance Program administered by Medavie Blue Cross, and payment from the individual's private insurance

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<sup>2</sup> The Ontario Information and Privacy Commissioner produced the short notice information in conjunction with the Ontario Bar Association (Health and Privacy Law Sections), the Ontario Ministry of Health and Long Term Care, and the Ontario Dental Associations. The sample short notices are available at <http://www.ipc.on.ca/> under “Resources”.

- to report issues as required or permitted by provincial or federal law including the *Prescription Monitoring Act*
3. A statement about the individual's rights under *PHIA*:
- to request and receive or view a copy of the individual's personal health information (with exceptions)
  - to request that corrections be made to personal health information that is not accurate, complete or up-to-date
  - to request a record of who has accessed the individual's personal health information on an electronic information system (a record of user activity)
  - to request that specific personal health information not be provided to other health care providers
  - to be advised if a breach of the individual's personal health information has occurred<sup>3</sup>
  - to make a complaint to the custodian about a concern related to access, correction or another privacy issue under the *Act*
  - to request a review by the Review Officer of the custodian's decision or actions

See Template 3 – 2 *Template for a Notice of Purposes*.

#### EXCEPTIONS TO AN INFERENCE OF KNOWLEDGEABLE IMPLIED CONSENT

Section 15(2) states that a custodian cannot infer that the individual understands the purposes if the custodian should have known that:

- a) the individual has a limited ability to read or understand the language in which the notice or explanation is presented; or
- b) has a disability or condition that impairs the individual's ability to read or understand the notice.

If this is the case, section 15(3) requires the custodian to make “reasonable efforts” to assist with the individual's understanding of the purposes. This may include verbally explaining the purpose(s) to the individual, or facilitating an explanation – verbally or in writing - in the individual's language.

<sup>3</sup> See Template 3-5 *Breach Reporting Form*

## EXAMPLE

Edward, a physiotherapist, produces a poster that outlines:

- the purpose of *PHIA*
- the patient's basic rights under *PHIA* (including the right to make a complaint)
- why the physiotherapist collects personal health information
- how the personal health information will be used and disclosed
- the right of a patient to request that disclosure of their information be limited or revoked
- the right of a patient to make a complaint about the physiotherapist's use and disclosure of information
- the name and contact information for the physiotherapist's privacy contact person under the legislation

The poster is in English, and is posted on the counter where all patients are required to check in with the receptionist, and where they pay for any services or purchases.

Candace shows up for her physiotherapy appointment. She is obviously able to read the notice and asks no questions about it.

In this case, it would be reasonable for Edward to infer that Candace is providing "knowledgeable implied consent" to him – that is, she understands the information and by proceeding with requesting services, she is consenting to Edward's collection, use and disclosure of her personal health information.

If another client came to the clinic and it was obvious that the client did not read or speak English, Edward would be required to make a reasonable effort to assist the client's understanding of the notice. This could include asking if anyone in the clinic could help with translation, or using an online translator.



## 2. RETENTION AND DESTRUCTION SCHEDULE

### RETENTION

“Retention” is described as “[t]he process of holding data or information in a secure or intact manner usually for a defined period of time after which it may be permanently discarded”.<sup>4</sup>

A custodian under *PHIA* is required to have a written retention schedule for personal health information in its custody or under its control (section 50(1)). The *Act* does not set out a specific period for which records must be retained by a custodian, but does provide that the schedule set out all legitimate purposes for retaining the information, and the retention and destruction schedules associate for each purpose.

The regulatory bodies for regulated professions and professional associations may also provide guidance on the issue of retention specific to each profession.

The COACH Guidelines also note the following specific issues to consider for retention:

- information is only retained for as long as is needed to fulfill the identified purpose(s);
- if information is used to make a decision about an individual, it must be retained long enough to allow the individual to access the information and challenge its accuracy;
- retention schedules must include a minimum and maximum retention time and must contemplate all forms of media on which patient information is stored (i.e. paper, electronic, microfiche);
- legislation affecting retention takes precedence over retention times tied to specific purposes;
- custodians should ensure that personal health information held by their agents or other third parties is retained and destroyed in accordance with the custodian’s retention schedule; and
- an individual’s right of access to personal health information continues until personal health information has been destroyed in accordance with a destruction/disposition schedule.<sup>5</sup>

See Template 3 – 3 *Template for Retention Schedule*.

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<sup>4</sup> *COACH Guidelines for the Protection of Health Information* (December 15, 2006) at p. 157. COACH is Canada’s health informatics association. See [www.coachorg.com](http://www.coachorg.com) or the Appendix 4: *Resources* section for information about purchasing the *Guidelines*.

<sup>5</sup> *COACH Guidelines for the Protection of Health Information* (December 15, 2006) at p. 168.

## DESTRUCTION, DISPOSAL AND DE-IDENTIFICATION

Once the relevant retention period expires, PHIA section 49(2) states that the personal health information must be securely destroyed, erased or de-identified.

Under *PHIA*, “securely destroyed” means “destroyed in such a manner that reconstruction is not reasonably foreseeable in the circumstances” (section 49(1)). This would include shredding paper records in a manner that prevents the reassembling of the record (cross-cut shredding or pulverizing), or wiping the hard drive of any electronic devices.

ARMA’s Generally Accepted Recordkeeping Principles recommend that “*destruction must always be performed in a manner that renders the records completely and irreversibly destroyed*”.<sup>6</sup>

The Ontario Information and Privacy Commissioner has developed a Fact Sheet on Secure Destruction of Personal Information.<sup>7</sup> It provides guidance on secure destruction for both paper and electronic records. This includes:

- securely destroying all copies of a record, including duplicate copies, personal copies of records, and records on all media (paper and electronic);
- ensuring that all electronic and wireless media (CDs, USB keys, personal digital assistants and hard drives) are securely destroyed by physically damaging and discarding them or wiping them when the medium is to be re-used; and
- remembering that office equipment– including photocopiers, fax machines, scanners and printers – may contain hard drives which retain information. Custodians should either disable the hard drives, or wipe them before disposing of the equipment.

Section 49(2) of *PHIA* also states that personal health information may be “de-identified”. Section 3(g) of *PHIA* defines “de-identified information” as “information that has had all identifiers removed that

- i. identify the individual, or
- ii. where it is reasonably foreseeable in the circumstances, could be utilized, either alone or with other information, to identify the individual”

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<sup>6</sup> ARMA (formerly Association of Records Managers and Administrators) Generally Accepted Recordkeeping Principles: Principle of Disposition. See <http://www.armacanada.org/>

<sup>7</sup> Fact Sheet #10 (December 2005) – see <http://www.ipc.on.ca/> under “Resources”

Appropriate de-identification is important where identifying personal health information is no longer required for a custodian's primary purpose, but de-identified health information continues to be necessary for a custodian's secondary purposes.

#### EXAMPLE

Identifying personal health information is collected from Eleanor by her dentist to provide her with dental care. Once the retention period is reached for the identifying health information, the dentist may retain Eleanor's information in a de-identified form for research, quality or other management purposes.

*Note: Section 5(2)(a) of PHIA provides that the Act does not apply to statistical, aggregate or de-identified health information. This permits a custodian to retain de-identified information beyond the retention schedule in effect for identifying personal health information*

### 3. INFORMATION PRACTICES

A custodian is required to implement, maintain and comply with "information practices" that ensure personal health information in the custodian's custody or control is protected against theft or loss of the information and unauthorized access to or use, disclosure, copying or modification of the information (section 62(1)).

Section 3(n) of *PHIA* defines "information practices" as "the policies of a custodian or a prescribed entity<sup>8</sup> for actions in relation to personal health information, including:

- when, how and the purposes for which the custodian routinely collects, uses, discloses, retains, de-identifies, destroys or disposes of personal health information; and
- the administrative, technical and physical safeguards and practices that the custodian maintains with respect to the information.

As part of complying with *PHIA*, a custodian may choose to develop a written *PHIA* policy specific to the custodian's organization, its information practices and its patients, clients or residents. This policy may include the following:

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<sup>8</sup> See Chapter 5 - *Collection, Use and Disclosure* at p. 19 - Prescribed Entity

- when and how the custodian collects personal health information;
- when and how the custodian uses personal health information;
- when and how the custodian discloses personal health information;
- the purposes for all of the above collections, uses and disclosures;
- any uses and disclosures the custodian may routinely make without the individual's consent (see. *PHIA* section 35 for permitted uses without consent, and sections 38(1) and (7), and section 39 for permitted disclosures without consent);
- a summary of the custodian's retention policy, including the custodian's destruction and/or disposition practices; and/or
- the name and contact information of the custodian's *PHIA* contact person(s).

The custodian should also develop, maintain and comply with policies related to administrative, technical and physical safeguards for personal health information, both paper and electronic.

These policies may include the following:

- physical security of the custodian's records when in paper form, including policies for taking information away from the workplace, and managing documents at a photocopier or fax machine;
- security standards for physical access to areas when personal health information is used or stored;
- required training on the requirements under *PHIA* for all employees, volunteers and other agents;
- "clean desk" policies for employees; and
- guidelines for appropriate conversations in public areas.

See Chapter 8 – *Electronic Health Record/ Electronic Information Systems* for detail related to personal health information held in electronic form.

## 4. COMPLAINTS POLICY

### PRIVACY COMPLAINTS UNDER *PHIA*

Under section 62(2), every custodian is required to implement, maintain and comply with a complaints policy which outlines the process under which an individual may make a complaint. This requirement is part of the custodian's responsibilities to protect the personal health information of the individuals it serves.

An individual may make a complaint about any aspect of the custodian's conduct in relation to the privacy provisions of *PHIA*. Pursuant to section 92(1)(a) of *PHIA*, the "privacy provisions" of the Act are sections 11-70. These sections include:

- consent (sections 11 - 20)
- substitute decision-maker (sections 21-23)
- collection, use and disclosure - general (sections 24-29)
- collection (sections 30- 32)
- use (sections 33-35)
- disclosure (sections 36 - 46)
- retention, destruction, disposal and de-identification (sections 47 - 51)
- research (sections 52-60)
- practices to protect personal health information (sections 61 - 68)
- reporting of a privacy breach (sections 69 - 70)

### ACCESS AND CORRECTION COMPLAINTS

Complaints related to a request for access and/or correction would follow the review process outlined in Chapter 10 – *The Review Officer, Reviews and Mediation*.

### DEVELOPING A COMPLAINTS POLICY

The details of suggested content of a complaints policy and best practices for developing a policy are outlined in Chapter 9 – *Privacy Complaints under PHIA*.

## 5. DESIGNATION OF A CONTACT PERSON

A custodian is required to designate a contact person under *PHIA* to enhance accountability. If appropriate, the custodian can take on the contact person role. For example, if a physiotherapist is practicing as a sole practitioner, he can be the contact person.

Under section 67, the contact person's duties are to:

- facilitate the custodian's compliance with the *Act*;
- ensure that all agents of the custodian are informed of their duties under the *Act*;
- respond to inquiries about the custodian's information practices;
- respond to requests for access to and correction of records;
- receive and process complaints under the *Act*;
- facilitate the communications to and the training of the custodian's staff about the custodian's policies and procedures and about the *Act*; and
- develop information to explain the organization's policies and procedures.

The *PHIA* contact person does not have to have any specific education or professional background to fulfill the requirement in section 67. However, the contact person must have sufficient knowledge about the duties outlined below to be able to assist individuals who have questions about their personal health information and how it is managed by the custodian.

The contact person must also understand the requirements in *PHIA* to a level that would support their training of the custodian's staff and providing information to the custodian's agents and to the public.

The contact person duties can also be shared by more than one person in the custodian's organization.

The name and contact information for the contact person must be included in all privacy notices under *PHIA*. If more than one person is designated as being *PHIA* contacts, each contact person, their contact information and their duties under *PHIA* should be included.

For example, if one person is responsible for responding to requests for access and correction, and another is responsible for all other duties under *PHIA*, both would be listed with their individual contact information and their specific duties.

## 6. WRITTEN PRIVACY STATEMENT

Section 68 of the *Act* requires that a custodian make available to the public a written privacy statement explaining:

- the custodian’s information practices;
- how to contact the designated contact person;
- how to obtain access to or request correction of a record; and
- how to make a complaint under *PHIA* to the custodian and to the Review Officer.

The written privacy statement is a more detailed version of the notice of purposes required under section 15(1)(a). It provides additional information about the custodian’s management of personal health information. It may include specific details about the complaints process (e.g. the custodian’s timelines for responding to the complaint), or set out the exceptions to a request for access to the individual’s personal health information as permitted in section 72.

*PHIA* does not specify exactly how to make the written privacy statement available to the public; it states that it must make it available to the public “in a manner that is practical in the circumstances”. This may include all or a combination of the following:

- providing brochures to patients;
- putting a poster on the wall of the office; and/or
- placing information on the custodian’s website.

The written privacy statement must be available to the public on request.

See Template 3 – 4 *Template for a Written Privacy Statement*.

## 7. REPORTING OF A PRIVACY BREACH

Section 69 of *PHIA* requires a custodian to notify an individual at the “*first reasonable opportunity*” if the custodian “*believes on a reasonable basis that*

- a) the information is stolen, lost or subject to unauthorized access, use, disclosure, copying or modification; and*
- b) as a result, there is potential for harm or embarrassment to the individual”.*

## “FIRST REASONABLE OPPORTUNITY”

The definition of when the “*first reasonable opportunity*” is reached will vary depending on each custodian. If a custodian has a policy on how to report a breach, the policy should outline the steps to be taken between the time a breach is confirmed, and the time a decision is made to contact the individual(s) whose personal health information was the subject-matter of the breach.

The person who was responsible for committing the breach should not contact the individual immediately upon discovering the breach. The policy should indicate whether further action, investigation, and documentation are required before an individual is contacted about the breach of his/her personal health information.

## CONTENTS OF A PRIVACY BREACH POLICY

Although *PHIA* does not specifically require that a custodian develop and maintain a breach policy, the Act does require that every custodian have information practices to protect personal health information in its custody or under its control:

*62 (1) A custodian shall implement, maintain and comply with information practices that*

- a) meet the requirements of this Act and the regulations;*
- b) are reasonable in the circumstances; and*
- c) ensure that personal health information in the custodian's custody or under its control is protected against*
  - (i) theft or loss of the information, and*
  - (ii) unauthorized access to or use, disclosure, copying or modification of the information.*

Privacy oversight bodies in other provinces have developed helpful material for the custodians in their jurisdictions.<sup>9</sup>

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<sup>9</sup> See Information and Privacy Commissioner of Ontario *What to do When Faced with a Privacy Breach: Guidelines for the Health Sector and Privacy Breach Protocol & Guidelines for Government Organizations* at [www.ipc.on.ca](http://www.ipc.on.ca). Also Newfoundland and Labrador Health and Community Services *The Personal Health Information Act: Frequently Asked Questions*, at p. 48-50 at [www.health.gov.nl.ca/health/phia/PHIA\\_FAQs\\_Feb\\_2011.pdf](http://www.health.gov.nl.ca/health/phia/PHIA_FAQs_Feb_2011.pdf)



The basic components of a privacy breach policy may include:

### 1. Containment of the privacy breach

Once a privacy breach has been discovered, the person who discovered the breach must act quickly to ensure that the breach is contained.

#### EXAMPLE

Leon, a nurse working in a large medical practice, sent a fax containing personal health information to the wrong fax address. Leon should immediately send a fax to the address where the information was sent asking the receiver to destroy the information and confirm with Leon that it has been destroyed.

Other examples of containment include:

- retracting an e-mail sent in error (where possible);
- contacting a person who has received personal health information in error to request that they return or destroy the information; and
- in the case of a lost mobile device, requesting that the device be remotely wiped of all information.

### 2. Notify all relevant individuals

Each custodian's breach policy should set out who should be contacted when a breach has occurred. In most cases, the person discovering the breach should notify both their immediate supervisor and the person designated by the custodian as the contact person for breaches reportable under *PHIA*. The custodian may develop a breach reporting form to accompany the policy. See Template 3-5 *Personal Health Information Breach Reporting Form* as an example.

Others who may need to be contacted include the custodian's legal counsel and the head of the custodian.

Notifying the individual whose personal health information was the subject of the breach should occur after a full investigation of the breach. As the legislation requires notification at the "*first reasonable opportunity*" the investigation should be commenced as soon as possible after the breach is discovered.

### 3. Investigate the breach

The individual who discovered the breach should work with whoever is designated in the breach policy to complete the investigation. Part of the investigation would include a determination of the two factors identified in s. 70(1); specifically that, despite the fact that the information has been stolen, lost or subject to unauthorized access, use, disclosure, copying or modification:

- a) it unlikely that a breach of the information has occurred; or
- b) there is no potential for harm or embarrassment to the individual.

There may be cases where personal health information has lost or stolen, but it is unlikely that the information was breached.

#### EXAMPLE

Priscilla, a physician with a small clinic, keeps a small number of medical records on her laptop in order to be able to review them at home. The laptop is encrypted, and requires one strong password to access the laptop's operating system and another to access the file. Priscilla's laptop is stolen out of her car.

When Priscilla reports it as required by her breach policy, she should provide the information about the encryption and the double passwords. The decision may be that it is unlikely that a breach of the information could have occurred.

In other cases, a thorough review of the incident may lead to a determination that there is no potential for harm or embarrassment to the individual.

#### EXAMPLE

Jane, a care coordinator with a district health authority, wants to review the health records of her four clients with continuing care assessments the next day. She takes the paper files home in her briefcase, and leaves for her bus. When she reaches her apartment, she realizes that she left her briefcase on the bus. The bus company was unable to locate it.

There was information in three of the four records that Jane believes on a reasonable basis would cause embarrassment to each of her clients, including previous treatment for addiction, status of relationship with children and information about the client's ongoing treatment for depression. The fourth record included only the client's name and address; however, the

presence of the record with the other three does suggest that the individual is being considered for a continuing care assessment.

Jane should inform her supervisor and the *PHIA* contact person about the loss of the records, indicating the specifics of the personal health information in each record. The *PHIA* contact person would make a recommendation to the Chief Executive Officer for the district health authority on which of the clients should be contacted.

#### **4. Follow-up with recommendations on how to avoid future breaches**

The individual who committed the breach and the contact person for *PHIA* should review the incident to determine if any further policies or procedures are needed to prevent future breaches. For example:

- if an unencrypted mobile device was lost, mandatory encryption may be recommended;
- if files were lost, the custodian may require that no records leave the custodian's premises; or
- if an e-mail was sent to the wrong address, the custodian may recommend that every e-mail address is checked before it is sent.

## ***Personal Health Information Act***

### **COMPLIANCE CHECKLIST**

This checklist will help custodians under the Nova Scotia *Personal Health Information Act (PHIA)* start their privacy analysis to determine whether they have fulfilled their high-level requirements under the *Act*.

Please note that this checklist does not represent an exhaustive list of custodians' responsibilities under *PHIA*. For further details, please consult the *Act* and any regulations made under the *Act*, which are available for review at [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA). Custodians may also choose to seek professional advice regarding their compliance with the *Act*.

Under *PHIA*, custodians are required to:

- prepare and make readily available a notice describing the purpose of the custodian's collection, use and disclosure of personal health information [**"notice of purposes"**] (s. 15);
- have a **written retention and destruction schedule** for personal health information (s. 50);
- put in place **"information practices"** that:
  - meet the requirements of the *Act* and the regulations;
  - are reasonable in the circumstances; and
  - ensure that personal health information in the custodian's custody or under its control is protected against:
    - theft or loss of the information; and
    - unauthorized access to or use, disclosure, copying or modification of the information (s. 62(1)).

*"Information practices"* are defined in the *Act* (s. 3(n)) as *"the policies of the custodian for actions in relation to personal health information, including:*

- (i) *when, how, and the purposes for which the custodian routinely collects, uses, discloses, retains, de-identifies, destroys or disposes of personal health information; and*
  - (ii) *the administrative, technical, and physical safeguards and practices that the custodian maintains with respect to the information.”*
- implement, maintain, and comply with a **complaints policy** for an individual to make a complaint under this Act (s. 62(2)):

A complaints policy must include the following:

- a requirement that the complaint be submitted in writing;
- a statement of the time period following receipt of the written complaint when the custodian must process, investigate and made a decision on the complaint and reply to the complainant; and
- the time period referenced above must be no longer than 60 days, unless:
  - the custodian extends the period by no more than 30 days; or
  - a longer extension if approved by the Review Officer.

[Regulation clause 8]

- have the ability to create and maintain a **record of user activity** for any electronic information system it uses to maintain personal health information (s. 63);

A record of user activity must include the following:

- the name of the individual
- a unique identification number, including their health card number or a number assigned by the custodian;
- the name of the person who accessed the personal health information;
- any additional identification of the personal who accessed the information;

## TEMPLATE 3-1

- a description of the personal health information accessed or, if this cannot be determined, all possible personal health information that could have been accessed;
- the date and time the personal health information was accessed or, if this cannot be determined, a range of dates when the personal health information could have been accessed by the person.

The information used to update a record of user activity must be maintained for one year after each date of access.

[Regulation clause 11]

- designate a **PHIA contact person** to perform the functions set out in the *Act* (s. 67).  
[Note: If the custodian is a “natural person” (i.e. an individual health care practitioner), the practitioner may act as the contact person];
- implement **additional safeguards** for personal health information held in an electronic information system, including:
  - protection of network infrastructure;
  - protection of hardware and its supporting operating systems to ensure that the system functions consistently and only those authorized have access to the system; and
  - protection of the system’s software, including the way it authenticates users’ identity.

In addition, custodians must:

- create and maintain written policies to support and enforce the safeguard listed above; and
- create and maintain a list of every security breach likely to pose a risk to an individual’s personal health information, including details of all corrective action taken to diminish future breaches.

[Regulation clause 10]

TEMPLATE 3-1

- prepare and make available a written statement about the custodian’s information practices, how to reach the contact person, how to request access and correction of the individual’s record, and how to make a complaint [**“written privacy statement”**] (s. 68).

**Templates for the following are available in the Toolkit for Custodians:**

- Notice of Purposes
- Retention and Destruction Schedule
- Complaints Policy
- Written Privacy Statement

For more information about your responsibilities under the *Personal Health Information Act* please consult the *Personal Health Information Act* Toolkit for Custodians available at [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) .

You may also contact the Department of Health and Wellness Privacy Office at [phia@gov.ns.ca](mailto:phia@gov.ns.ca), by calling 902-424-5419 or Toll Free 1-855-640-4765.

## *Protecting your personal health information under the Personal Health Information Act*

### *What is the Personal Health Information Act?*

The *Personal Health Information Act* or *PHIA* is a new provincial law that aims to balance your right to have your personal health information protected with the need of those in the health sector to use your information to provide you with appropriate care and treatment.

### *How does PHIA protect my personal health information?*

*PHIA* requires that “custodians” of personal health information (including hospitals, physicians, dentists, and nursing homes) have policies and practices to protect your personal health information. Under *PHIA* we must:

- follow *PHIA*'s requirements for appropriate collection, use, disclosure, retention and destruction of your personal health information
- have a privacy contact person who can answer your questions about our management of your personal health information
- have policies to protect the privacy and security of your personal health information whether it is held on paper or in electronic form, or if it is unrecorded
- have a complaints policy for you to use if you have concerns about our compliance with *PHIA*
- take appropriate action if the privacy of your personal health information has been breached which may include notifying you or the Privacy Review Officer
- handle your requests for access to and correction of your personal health information

### *Who can see and use my personal health information?*

- individuals involved in your care and treatment, including students
- individuals who require the information to get payment for your health care
- anyone who can legally act for you with your consent
- specified organizations who have a legal right to see the information



***What are my rights under PHIA?***

- You have the right to have your personal health information collected, used, disclosed, retained and destroyed according to the provisions in *PHIA*.
- You have the right to request access to your personal health information which is provided according to the *PHIA* access fee schedule
- You have the right to request a correction to your personal health information.
- You have the right to request information on who has accessed your personal health information held in electronic form.
- You have the right to request that some or all of your personal health information not be collected, used or disclosed to specific individuals or organizations involved in your care.
- You have the right to make a complaint to any custodian related to their management of your personal health information.
- You have the right to request a review by the Review Officer responsible for *PHIA* if you are not satisfied with the resolution of your complaint or your access or correction request.

***Who do I contact for more information on my rights under PHIA?***

**This information is a summary of your rights and our obligations under *PHIA*. There are specific exceptions to these rights and obligations.** Additional information is included in our brochure [*name of custodian's brochure*].

You can also contact our *PHIA* Contact Person at [contact person's phone number and e-mail address].

For general information on *PHIA*, you can reach the Department of Health and Wellness *PHIA* contact at 1-902-424-5419 or toll-free at 1-855-640-4765. You can also get general information on *PHIA* at [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) or by e-mailing your questions to [phia@gov.ns.ca](mailto:phia@gov.ns.ca).

**Personal Health Information Act**

**Retention Schedule**

This template is for a retention schedule for a hospital. It includes an explanation of what could be included in each column, and an example of retention schedule information.

Original Documents	Guidelines for Retention	Authority for Disposal	Retention Period	Retention Mode	Disposition <sup>1</sup> Date
<i>Description of each health record category</i>	<i>Indicate the authority for the retention guidelines e.g. guidelines recommended by a specific regulatory college, guidelines from the Department of Health and Wellness</i>	<i>Indicate the position in the custodian organization responsible for authorizing disposal</i>	<i>Indicate the minimum time that the records must be retained by the custodian</i>	<i>Indicate the format on which the record will be held (e.g. paper, electronic, film).</i>	<i>Indicate the date when the records will be securely destroyed, erased or de-identified.</i>
<p style="text-align: center;"><b>Example</b></p> <p>1.1 Diagnostic Imaging</p> <p>1.1.1 Films &amp; tapes</p>	<p style="text-align: center;"><b>Example</b></p> <p>Department of Health and Wellness Guidelines 1995</p>	<p style="text-align: center;"><b>Example</b></p> <p>Vice-President of Clinical Services</p>	<p style="text-align: center;"><b>Example</b></p> <p>20 years following the date of the last hospital visit or 7 years past age 19, whichever occurs last</p>	<p style="text-align: center;"><b>Example</b></p> <p>Images and report retained electronically on the PACS system</p>	<p style="text-align: center;"><b>Example</b></p> <p>At the end of the minimum retention period for each record</p>

<sup>1</sup> “Disposition” include secure destruction, disposal and de-identification

## **The Personal Health Information Act**

The *Personal Health Information Act (PHIA)* came into force in June 2013.

This new provincial health information privacy and access legislation is intended to ensure that personal health information management rules in the health sector are clear, consistent and relevant to all records of personal health information, including the electronic health information systems being implemented in Nova Scotia.

*PHIA* balances your right to have your privacy protected with the need of the health sector – including our organization – to collect, use and disclose it to provide appropriate care and service to you.

As a “custodian” of personal health information under *PHIA*, we have an obligation to protect the privacy of the information we collect, use and disclose about you. This brochure is a summary of the purposes for our management of your personal health information.

### **What is “personal health information”?**

Personal health information is identifying information about you, and includes demographic information (name, address, date of birth), your health card number, information related to your physical and mental health care, and financial information related to your application and eligibility for health care services. Personal health information can be recorded and unrecorded, and continues to be protected after you are deceased.

### **Why do you collect my personal health information?**

We collect it for several purposes:

- to inform our decisions related to appropriate health care for you
- to disclose to other providers involved in your health care
- to ensure that all custodians receive appropriate payment for delivering care (e.g. services that are insured for you through the Department of Health and Wellness)
- to conduct research approved under *PHIA*

- to plan and manage health care services for you and others in Nova Scotia
- for other purposes required or permitted by law

### **When do you disclose my personal health information to others?**

The personal health information we collect from you is used within our organization to provide appropriate care to you. Anyone in our organization who is required to review your personal health information would have access to it.

We may disclose it to health professionals outside of our organization if they are in the “circle of care” for your illness or injury. This information would enable them to provide appropriate care to you.

### **Do I need to consent to this disclosure?**

This disclosure is carried out under the principle of “*knowledgeable implied consent*”. This means that we have to provide you sufficient information about the purposes for collecting, using and disclosing your personal health information, and about your right to give or withhold consent. In addition to the information contained in this brochure, you may ask for additional information about the



management of your personal health information.

If you continue to seek our services, we can assume your consent to our use and disclosure of your personal health information for your health care.

**Can I decide who can and can't have access to my personal health information?**

You have the right to request that your personal health information not be used or disclosed by a specific health professional or organization. We are required to:

- take reasonable steps to comply with your request
- advise you of any consequences of your request (e.g. one of your health professionals may not be confident that they have sufficient information to provide care to you)
- advise anyone to whom your personal health information is disclosed that the information is not complete
- advise you that we cannot comply with your request where the information is required by law to collect, use or disclose

**How do I request that my personal health information not be used or disclosed?**



A form is available from our *PHIA*/Privacy contact person.

**Can I request a copy of my personal health information?**

Yes – you have the right to request a copy of your personal health information, or request an opportunity to view your personal health information. There are limited exceptions to what you cannot access, including information what was collected during an investigation or information that includes the personal information of another person.

We are permitted to charge you a prescribed fee for providing you with a copy of your record or an opportunity to view your record. We can provide you with the fee schedule.

**Can I request that something in my personal health information be corrected?**

Yes – you may make the request to our *PHIA*/privacy contact person. There are limited exceptions to your right to a correction of your record, including when the information you request to be corrected is part of a professional opinion of a health practitioner.

**What happens if you lose my personal health information or someone who isn't authorized to see it gains access to it?**

If your personal health information is breached and we believe that this breach may cause you harm or embarrassment, we are required to notify you of the breach. If we don't notify you, we are required to notify the Review Officer for *PHIA*.

**Can I make a complaint if I think you have not followed the rules in *PHIA*?**

Yes – our organization has a *PHIA* complaints process. Our *PHIA*/privacy contact person can provide you with the necessary information and form.

**What if I am not happy with the way your organization has handled my complaint?**

You may request a review under *PHIA*. The Review Officer for *PHIA* can be reached at:

**Review Officer**  
***Personal Health Information Act***  
**P.O. Box 181**  
**Halifax, Nova Scotia B3J 2M4**  
**Phone: 902-424-4684**  
**Toll-free: 1-866-243-1564**  
**Fax: 902-424-8303**

**Who do I contact for more information?**

You can reach our *PHIA*/Privacy Contact person at: [custodian's contact person information].

***Personal Health Information Act***

**Personal Health Information Breach Reporting Form**

**NOTE**

This template outlines the key information which should be documented during the process of reporting, containment, investigation, and notification of a breach of personal health information. Based on their breach policy, each custodian will have a different requirement for who is responsible for each stage of the process, and who is responsible for signing the form. Multiple forms may be used to separate information from each stage of the process.

This form is to be used to document the theft, loss or unauthorized access, use, disclosure, copying or modification of an individual's personal health information.

Please complete this document and provide the completed and signed document to [Contact Person, Name of Custodian].

*Note: When completing this form, include the minimum amount of personal health information necessary to adequately explain the breach. Do not include specific details - describe the type of information that was allegedly breached (e.g. "the individual's diagnosis was included in the information").*

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**Reporting**

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**Date and time of breach**

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**Date and time of breach was reported**

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**Name and position of person who reported the breach**

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**Details of breach** (include name(s) and contact information for all individuals whose information was allegedly breached)

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**If known, name and position of person(s) responsible for the breach**

**Containing the Breach**

**Describe the steps taken to contain the breach.** This may include recovering copies of information in all media and removing access privileges to persons allegedly involved in the breach. Include the names and positions of all persons involved in containing the breach. Attach all relevant documents.

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**Investigation of the breach**

**Outline all information related to the investigation of the breach.** Attach all relevant documents.

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**Determination of whether notification is required**

Will notification be made to the individual(s)?

- Yes
- No

If **“yes”**, outline how the notification will be made (e.g. phone call, letter), and by whom. Attach all relevant documents.

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**Notification – Individual**

Include all relevant information including date and time of notification to the individual, and detailed notes of all discussions. Attach all relevant documents.

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**Follow-up**

Outline any follow-up requested by the individual(s), or committed to by the person notifying the individual(s).

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**Determination of whether notification is required**

If “no”, outline the rationale for not notifying the individual. Include information on who participated in the decision. Attach all relevant documents.

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**Notification – Review Officer**

If the decision has been made not to notify the individual, section 70(2) of the *Personal Health Information Act* requires that the custodian notify the Review Officer as soon as possible. **Attach a copy of the notification to the Review Officer.**

**Signatures**

*Note: Signatures may be required from the individual who reported the breach, his/her supervisor, the individual responsible for investigating the breach, and/or the Contact Person.*

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Include the dates the document was signed by each person.

**Notes from Contact Person**

Include any additional relevant information (e.g. details of any complaint lodged by the individuals, a request from the individual or the custodian to the Review Officer to investigate).

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# CONSENT, CAPACITY, AND SUBSTITUTE DECISION-MAKERS

*Note: This chapter deals with consent related to the collection, use, and disclosure of personal health information, and not consent to treatment. The Act has not changed the consent to treatment rules.*

## CONSENT

The Act provides for three primary models of consent to the collection, use and disclosure of personal health information:<sup>1</sup>

1. express consent;
2. knowledgeable implied consent; and
3. no consent.

Consent must be obtained from an individual by a custodian if the custodian is collecting, using or disclosing the individual's personal health information unless the collection, use or disclosure is permitted without consent or required without consent by *PHIA* (section 11).

Later in this Chapter we will look at the provisions of the Act that permit the collection, use or disclosure of personal health information without consent.

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<sup>1</sup> Other types of consent are discussed in Chapter 5: *Collection, Use and Disclosure of Personal Health Information*.



## GENERAL RULES OF CONSENT

Consent for the collection, use or disclosure of personal health information by a custodian under the *Act*, whether express consent or knowledgeable implied consent, must meet the following requirements (section 13):

- it must be given by the individual;
- it must be knowledgeable;
- it must be related to the specific information at issue; and
- it must be voluntary.

## EXPRESS CONSENT

Express consent is not defined in *PHIA*. However, the *COACH Guidelines for the Protection of Health Information* define “express consent” as follows:

*“Voluntary agreement with what is being done or proposed that is unequivocal and does not require any inference on the part of the organization seeking consent. Express consent may be verbal or written.”*<sup>2</sup>

Consistent with the *COACH Guidelines* definition, under *PHIA*, express consent can be written or oral (section 16).

Express consent of the individual to whom the personal health information relates is required in a number of different sections of the *Act* for collection, use and disclosure of that personal health information.

Express consent of the individual to whom the personal health information relates is required for the collection and use of personal health information for fund-raising activities as well as for market research and marketing any service for a commercial purpose (sections 32 and 34).

Express consent of the individual to whom the personal health information relates is required for the disclosure of the information (section 43):

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<sup>2</sup> *COACH Guidelines for the Protection of Health Information* (December 15, 2006) at p. 332. COACH is Canada’s health informatics association. See [www.coachorg.com](http://www.coachorg.com) or the Appendix 4: *Resources* section for information about purchasing the *Guidelines*.

- by a custodian to a non-custodian (unless required or authorized by law);
- by a custodian to another custodian if it is not for the purpose of providing health care (unless required or authorized by law);
- for fund-raising activities;
- for market research or marketing any service for a commercial purpose;
- to the media; or
- to a person or organization for the purpose of research (unless provided for in section 57).<sup>3</sup>

#### **EXAMPLE**

A hospital's fund-raising foundation would like to use a testimonial from a patient in a new fund-raising brochure. The hospital would require express consent from the patient before giving the foundation the patient's contact information.

### **KNOWLEDGEABLE IMPLIED CONSENT**

Consent is "knowledgeable" when it is reasonable in the circumstances for the custodian to believe that:

- the individual knows the purpose of the collection, use or disclosure, as the case may be; and
- the individual knows that s/he may give or withhold consent. (section 14)

If the individual then proceeds to pursue services, the custodian may infer that the individual is consenting to the collection, use and/or disclosure of the personal health information.

To ensure that consent is "knowledgeable," a custodian must either provide written or verbal information directly to the individual, post a notice, or distribute brochures describing the purpose of the collection, use and disclosure of personal health information that are readily available to the public (section 15(1)).

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<sup>3</sup> See Chapter 7 – *Research*

See Chapter 3: *Duties of a Custodian* at page 2 for information on the content of a “Notice of Purposes”.

#### EXAMPLE

Downtown Pharmacy has developed a poster that clearly explains the general purposes of its collection, use and disclosure of personal health information. The pharmacy hangs the poster next to the counter where prescriptions are dropped off and where all individuals using the pharmacy will see it.

Taylor gives a prescription written by his physician to the pharmacy technician on duty. The poster is right beside the counter. The pharmacist can reasonably assume that the Taylor has consented to the collection, use and disclosure of the personal health information for the purposes outlined in the poster.

Providing written information, posting notices or distributing brochures is not sufficient if the custodian should have known that the individual cannot read or cannot understand the notice (section 15(2)). If the custodian determines that an individual requires assistance understanding the notice, the custodian may assist the individual by using an interpreter (if available), or explaining the information in the notice directly to the individual as best s/he can.

#### “CIRCLE OF CARE”

The circle of care supports the care and treatment of individuals by allowing information to flow under different rules than the rules for those outside the circle. It allows custodians to assume an individual’s knowledgeable implied consent to collect, use or disclose personal health information for the purpose of providing health care, unless a custodian knows that an individual has expressly withheld or withdrawn consent pursuant to section 17 (see below).

The term “circle of care” is not used in the legislation, but is used in the health sector to refer to the custodians who provide or support care to an individual in each instance of care provision. The term “circle of care” is defined in Industry Canada’s guidelines for the health sector as follows:

*“Individuals and activities related to the care and treatment of a patient. Thus, it covers the health care providers who deliver care and services for the primary therapeutic*

*benefit of the patient and it covers related activities such as laboratory work and professional or case consultation with other health care providers.”<sup>4</sup>*

Under the “circle of care,” it does not matter whether care and treatment is provided in the private or public sector, or that services are publicly insured or not insured – the personal health information will follow the individual where s/he goes in the health care system.

However, the information may only be disclosed by a custodian to another custodian (or his/her agent) within the circle of care. If the individual is also receiving care and treatment from a person or organization not designated as a custodian under *PHIA*, express consent must be obtained from the individual.

The *Act* sets out minimum standards for consent that custodians must obtain for the collection, use and disclosure of personal health information. Unless the *Act* requires express consent or makes an exception to the requirement for consent, knowledgeable implied consent may be accepted as consent (section 12).

However, a custodian may decide to go further than the minimum standard and require express consent if the custodian believes it is appropriate.

Finally, it is important to remember that a circle of care is different for each instance of care provision.

#### EXAMPLE

Tessa receives care in a hospital for a broken leg. The custodians within her circle of care will include agents of the custodian involved in treating or supporting treatment of the broken leg such as paramedics, health records staff, the nursing staff, physicians, and physiotherapists.

If Tessa is treated three months later for a concussion, her circle of care will change to those agents of the custodian involved in treating Tessa’s concussion (e.g. health records staff, nurses and physicians in the neurological service). The care providers involved in the treatment of the broken leg are not permitted to use or have disclosed to them the personal health information related to Tessa’s concussion unless there is a reasonable reason to do so.

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<sup>4</sup> Industry Canada, *PIPEDA Awareness Raising Tools (PARTs) Initiative for the Health Sector, Questions and Answers*, question 12. Available at <http://www.ic.gc.ca/eic/>

The same would be true for information disclosed from custodian to custodian.

#### EXAMPLE

If the hospital (a custodian under *PHIA*) referred Tessa to a physiotherapist in private practice outside of the hospital (also a custodian under *PHIA*) to receive services for her broken leg, the physiotherapist would not be part of the circle of care for any subsequent hospital treatment that Tessa received for her concussion.

## WITHDRAWAL OF CONSENT

An individual may request to limit or revoke consent for the collection, use or disclosure of personal health information in the custody or control of a custodian by giving notice to the custodian (section 17(1)). In the context of electronic health records, this limitation or revocation of consent is often referred to as a “lockbox”; the terms “consent directives” and “masking” are also used in reference to both paper and electronic records.

An individual may request to limit or revoke his/her consent at any time, but it is not retroactive (section 17(2)). This means that if an individual informs a custodian that s/he is withdrawing consent to have information disclosed to one of his/her health providers, the custodian is not required to request that any information previously disclosed to the other provider be returned.

However, pursuant to section 17(5), the custodian must inform the provider named by the individual that the individual’s record is not complete, meaning the custodian considers that the information disclosed to that provider is not what is “reasonably necessary” for the care of the individual.

The custodian must also inform the individual of the consequences of limiting or revoking consent (section 17(4)), including the fact that the other provider may decide that s/he is not confident in providing care to the individual without understanding what information has been withheld.

#### EXAMPLE

François receives a referral from his optometrist for eye surgery. François has asked that the optometrist not disclose to the surgeon that he occasionally takes medication to help him sleep.

The optometrist would have to evaluate whether this information is reasonably necessary for the surgeon to know, and if so, must inform the surgeon that the record is not complete. The optometrist would also have to discuss with François the consequences of not disclosing this information, including the fact that he may not receive appropriate and safe care, or that the surgeon may refuse to treat him at all.

A custodian is required to take reasonable steps to comply with an individual's request to limit or revoke consent (section 17(3)). Each individual circumstance will determine what is reasonable.

#### EXAMPLE

A nursing home holds their residents' personal health information records in an electronic information system. Kenneth, a resident of the home, informs the administrator that he doesn't want the nursing home's physiotherapist to have access to specific information in his nursing home record.

The nursing home's electronic system does not have the technological means to withhold the information, and the system is not scheduled to be upgraded for another two years. The upgrade will include the ability to mask the residents' information on request.

It would not be reasonable for Kenneth to expect that the custodian incur the costs of upgrading immediately to meet his request. However, it would be reasonable to expect that the custodian explain to Kenneth that only persons involved in his care would have information disclosed to them. If the physiotherapist is involved in Kenneth's care, he would have the option not to use the physiotherapist's services. However, the nursing home would be required to inform him of any consequences of limiting access to his records, including the possibility that he may not be provided with physiotherapy.

The revocation of consent does not apply to collection, use and disclosure of personal health information that a custodian is required by law to collect, use or disclose (section 17(6)).<sup>5</sup>

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<sup>5</sup> See Chapter 5: *Collection, Use and Disclosure of Personal Health Information* for information on revocation of consent

### EXAMPLE

Section 38(1)(c) authorizes a custodian to disclose information to a regulated health profession body for the purposes of carrying out its duties in Nova Scotia under a provincial *Act*.

A complaint has been received against Cheryl, a dentist. Darren, one of her patients, requests that the information in his dental record not be disclosed to the Provincial Dental Board.

This request could be denied under section 38(1)(c), as the Provincial Dental Board may require Darren's records to aid in its investigation against Cheryl Smith carried out under the Board's authority in the *Dental Act*.

## WHEN CONSENT IS NOT REQUIRED

The *Act* provides for circumstances where personal health information may be collected, used or disclosed without consent.<sup>6</sup>

In circumstances where disclosure without consent is permitted by the *Act*, a custodian is not obliged to disclose information to a third party unless required to do so under another law or enactment. In addition, the custodian may choose to obtain the individual's consent for the disclosure or give notice to the individual of the disclosure (section 10(2)(c)).

## CAPACITY TO CONSENT

For the consent of an individual to be valid, the individual must have the *capacity* to consent. In the context of *PHIA*, capacity means:

- the ability to understand information that is relevant to the making of a decision related to the collection, use or disclosure of personal health information and
- the ability to appreciate the reasonably foreseeable consequences of a decision or a lack of a decision. (section 3(b))

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<sup>6</sup> See Chapter 5: *Collection, Use and Disclosure of Personal Health Information* for information on the collection, use and disclosure of information without individual consent.

Any capable individual, regardless of age, may consent or withdraw consent for the purpose of the Act (section 18). The capacity of an individual must be considered in each instance consent is being sought. An individual may have the capacity at a particular time to consent to the collection, use or disclosure of some parts of personal health information, but may be incapable of consenting at another time (section 19).

Where an individual is deemed to have the capacity to consent to the collection, use and disclosure of personal health information, such consent includes disclosure to a parent, guardian or substitute decision-maker where applicable (section 20).

## MATURE MINORS

Under the provincial *Age of Majority Act*, a person ceases to be a minor when they reach the age of nineteen years. This age is recognized by some provincial legislation, while other provincial legislation provides for benefits and rights when an individual reaches a younger age.<sup>7</sup>

*PHIA* recognizes the common-law principle of “mature minors,” which recognizes that the capacity to consent is incremental and situational. The capacity of each individual minor must be considered in the context of each episode of care. A 17-year-old may have the capacity to consent to (or withhold) disclosure of information related to one issue while lacking the capacity to consent to disclosure related to another.

### EXAMPLE

Sixteen-year-old Jenny may have the capacity to consent to receive a prescription for oral contraceptives and to request that the information related to this health care service not be disclosed to her parents. If Jenny is diagnosed with cancer which requires ongoing treatment, she may not have the capacity to make a decision about the treatment.

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<sup>7</sup> For example, the *Freedom of Information and Protection of Privacy Act* provides that the guardian of an individual under the age of majority may exercise the individual’s rights unless it would be an “unreasonable invasion” of the individual’s privacy, while the *Adult Protection Act* defines an “adult” as being or appearing to be sixteen years of age or older.



In that circumstance, it may be reasonable for the physician to disclose the diagnosis and treatment information to Jenny's parents, even if she objects.

## SUBSTITUTE DECISION-MAKER

Where an individual lacks the capacity to consent or refuses the collection, use and disclosure of personal health information, a substitute decision-maker may make that decision on behalf of the individual.

A hierarchy of substitute decision-makers is outlined in section 21(2) of the Act. The hierarchy is:

- (a) a person who is authorized by or required by law to act on behalf of the individual;
- (b) the individual's guardian appointed by a court of competent jurisdiction;
- (c) the spouse of the individual;
- (d) an adult child of the individual;
- (e) a parent of the individual;
- (f) a person who stands in loco parentis to the individual;
- (g) an adult sibling of the individual;
- (h) a grandparent of the individual;
- (i) an adult grandchild of the individual;
- (j) an adult aunt or uncle of the individual;
- (k) an adult niece or nephew of the individual;
- (l) any other adult next of kin of the individual;
- (m) the Public Trustee.

The criteria for choosing a substitute decision-maker are set out in section 21(5). The criteria are:

- a) the potential substitute decision-maker has been in contact with the individual throughout the preceding twelve-month period; or if the individual has not been in contact, a court order has been granted to waive the twelve-month period;
- b) the potential substitute decision-maker is willing to accept the responsibility;
- c) the potential substitute decision-maker knows of no person of a higher category who is able and willing to make the decision; and
- d) the potential substitute decision-maker certifies in writing the potential substitute decision-maker's relationship to the individual and the facts that meet the criteria set out above.

Once a substitute decision-maker is chosen by the custodian, section 22 states that the substitute decision-maker shall make decisions based on the following:

- the prior expressed wishes of the individual. However, the substitute decision-maker may also act according to what s/he believes the individual would have wished had the specific circumstances been known to the individual. In doing this, the substitute decision-maker would base his/her decision on what s/he knows about the values and beliefs of the individual, and any written or oral instructions;

*Note: The written or oral instructions would not necessarily be related to the specific care decision where the substitute decision-maker has to act. It may be related to previous care decisions made by the individual.*

- in the absence of instructions, the substitute decision-maker would base his/her decision on what s/he knows about the values and beliefs of the individual, and any other written or oral instructions;

*Note: The written or oral instructions would not necessarily be related to the specific care decision where the substitute decision-maker has to act. It may be related to previous care decisions made by the individual.*

- where the substitute decision-maker does not know the wishes, values and beliefs of the individual, the substitute decision-maker may make decisions that s/he believes would be in the best interest of the individual.

The person seeking consent on an individual's behalf is entitled to reply on the potential substitute decision-maker's statement in writing as to his/her relationship with the individual and as to the criteria outlined in section 21(5) outlined above, unless it is not reasonable to believe the statement.

#### EXAMPLE

Michelle, a family physician, has been treating Daphne for 20 years. Daphne now lacks the mental capacity to make decisions for herself.

Michelle know from prior discussions with Daphne that she has two adult children, Kelly and Derek, who meet the criteria to be a substitute decision-maker. However, only Derek has stepped forward and says that he is the only child who can act for his mother.

It would not be reasonable for Michelle to believe Derek's statement. It would be reasonable for her to make further inquiries to determine if Kelly would be willing to be considered as a potential substitute decision-maker.

Once a custodian has determined who will act as the individual's substitute decision-maker, the custodian shall only accept the consent of the chosen substitute decision-maker. However, there can be different substitute decision-makers for different custodians, and even different substitute decision-makers for the same custodian in different circumstances.

#### EXAMPLE

In the example above, Daphne's physician spoke to Kelly and determined that she was the appropriate substitute decision-maker for her mother for her current hospitalization.

Six months later, Daphne is admitted to the hospital again, but Kelly is out of the country and will not be returning for two weeks. In this case, if Michelle determines that Derek still meets the criteria for substitute decision-maker, she can recognize him as the new substitute decision-maker for her current hospitalization.

# COLLECTION, USE AND DISCLOSURE

The full title of the *Personal Health Information Act* is *An Act Respecting the Collection, Use, Disclosure and Retention of Personal Health Information*. The title underscores the primary activities sought to be regulated by the *Act*: collection, use, disclosure and retention of personal health information.

This chapter outlines a custodian's requirements under *PHIA* related to collection, use and disclosure. Retention (and destruction, disposal and de-identification) are covered in Chapter 3 – *Duties of a Custodian*.

See Chapter 4: *Consent, Capacity and Substitute Decision-Makers* for additional information on consent.

## LIMITS ON COLLECTION, USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION

There are two guiding principles that limit the collection, use and disclosure of personal health information. These are found in *PHIA* sections 24 and 25. In summary:

- a custodian cannot collect, use or disclose personal health information where other information will serve the custodian's purpose; and
- a custodian must collect, use and disclose the minimum amount of personal health information necessary to achieve the custodian's purpose.

### EXAMPLE

Samantha is a dentist providing service to her new patient, Whitney. Samantha has requested a full medical history. Whitney would be justified in not disclosing the fact that she had broken her leg as a teenager, as it is not necessary information Samantha needs to provide dental services to her.

There are additional limiting principles in *PHIA*:

- a custodian may only collect, use or disclose personal health information if the individual consents and if it is reasonably necessary for a lawful purpose; or
- the collection, use or disclosure is permitted or required by the *Act* (section 11).

#### EXAMPLE

Steven has an appointment with Kevin, his new dietician. He has consented to his previous dietician's records being transferred to Kevin.

The Act also states the following:

- a custodian will limit the use of the personal health information to those agents requiring the information to carry out the purpose (section 25(2)(a)).

***Note:** The definition of “agent” includes employees and volunteers of the custodian.*

- a custodian will only disclose the information necessary to regulated health professionals that they need to carry out their duties and responsibilities (section 25(2)(b)).

#### EXAMPLE

Kathryn is a physician with privileges at the local hospital. Her patients include Gilles, who is being monitored by Kathryn for high blood pressure. The hospital does not need to disclose to Kathryn that Gilles had been treated for a sprained ankle ten years before, as it is not necessary information that she would need to provide treatment to him.

## SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege is protected under *PHIA* (section 5(3)). This means that a custodian is not required to disclose information where solicitor-client privilege is being claimed:

- to an individual requesting his/her own personal health information under sections 71 and 75; or
- to the Review Officer in a review of a decision regarding an access request, a request for correction, or a privacy complaint.<sup>1</sup>

In respect of the individual, this protection is consistent with privilege provisions in the *Nova Scotia Freedom of Information and Protection of Privacy Act* and the federal *Personal Information Protection and Electronic Documents Act*. In respect of the Review Officer, the

<sup>1</sup> The Supreme Court of Canada has ruled that only a court can review the validity of a claim of solicitor-client privilege. See *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574

protection is consistent with the privilege provision in the federal *Personal Information Protection and Electronic Documents Act*.

## COLLECTION

*PHIA* defines “collect” in relation to personal health information as, “to gather, acquire, receive, gain access to or obtain the information by any means from any source” (section 3(c)).

Section 31 states that custodians must collect personal health information directly from the individual about whom the information is being collected.

## INDIRECT COLLECTION

However, section 31 of the *Act* also sets out exceptions to direct collection. It allows a custodian to collect information indirectly in the following circumstances:

- the individual authorizes collection from another person;

***Note:*** Authorization may be written or verbal. The other person does not have to be the individual’s substitute decision-maker.

- the collection is from the substitute decision-maker if the substitute decision-maker has the authority to act;

***Note:*** See *PHIA* section 21 for details on the requirements for substitute decision-makers.

- the information to be collected is reasonably necessary for providing health care or assisting in the provision of health care to the individual and it is not reasonably possible to collect, directly from the individual:
  - personal health information that can reasonably be relied on as accurate, or
  - personal health information in a timely manner.

## EXAMPLES

### **Personal health information that can be relied upon as accurate**

David is experiencing chronic post-concussion dizziness but does not want to tell his physician. He is concerned that his physician may report it to the Registrar of Motor Vehicles, who could suspend David's license to drive.

The physician would be justified in collecting the information from David's wife, as the information collected from David cannot reasonably be relied upon as accurate.

### **Personal health information in a timely manner**

Mary is unconscious upon admission to the hospital. The admission staff would be justified asking the person accompanying Mary to the hospital for any relevant health information.

- the custodian believes, on reasonable grounds, that collection from the individual who is the subject of the information would prejudice the safety of any individual;
- for the purpose of assembling a history of family-health issues potentially relating to or also affecting the individual.

## EXAMPLE

Tim is admitted to a hospital with chest pain, but doesn't know if he has any family history of heart disease. A nurse may collect personal health information from Tim's family to determine whether there is a relevant family history of heart disease.

- collection is for:
  - determining the eligibility of an individual to participate in a program of, or to receive a benefit, product or health service from, a custodian, and the information is collected in the course of processing an application made by or for the individual who is the subject of the information, or
  - verifying the eligibility of an individual who is participating in a program of, or receiving a benefit, product or health service from, a custodian to participate in the program or to receive the benefit, product or service.

- the custodian is a public body within the meaning of the *Freedom of Information and Protection of Privacy Act* or is acting as part of such a public body, and the custodian is collecting the information for a purpose related to:
  - investigating a breach of an agreement or a contravention or an alleged contravention of the laws of the Province or Canada;
  - the conduct of a proceeding or a possible proceeding, or;
  - the statutory function of the custodian.
- the custodian collects the information from a person who is not a custodian for the purpose of carrying out a research project that has been approved by the research ethics board or a research ethics body, except if the person is prohibited by law from disclosing the information to the custodian;
- the custodian is a prescribed entity mentioned in clause 38(1)(j) and the custodian is collecting personal health information from a person who is not a custodian for the purpose of that clause;<sup>2</sup>
- the custodian collects the information from a person who is permitted or required by law or by a treaty, agreement, or arrangement made under this *Act* or another *Act* of the Province or of the Parliament of Canada to disclose it to the custodian;
- subject to the requirements and restrictions, if any, that are prescribed, the custodian is permitted or required by law or by a treaty, agreement, or arrangement made under this *Act* or another *Act* of the Province or of the Parliament of Canada to collect the information indirectly;
- the custodian is the Minister of Health and Wellness and the collection of the personal health information is for the purpose of planning and management of the health system;

***Note: Only the Minister has the authority to collect personal health information for the purpose of planning and management of the health system.<sup>3</sup>***

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<sup>2</sup> See page 19 for further information on prescribed entities

<sup>3</sup> The only exception to this would be the prescribing of a “prescribed entity” in the regulations. At the time of the proclamation of *PHIA*, no entities had been designated as “prescribed entities” under the legislation.



- the collection is for the purpose of ensuring quality or standards of care within a quality review program within the custodian's organization;
- the collection is reasonably necessary for the administration of payments in connection with the provision of health care to the individual or for contractual or legal requirements in that connection; or
- the custodian is the Minister of Health and Wellness and the collection of personal health information is from another custodian for the purpose of creating or maintaining an electronic health record.

#### EXPRESS CONSENT FOR COLLECTION

Express consent is required for collection of personal health information for the purposes of fund-raising activities, market research, or marketing any service for a commercial purpose (section 32).

Express consent may be written or oral (section 16).

See Chapter 4 – *Consent, Capacity and Substitute Decision-Making* for further detail on express consent for collection, use and disclosure.

## USE

*PHIA* defines “use” in relation to personal health information in the custody or control of the custodian as to handle or deal with the information (section 3(ab)). It does not include disclosure of the information.

## USE WITH CONSENT

Where the *Act* permits a custodian to collect personal health information, section 33 also permits the custodian to use the information for:

- the purpose for which the information was collected or created and for all the functions reasonably necessary for carrying out that purpose;

### EXAMPLE

If a nursing home collects personal health information about a resident, the home may also use the information to develop case and service plans to assist the resident while in the facility.

- a purpose for which this *Act*, another *Act* of the Province or of the Parliament of Canada permits or requires a person to disclose it to the custodian;

### EXAMPLE

Section 31 of the *Health Protection Act* requires physicians, nurses, and medical laboratory technicians who have reasonable and probable grounds to believe that a person has a notifiable disease or condition, to report the information to a medical officer.

- educating agents to provide health care.

### EXAMPLE

A hospital may use personal health information collected about a patient to teach interns, residents, and other health profession students.

However, if an individual determines that they do not want their personal health information used for a specific purpose (e.g. educating students) they have the right under *PHIA* section 17 to request that it not be used for that purpose. However, an individual cannot request that a custodian not use information that is required by law to be disclosed to the custodian.

### EXAMPLE

Section 31 of the *Health Protection Act* requires physicians, nurses and medical laboratory technicians who have reasonable and probable grounds to believe that a person has a notifiable disease or condition report the information to a medical officer.

A patient cannot request the information related to their notifiable condition not be used by the medical officer.

### USE WITHOUT CONSENT

Section 35(1) states that a custodian may use personal health information about an individual without the individual's consent in the following circumstances:

- for planning or delivering programs or services that the custodian provides or that the custodian funds in whole or in part, allocating resources to any of them and evaluating or monitoring any of them;
- for detecting, monitoring, or preventing fraud or any unauthorized receipt of services or benefits related to any of them;
- for the purpose of ensuring quality or standards of care within a quality review program within the custodian's organization;

***Note:** The use of personal health information in this circumstance must be part of a quality review program. It cannot be a review initiated by an individual employee of the custodian.*

- for the purpose of disposing of the information or modifying the information in order to conceal the identity of the individual;
- for the purpose of seeking the individual's consent, when the personal health information used by the custodian for this purpose is limited to the individual's name and contact information;

### EXAMPLE

A physician may contact his/her patients to ask if they would consent to the physician's disclosure of the individual's personal health information to a researcher.

- for the purpose of a proceeding or a contemplated proceeding in which the custodian or an agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding;

#### EXAMPLE

A nursing home is being sued by a former resident. The nursing home may use personal health information collected about the resident if the information relates to the legal case.

- for the purpose of obtaining payment or processing, monitoring, verifying or reimbursing claims for payment for the provision of health care or related goods and services;
- for research conducted by the custodian, in accordance with sections 52 to 60 ;
- Subject to requirements and restrictions, if any, that are prescribed, if permitted or required by law or by a treaty, agreement or arrangement made under this *Act* or another *Act* of the Province or of the Parliament of Canada;

or

- for the purpose of risk management or patient safety within the custodian's organization.

A custodian may provide personal health information to an agent to use for any of the above purposes (section 35(2)). Agents include employees, volunteers, or the custodian's lawyer.

#### USE WITH EXPRESS CONSENT

Express consent is required for use of personal health information for the purposes of fund-raising activities, market research, or marketing any service for a commercial purpose (section 34).

Express consent may be written or oral (section 16).

## DISCLOSURE

Under *PHIA* “disclose” in relation to personal health information in the custody or control of a custodian is defined as making the information available or releasing it to another custodian or to another person (section 3(h)).

### KNOWLEDGEABLE IMPLIED CONSENT WITHIN THE “CIRCLE OF CARE”

A custodian may disclose personal health information about an individual to another custodian(s) involved in the individual’s health care if:

- the information is reasonably necessary for the provision of health care to the individual; and
- the individual has not limited or revoked consent to disclosure under *PHIA* section 17.

See Chapter 4 - *Consent, Capacity and Substitute Decision-Maker* for more information on the “circle of care,” an individual’s rights, and a custodian’s obligations under section 17.

### DISCLOSURE WITHOUT CONSENT

Section 38 of the *Act* permits a custodian to disclose personal health information without the individual’s consent in the following circumstances:

- to another custodian if the custodian disclosing the information has a reasonable expectation that the disclosure will prevent or assist an investigation of fraud, limit abuse in the use of health services or prevent the commission of an offence under an enactment of a province or the Parliament of Canada;
- to persons acting on behalf of the individual including:
  - a person who is legally entitled to make a health-care decision on behalf of the individual;
  - a legal guardian, or
  - the administrator of an estate, if the use or disclosure is for the purpose of the estate.
- to a regulated health profession body or a prescribed professional body that requires the information for the purpose of carrying out its duties in the Province under an *Act* of the Province or in another province of Canada under an *Act* of that province regulating the profession;

#### EXAMPLE

The College of Registered Nurses of Nova Scotia carrying out its duties under the *Registered Nurses Act*.

- to any person if the custodian believes, on reasonable grounds, that the disclosure will avert or minimize an imminent and significant danger to the health or safety of any person or class of persons;

#### EXAMPLE

Robert arrives at the hospital emergency room seriously intoxicated. He is admitted, but leaves before being treated and states that he is going to drive himself home.

The staff of the hospital is permitted by this provision to call the local police and provide relevant information to them.

- to an official of a correctional facility, as defined in the *Correctional Services Act*, or to an official of a penitentiary, as defined in the *Corrections and Conditional Release Act (Canada)* in which the individual is being lawfully detained if the purpose of the disclosure is to allow the provision of health care to the individual or to assist the correctional facility or penitentiary in making a decision concerning correctional services as defined in the *Correctional Services Act* or services provided under in the *Corrections and Conditional Release Act (Canada)*;

#### EXAMPLE

The provincial *Correctional Services Act* includes a provision requiring a correctional facility to make reasonable accommodation for an offender in custody who is unable to participate in programs or work due to illness, disability, or injury. If Jason has multiple sclerosis and cannot work for prolonged periods of time, information to support Jason's request for accommodation could be disclosed from his health record.

- to another custodian for the purpose of ensuring quality or standards of care within a quality review program within the custodian's organization;
- to the Minister of Health and Wellness for the purpose of planning and management of the health system;

- to the Nova Scotia Prescription Monitoring Board for monitoring prescriptions pursuant to the *Prescription Monitoring Act*;
- to the Canadian Institute for Health Information to assist in the planning and management of the health system in accordance with the terms of an agreement between the Canadian Institute for Health Information and the Province;
- to a prescribed entity for the planning and management of the health system for all or part of the health system, including the delivery of services, if the entity meets the requirements under subsection (2) <sup>4</sup>;
- from the Province to another provincial or territorial government or the Government of Canada to assist in the planning and management of the health system;
- subject to the requirements and restrictions, if any, that are prescribed, if the disclosure is required or permitted by law or a treaty, agreement or arrangement made pursuant to this *Act* or another *Act* of the Province or the Parliament of Canada;

***Note: Provincial legislation requiring mandatory disclosure of health information includes the Adult Protection Act, the Health Protection Act, the Gunshot Wounds Mandatory Reporting Act, and the Children and Family Services Act.***

- to another custodian for the purpose of determining or verifying an individual's eligibility for insured services;
- subject to the requirements and restrictions, if any, that are prescribed, to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by or under this *Act* or another *Act* of the Province or an *Act* of the Parliament of Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection, investigation or similar procedure;
- to a proposed litigation guardian or legal representative of the individual for the purpose of having the person appointed as such;

***Note: A "litigation guardian" is a person appointed by the court to act on behalf of an individual who is not capable of managing his/her own affairs. It may include a minor child or a person who lacks capacity to make decisions.***

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<sup>4</sup> See page 19 for further information on prescribed entities.

- to a litigation guardian or legal representative who is authorized under the Civil Procedure Rules, or by a court order, to commence, defend or continue a proceeding on behalf of the individual or to represent the individual in a proceeding;
- for the purpose of complying with:
  - a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or
  - a procedural rule that relates to the production of information in a proceeding.
- the disclosure is reasonably necessary for the administration of payments in connection with the provision of health care to the individual or for contractual or legal requirements in that connection;
- for the purpose of a proceeding or a contemplated proceeding in which the custodian or an agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding;
- for the purpose of risk management or patient safety within the custodian's organization; or
- to the Minister of Health and Wellness for the purpose of creating or maintaining an electronic health record.

## DOCUMENTING DISCLOSURE WITHOUT CONSENT

A disclosure of personal health information without the individual's consent must be documented (section 42). The documentation must include:

- a description or copy of the personal health information disclosed;
- the name of the person or organization to whom the personal health information was disclosed;
- the date of the disclosure; and
- the authority for the disclosure.

***Note:** The authority for the disclosure would either be a provision of this Act or another Act. If the disclosure is authorized by an agreement referenced in this Act or another Act, it would helpful to note details of the agreement (e.g.name of the agreement, parties to the agreement).*



## DISCLOSURE TO NON-CUSTODIANS – ASSESSMENT, CARE AND TREATMENT SERVICES

Under section 39, a custodian may disclose an individual’s personal health information to a non-custodian without the individual’s consent at the request of any custodian for the purposes of facilitating assessment, care and treatment services for the individual. Before the information may be disclosed:

- the custodian must make a request to the Minister in writing detailing the reasons why the non-custodian requires the personal health information on an ongoing basis; and
- the Minister of Health and Wellness must have authorized the non-custodian to receive the information.

This provision was included to continue authority for assessment, care and treatment services that may include a non-custodian.

### EXAMPLE

A mental health crises team operates as a partnership of two district health authorities, the Department of Health and Wellness, and the local police. Prior to *PHIA*, this would be authorized by the Minister of Health in a Ministerial Authorization under the *Hospitals Act* (see below) and may be continued under *PHIA* if a request is made and approved under section 39.

## MINISTERIAL AUTHORIZATIONS UNDER THE *HOSPITALS ACT*

Under the *Hospitals Act* section 71(5) (e), the Minister of Health and Wellness could authorize a hospital to disclose personal health information to a “person or agency designated or authorized by the Minister.” These designations became known as “Ministerial Authorizations.”

Ministerial authorizations were generally requested to allow district health authorities to disclose information to health care providers or others outside of the relatively strict guidelines of the *Hospitals Act*. The *Act* only allowed information to be disclosed within the hospital or to the patient’s physician. This prevented personal health information from being disclosed to a patient’s nursing home or other health care providers outside of the hospital.

Section 71 of the *Hospitals Act* will be repealed by section 113 of *PHIA*. Without section 71 of the *Hospitals Act*, there can be no requests for Ministerial Authorizations.

The provisions of *PHIA* will make the Ministerial Authorizations unnecessary. For example, *PHIA* will include the ability to assume knowledgeable implied consent for disclosure of personal health information within the circle of care; exceptions in section 38 to allow for disclosure of

personal health information without individual consent, and section 39, which allows for disclosure to non-custodians for assessment, care, and treatment of an individual.

#### DISCLOSURE TO FAMILY MEMBERS OR OTHERS

Under section 37, a custodian has the discretion to disclose personal health information related to the presence, location and general condition of an individual on the day that the information is requested to:

- family members of the individual; or
- another person if the custodian has a reasonable belief that the person has a close personal relationship with the individual.

A custodian may not disclose this information if it is contrary to the express request of the individual.

#### EXAMPLE #1

Janet calls the hospital and identifies herself as the mother of a person she understands has been admitted to the hospital. She gives her son's name, and asks for his location and general condition. The patient has not indicated that he does not wish to be contacted or visited by family.

The hospital would be justified in disclosing the information to Janet.

#### EXAMPLE #2

Janet calls the hospital and identifies herself as the mother of a person she understands has been admitted to the hospital. She gives her son's name, and asks for his location and general condition. The patient, who was conscious when admitted, specifically told the nurse that he did not want his family to know that he was in hospital.

The hospital would be justified in withholding information from Janet.

If a caller or visitor has indicated that they are not family, the custodian may make further inquiries to determine if the person has a "close personal relationship" with the individual. Each circumstance would be separately assessed by the custodian based on information provided by family or the individual him/herself.

**Note:** This section permits the disclosure without consent, but disclosure is not required (unless *PHIA* or another *Act* requires the disclosure).

When a custodian discloses personal health information to a non-custodian under the *Act*, the non-custodian may only use that information for the purpose which the custodian was authorized to disclose that information (section 45(2)).

See following section for information on disclosure of information to family members related to a deceased person.

#### DISCLOSURE OF PERSONAL HEALTH INFORMATION RELATED TO A DECEASED PERSON

Under section 40(1), a custodian may release information about an individual who is deceased, or believed to be deceased, for the following purposes:

- for the purpose of identifying the individual;
- for the purpose of informing any person whom it is reasonable to inform that the individual is deceased or believed to be deceased;
- to a spouse, parent, sibling, or child of the individual if the recipient of the information reasonably requires the information to make decisions about the recipient's own health care or the recipient's children's health care and it is not contrary to a prior express request of the individual;

#### EXAMPLE

Terry dies from Huntington's disease, a hereditary brain disorder. She has not requested that this information be kept private if her family makes inquiries about her cause of death.

Biological family members may need this information to determine their own risk of developing the disease. Terry's care providers in the hospital would be justified in providing this information to her family.

- for carrying out the deceased person's wishes for the purpose of tissue or organ donation.

Under section 40(2), a custodian may disclose personal health information about a deceased individual to:

- a family member of the individual; or
- another person if the custodian has a reasonable belief that the person has a close personal relationship with the individual

if the information relates to circumstances surrounding the death of the individual or to health care recently received by the individual and the disclosure is not contrary to a prior express request of the individual.

#### EXAMPLE

Aziz sustains injuries in a car accident, and is pronounced dead in the emergency room of a hospital. The hospital may provide information related to the treatment received by Aziz to his wife, unless Aziz had specifically requested that the hospital not release the information to anyone.

#### DISCLOSURE WITH EXPRESS CONSENT

Section 43 provides that express consent is required for disclosure of the information:

- by a custodian to a non-custodian unless required or authorized by law;
- by a custodian to another custodian if it is not for the purpose of providing health care unless required or authorized by law;
- for fund-raising activities;
- for market research or marketing any service for a commercial purpose;
- to the media; or
- to a person or organization for the purpose of research unless provided for in section 57.

Express consent may be written or oral (section 16).

#### HEALTH CARD NUMBERS

*PHIA* defines “*health card number*” as a unique identification number assigned by the Minister of Health and Wellness to individuals insured under the *Health Services and Insurance Act* (section 3(j)). The Medical Services Insurance Programs are administered by Medavie Blue Cross on behalf of the Nova Scotia government. Every eligible resident is assigned a unique 10-digit health card number as evidence of his/her eligibility to receive insured services.

Section 3(r)(v) defines personal health information and includes the individual’s health card number in the definition.

## COLLECTION AND USE OF HEALTH CARD NUMBERS

The health card number is intended for use in health care only. *PHIA* stipulates that only:

- custodians; or
- persons authorized through regulation

may collect or use an individual's health card number (section 27).

Examples of organizations that may be considered for authorization to collect the health card number include a school where a staff member may have to take a child to receive health care.

See [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) for current regulations on individuals or organizations designated to collect and use health card numbers.

## HEALTH CARD NUMBER DATABASE/COMMON CLIENT REGISTRY

In addition to providing protection for the collection and use of an individual's health card number, *PHIA* also restricts the authority for determining who may have access to the health card number database, the Common Client Registry, or any successor client information system related to the health card number.<sup>5</sup> Under section 46, only the Minister of Health and Wellness may decide who may have access to these databases and registries.

The only exceptions are two legislative provisions that pre-date *PHIA*:

1. the *Juries Act* regulation (N.S. Reg. 126/2000) stipulates that the Department of Health and Wellness' Health Insurance list is a prescribed list from where the pool of prospective jurors may be selected; and
2. pursuant to the *Elections Act* section 43(5), which requires a public body under the *Freedom of Information and Protection of Privacy Act* (including the Department of Health and Wellness) to provide to the Chief Electoral Officer any personal information held by the public body for creating, revising or updating the Register of Electors.

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<sup>5</sup> *PHIA* section 3(d) defines "Common Client Registry" as a provincial database that is a master index for all residents eligible to receive insured services and all non-residents who have received insured services in the Province. It is a component of the provincial Electronic Health Record.

## PRESCRIBED ENTITIES

There are several references to a “prescribed entity” in *PHIA*, including:

- section 3(n) definition of information practices, including practices of a “prescribed entity”;
- section 31(i) authorizing a “prescribed entity” to indirectly collect personal health information in certain circumstances;
- section 38(1)(j) authorizing a custodian to disclose personal health information to a “prescribed entity” for the purposes of planning and management of the health system if the entity meets the requirements in section 38(2);
- section 38(2) - (6) requirements to be recognized as a “prescribed entity” under the legislation;
- section 110(1)(j) enabling the Governor in Council to make regulations prescribing a “prescribed entity.”

The concept of a “prescribed entity” was included in *PHIA* to recognize that in the future, there may be an organization that would participate in the planning and management of the health system, working with and supplementing the work of the Department of Health and Wellness.

The model originated in the Ontario *Personal Health Information Protection Act*. The Ontario Ministry of Health and Long-Term Care have designated “prescribed planning entities” by regulation, including Cancer Care Ontario, the Canadian Institute for Health Information, the Institute for Clinical Evaluative Studies, and the Pediatric Oncology Group of Ontario.

At the time of the proclamation of *PHIA*, no organizations in Nova Scotia had been designated as a “prescribed entity.”

# ACCESS TO AND CORRECTION OF PERSONAL HEALTH INFORMATION

## ACCESS TO PERSONAL HEALTH INFORMATION

The general principle under *PHIA* is that an individual has the right to access a record of personal health information about him/herself that is in the custody or under the control of a custodian (section 71). This provision is consistent with the long-standing principle stated by the Supreme Court of Canada that a patient is entitled, upon request, to examine and copy all information in their medical records.<sup>1</sup> Under *PHIA*, this includes the right to request to examine a record or ask for a copy of a record (section 75).

## REFUSAL TO GRANT ACCESS TO PERSONAL HEALTH INFORMATION

There are exceptions to the individual's right of access. Under section 72(1); a custodian may refuse to grant access to all or part of the individual's personal health information if it is reasonable to believe that:

- a legal privilege restricts disclosure.

### EXAMPLE

Talia is requesting that her dentist, Jamie, provide a copy of her full dental record. However, there is a letter in Talia's record from Jamie's lawyer providing advice on a potential lawsuit threatened by Talia. Under section 5(3) of *PHIA*, Jamie is not required to disclose the letter to Talia because it would be protected by solicitor-client privilege.

- another law prohibits disclosure;

### EXAMPLE

Kyle was born in 2006, and placed for adoption by his birth mother.

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<sup>1</sup> *McInerney v. MacDonald*, [1992] 2 S.C.R. 138

If Kyle requested access to information related to his birth under his rights in *PHIA*, the hospital could sever the information, as the *Adoption Information Act* would be the appropriate legislation under which he would request this information.

- the information in the record was collected or created primarily for the purpose of ensuring quality or standards of care within a quality review program in the custodian's organization;
- the information in the record was collected or created in anticipation of or for use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded;
- the information was collected or created in the course of an inspection, investigation or similar procedure not yet concluded;

***Note: The previous two exemptions related to ongoing proceedings are a codification of "litigation privilege". This privilege allows a custodian to maintain a level of privacy over information which forms part of an ongoing proceeding or investigation. However, the custodian is not required to sever the information, and may provide it to the individual requesting it.***

- access could result in a risk of serious harm to the treatment or recovery of the individual or to the mental or physical health of the individual;

#### **EXAMPLE**

Taryn has been diagnosed with chronic leukemia, and is receiving regular cycles of chemotherapy in the hospital's cancer centre. In a discussion with Taryn's mother, Taryn's physician indicates that he believes Taryn is showing signs of early dementia. The physician suggests that Taryn's mother not mention the concern to Taryn in the short-term, as he is concerned it will have a negative impact on her recovery.

If Taryn requested her medical records from the hospital, the hospital could consider refusing access to the portion of the record related to the discussion about Taryn's dementia if they reasonably believed it would impact her recovery from leukemia.



- access could result in a risk of serious harm to the mental or physical health of another individual;

**EXAMPLE**

Kerry, a continuing care co-ordinator at a hospital, is carrying out an assessment on David to determine if he needs placement in a long term care facility. As part of her assessment of David, she interviews David's mother, who tells Kerry that when David stops taking his medication, he becomes aggressive towards her and she is afraid of him.

If David requests a copy of his assessment, Kerry would be justified in refusing to release his mother's statements to him if she reasonably believes that David's knowledge of his mother's comments would cause him to become more aggressive towards her.

- access could lead to the identification of a person who provided information in the record to the custodian in circumstances in which confidentiality was reasonably expected;

**EXAMPLE**

Robert is seeking medical assistance from Helen, a counseling therapist, for his addiction to painkillers. His ex-girlfriend told Helen in confidence that Robert had been abusing painkillers for several years, which led to the break-up of their relationship.

If Robert requested a copy of his personal health information Helen could consider severing the information provided by his ex-girlfriend if Helen believed that his ex-girlfriend expected the conversation to be kept confidential.

- access could result in the release of another individual's personal health information.

**EXAMPLE**

Jeannine is receiving treatment for breast cancer from her oncologist, Jose. In a private discussion with Jose, Jeannine's husband Jim discloses that her condition and treatment has caused him to seek counseling for depression, but he does not want Jeannine to know. Jose could consider severing this information from any request made by Jeannine for her records in the interest of protecting the privacy of Jim's personal health information.

A custodian may only deny access to all or part of an individual's personal health information on reasonable grounds. The onus is on the custodian to justify the decision to deny access.

An individual has a right of access to personal health information that can reasonably be severed from the part of the record to which the individual does not have access given the above-noted reasons (section 72(2)).

## **“FRIVOLOUS OR VEXATIOUS” REQUESTS TO ACCESS PERSONAL HEALTH INFORMATION**

A custodian may refuse to grant access to some or all of an individual’s personal health information where the custodian believes on reasonable grounds that the request for access is either frivolous or vexatious or is part of a pattern of conduct that amounts to an abuse of the right of access (section 81(1)).

It should be rare that this justification for refusal is used. As with other refusals, the onus is on the custodian to justify the decision to deny access.

If the custodian refuses to grant access, section 81(2) requires that the custodian:

- give written notice to the individual setting out the reasons for the refusal; and
- state that the individual has the right to make a complaint about the refusal to the Review Officer.

### **EXAMPLE**

Jason has filed six requests for information with his dentist, Harland, within a two-day time frame. Jason has also has filed 20 similar requests within the same year and he is starting to use abusive language.

Harland believes that the frequent requests and abusive language are part of a pattern of conduct that amounts to an abuse of the right of access. He may refuse to grant Jason’s request. In doing so, he is required to write to Jason outlining the reasons why the request is not being granted, and advise him of his right to ask the Review Officer to review the dentist’s decision.

## **REQUIREMENTS FOR A REQUEST TO ACCESS PERSONAL HEALTH INFORMATION**

Generally, an individual must meet three basic requirements for making a request to access their own personal health information:

1. the request for access must be made in writing [See Template 6-1 *Request for Access to Personal Health Information*] to the custodian that has the custody or control of the information (section 75(a));
2. the request for access must specify the subject matter of the record requested with sufficient information to enable the custodian to locate the record (section 75(b)); and
3. the individual must pay any required fees (section 75(c)).

There are exceptions to the requirement that the request be in writing. The custodian has the discretion to grant access to an oral request where either the individual has a limited ability to read or has a disability or condition that impairs his/her ability to make a request in writing (section 77). The custodian also has the discretion to grant informal access to personal health information without the stated requirements (section 80).

## PURPOSE FOR REQUESTING ACCESS TO PERSONAL HEALTH INFORMATION

The individual does not have to provide the reasons or purposes for which they are requesting the information (section 78).

## FEES FOR ACCESS TO PERSONAL HEALTH INFORMATION

Under section 82(1) of *PHIA*, a custodian has the right to charge a fee for access to personal health information that:

- a. does not exceed the prescribed amount; or
- b. where no amount is prescribed, the amount of “reasonable cost recovery”

where a record is made available or copied for the individual.

### **Personal Health Information Act Regulation**

**14** A custodian who makes a record, or part of a record, of personal health information available to an individual or provides a copy of it to an individual may charge a general fee, not to exceed \$30.00 per request, as compensation for all of the following:

- (a) receiving and clarifying the request;
- (b) locating and retrieving the record, including any record held electronically;
- (c) providing an estimate of the access fee to the requester as required by subsection 82(1) of the Act;
- (d) review of the record for no longer than 15 minutes by the custodian or an agent of the custodian to determine whether the record contains personal health information to which access may be refused under subsection 72(1) of the Act;
- (e) severing of the record if access to part of the record is refused under subsection 72(1) of the Act;
- (f) preparing the record for photocopying, printing or electronic transmission for no longer than 30 minutes;
- (g) preparing a response letter to the requester;
- (h) supervising an individual's examination of original records for no longer than 30 minutes;
- (i) the cost of mailing a record by regular mail to an address in Canada.

See [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) for the official text of the regulation

The regulation also permits custodians to charge additional specific fees where appropriate - for example, if the preparation of the record for photocopying takes two hours, rather than the 30 minutes provided for in clause 14(f) of the regulation.

<b>Specific fees</b>	
<b>15</b> In addition to the general fee provided for in Section 14 and any direct costs provided for in Section 16, a custodian may charge up to the maximum fee set out in the following table for the activity specified:	
<b>Activity</b>	<b>Maximum Fee</b>
Making photocopies of a record	\$ .20 per page
Preparing a record for photocopying, printing or electronic transmission	\$12.00 for every 30 minutes after the first 30 minutes referenced in the general fee under clause 14(f)
Faxing a record	\$ .20 per page
Making a compact disk containing a copy of a record stored in electronic form	\$10.00 per request
Making a microfiche copy of a record stored on microfiche	\$ .50 per sheet
Making a paper copy of a record from microfilm or microfiche	\$ .50 per page
Making a copy of an audio cassette	\$5.00 per cassette
Making and providing a copy of a ¼", ½" or 8mm video cassette that is	
- 1 hour long or less	\$20.00
- more than 1 hour long	\$25.00
Making and providing a copy of a ¾" video cassette that is:	
- 1 hour long or less	\$18.00
- more than 1 hour long	\$23.00
Producing a record stored on medical film, including x-ray, CT and MRI films	\$5.00 per film
Printing a photograph from a negative or from a photograph stored in electronic form, per print:	
- per 4" x 6" print	\$10.00
- per 5" x 7" print	\$13.00

- per 8" x 10" print	\$19.00
- per 11" x 14" print	\$26.00
- per 18" x 20" print	\$32.00
<i>Review of the record by a custodian or an agent of the custodian to determine whether the record contains personal health information to which access may be refused under section 72(1) of the Act</i>	<i>\$ 25.00 for every 15 minutes after the first 15 minutes referenced in the general fee under clause 14(d)</i>
<i>Supervising an individual's examination of original records</i>	<i>\$ 6.00 for every 30 minutes after the first 30 minutes referenced in the general fee under clause 14(h)</i>
<b>See <a href="http://www.novascotia.ca/DHW/PHIA">www.novascotia.ca/DHW/PHIA</a> for the official text of the regulation</b>	

The regulation also permits the charging of fees where the custodian has incurred a direct cost. In three of the four cases covered in the regulation, the additional fee would have been incurred as a result of a request from the individual. The fourth (taxes payable on services) is required by government.

<b>Personal Health Information Act Regulation</b>
<b>Direct costs</b>
<b>16</b> <i>In addition to the general fee provided for in Section 14 and the specific fees provided for in Section 15, a custodian may charge for the following direct costs incurred by the custodian, including any applicable tax:</i>
<i>(a) charges to retrieve a record from and return the record to off-site storage, if an individual requests expedited access to a record for which additional retrieval costs are charged to the custodian;</i>
<i>(b) courier costs, if courier delivery is requested by the individual;</i>
<i>(c) the cost of mailing a record to an address outside Canada;</i>
<i>(d) taxes payable on the services provided.</i>
<b>See <a href="http://www.novascotia.ca/DHW/PHIA">www.novascotia.ca/DHW/PHIA</a> for the official text of the regulation</b>

## FEE ESTIMATE

The custodian must first provide an estimate of the fee to the individual. Although it is not required by *PHIA*, a custodian may provide the estimate in writing [See Template 6-2 *Estimate of Fees – Access to Personal Health Information*].

The custodian may alter the final fee payable if the actual costs to the custodian were higher than the estimate. However, the Review Officer has the discretion to review a fee estimate and the final fees charged for access and make a recommendation for the final fee.

When determining a fee, a custodian should consider the overall purpose of *PHIA*, which includes the ability of an individual to access their own personal health information. The fee should not be a barrier to access. If a fee estimate is high or the individual objects to the estimate, the custodian should work with the individual to determine if their request could be narrowed.

## FEE FOR VIEWING THE RECORD

Under the fee regulation, a fee may also be charged for supervising the viewing of the record if the individual has not requested a copy of the information.

## FEE WAIVERS

Under *PHIA*, a custodian has the discretion to waive all or part of an access fee. Section 82 (3) states:

“A custodian has the discretion to determine whether to grant a fee waiver and may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, the individual cannot afford the payment or for any other reason it is fair to excuse payment.”

The decision to waive a fee is discretionary. Each custodian must determine for itself when it would be “fair to excuse payment.”

## REQUESTING A FEE WAIVER

The *Act* does not specify a process for requesting a fee waiver. If an individual requests a reduction or waiver of an access, a custodian may wish to provide a form to the individual to make the request (See *Template 6-3 Request for a Fee Waiver*).

## CONSIDERATIONS WHEN DECIDING TO REDUCE OR WAIVE AN ACCESS FEE

It may be helpful for a custodian to consider the following when making a decision on a fee waiver request:

- The onus is on the individual requesting the waiver to provide evidence to support the request.
- In exercising their discretion, custodians should review all evidence provided by the individual.
- Even if an individual provides evidence that s/he cannot afford the fee, or that there are other circumstances that the individual is suggesting would make it fair to excuse payment, a custodian is not obligated to reduce or waive the fee.
- Although a custodian may request that the individual provide evidence in writing, the individual is not required to provide it in writing. The lack of documented evidence would, however, make it more difficult to assess the individual's request. This should be explained to the individual.
- When a custodian receives a request for a fee waiver, the custodian should view it as an opportunity to work with the individual to see if the request can be narrowed.

Previous Review Officer decisions under *the Freedom of Information and Protection of Privacy Act* have acknowledged that fees are a part of any access process, but that they can be questioned "if the costs are so high as to discourage access to the Act" (FI-97-22).<sup>2</sup> It is reasonable to assume that the same principle would be applied to fees levied under *PHIA*.

In a decision frequently cited by Nova Scotia Review Officers, the Ontario Freedom of Information and Protection of Privacy Commissioner stated factors to be considered to determine whether it would be "fair" for fees to be waived.<sup>3</sup> The factors have been restated below using the "custodian" and "individual" language in *PHIA*:

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<sup>2</sup> Nova Scotia (Department of Human Resources) (Re), 1997 CanLII 1031 (NS FOIPOP) at page 5.

<sup>3</sup> Order P-760 Ministry of Natural Resources. Available at [www.ipc.on.ca](http://www.ipc.on.ca)



1) *The manner in which the custodian attempted to respond to the individual*

If the custodian responds quickly to the individual's request for personal health information, expressing a willingness to work with the individual, it may be reasonable to waive some or all of the fee.

2) *Whether the custodian worked with the individual to narrow or clarify the request*

If the custodian works with the individual to narrow the request or clarify what specific information the individual is seeking, it may be reasonable to waive some or all of the fee.

3) *Whether the custodian provided any documents to the individual free of charge*

A custodian may be less likely to waive a fee if some documents have already been provided to the individual free of charge.

4) *Whether the individual worked constructively with the custodian to narrow the scope of the request for personal health information*

A custodian may be less likely to waive a fee if the individual has refused to work with the custodian to narrow or clarify the scope of the request.

5) *Whether the application involves a large number of records*

If the request would require a significant amount of time for the custodian to retrieve, review and produce information, it may not be fair for the financial burden to shift from the individual to the custodian.

6) *Whether or not the individual has advanced a compromise solution which would reduce costs*

An individual's willingness to work with the custodian to limit the time and resources necessary to fulfill the request may result in a custodian being more willing to reduce or waive the fee.

## REVIEW OF A FEE WAIVER DECISION

If an individual requests a fee waiver, and the custodian decides not to reduce or waive the access fee, the custodian is not required to provide the reasons to the individual in writing.

However, decisions on fee waivers are subject to a review by the Review Officer, who has the authority to mediate and make recommendations on requests for reviews of decisions in respect of the access provisions.<sup>4</sup>

In a case of a review, it would be helpful to the custodian to have the reasons for denying the request documented.

## REFUSING A REQUEST FOR ACCESS: REQUIREMENT FOR NOTICE

Where a custodian refuses an individual's request for access in whole or in part, the custodian shall provide the individual with written notice setting out the reasons for the refusal and that the individual is entitled to make a complaint to the Review Officer (section 81(2)). See Template 6-4 *Response to Request for Access to Personal Health Information*.

## RESPONDING TO A REQUEST FOR ACCESS

Under section 84(1), a custodian who receives a request for access to a record of personal health information must respond to the individual as soon as possible, but no later than 30 days after receiving the request. In the written response, the custodian must either:

- grant the request;
- refuse the request; or
- extend the deadline for replying for a period of not more than 30 days; or longer with permission from the Review Officer.

A custodian may only extend the time for notice if replying to the request within 30 days would unreasonably interfere with the activities of the custodian, or if the time required to undertake the consultations necessary to reply to the request would not make it reasonably practical to reply within that time (section 84(1)(c)).

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<sup>4</sup> PHIA section 92(3)

If a custodian extends the time for response, a written notice must be sent to the applicant. The notice should state the length of the extension and the reasons for the extension.

The custodian must seek approval from the Review Officer for any time extension beyond 60 days. The timeline of 60 days includes the initial 30 day response deadline plus the custodian extension of 30 days. Approval of time extensions beyond 60 days is at the discretion of the Review Officer.

An individual who is not satisfied with a decision of the custodian about access to a record is entitled to make a request to the Review Officer for a review of the custodian's decision (section 92(3)).

See Template 6-4 *Response to Request for Access to Personal Health Information*. This template can be used for a granting or refusal of access, in whole or in part.

## CORRECTION OF PERSONAL HEALTH INFORMATION

Individuals may request that the custodian correct information contained within their records of personal health information (section 85) [See Template 6-5 *Request for Correction to Personal Health Information*].

No fee may be charged for a correction to personal health information.

The custodian's timelines for correction are the same as those for access: the custodian must respond as soon as possible but no later than 30 days after the request for access was made. The custodian may extend the deadline for a response for 30 days or longer with the Review Officer's permission (section 84(1)).

If the custodian does not respond to the individual's request for correction within 30 days, the custodian is deemed to have refused the request (section 86).

The custodian shall make the correction if the individual demonstrates, to the satisfaction of the custodian, that the record is not complete, accurate, or up-to-date and gives the custodian the information necessary to enable the custodian to correct the record (section 87(1)).

However, a custodian is not required to correct a record if:

- it consists of a record that was not originally created by the custodian and the custodian does not have sufficient knowledge, expertise, and authority to correct the record; or

- it consists of a professional opinion or observation that a custodian has made in good faith about the individual (section 87(2)).

#### EXAMPLE

Jessica is a patient of Rosalie, a psychologist. Rosalie has diagnosed Jessica as having a narcissistic personality disorder.

Jessica has reviewed her record, and wants her psychologist to change the diagnosis in the record.

Under section 87(2), Rosalie is not required to change her professional opinion made in good faith about Jessica.

Where possible, if a correction is made, the custodian should make the correction by recording the correct information in the record and striking out the incorrect information without obliterating the record (section 88(a)(i)(A)).

Where it is not possible to correct the information in this manner, under (section 88(a)(i)(B)) a custodian may make the correction by:

- labeling the information as incorrect;
- severing the incorrect information from the record;
- storing it separately from the record; and
- maintaining a link in the record that indicates that a correction has been made and enables the tracing of the incorrect information.

If a custodian cannot correct a record by either of these two methods, the custodian must ensure that there is a practical system in place to: inform a person who accesses the record that the information in the record is incorrect and direct the person to the correct information (section 88(a)(ii)).

The custodian must provide written notice to the individual about how the record was corrected (section 88(b)).

On the request of the patient, the custodian must also make reasonable effort to give written notice of the correction to the persons to whom the custodian has disclosed the information, unless the correction cannot be reasonably expected to have an effect on the ongoing provision of health care or other benefits to the patient (section 88(c)).

## “FRIVOLOUS OR VEXATIOUS” REQUESTS TO CORRECT A RECORD

A custodian may refuse to grant the request for a correction where the custodian believes on reasonable grounds that the request for correction is either frivolous or vexatious or is part of a pattern of conduct that amounts to an abuse of the right of correction (section 89).

## REFUSING A REQUEST FOR CORRECTION: REQUIREMENT FOR NOTICE

Under section 90, if a custodian refuses to make the correction, the custodian must give the reasons for the refusal and inform the individual that the individual is entitled to:

- prepare a concise statement of disagreement setting out the correction the custodian refused to make;
- require that the custodian attach the statement of disagreement as part of the records;
- disclose the statement of disagreement whenever the custodian discloses information to which the statement relates;
- require that the custodian make all reasonable efforts to disclose the statement of disagreement to any person who would have been notified had the request been granted; and
- make a complaint about the refusal to the Review Officer.

See Template 6-6 *Response to a Request for Correction Granted in Full*; Template 6-7 *Response to a Request for Correction Granted in Part*; Template 6-8 *Response to a Request for Correction Refusal*.

## COMPLAINTS TO THE REVIEW OFFICER: ACCESS AND CORRECTION

If a custodian has refused an individual access to their personal health information or refused to make a correction as requested by the individual, the individual may ask the Review Officer to conduct a review of the custodian’s decision (section 91(b)).

See Chapter 10: *The Review Officer, Reviews and Mediation* for details on the process for review of an access or correction decision.

***Personal Health Information Act***

**REQUEST FOR ACCESS TO PERSONAL HEALTH INFORMATION**

This form will be used to request access to your own personal health records

**1. IDENTIFICATION OF INDIVIDUAL** (please print clearly)

\_\_\_\_\_  
Last Name First Name Middle initial

\_\_\_\_\_  
Previous surname (if applicable) Date of birth (YY/MM/DD)

\_\_\_\_\_  
Provincial Health Card Number

\_\_\_\_\_  
Mailing address

\_\_\_\_\_  
Daytime telephone number

**2. IDENTIFICATION OF RECORDS**

Please indicate which records you are seeking to access:

\_\_\_\_\_  
\_\_\_\_\_

Please indicate what portion of the record(s) you are seeking to access:

- The whole record
- All records from the time period \_\_\_\_\_ to \_\_\_\_\_  
(yyyy/mm/dd) (yyyy/mm/dd)
- The following specific records: \_\_\_\_\_

**3. TERMS OF ACCESS**

I wish to access the records as follows:

- View only
- Photocopies

TEMPLATE 6-1

If receiving photocopies of the records, I wish to:

- have the records delivered to me by regular mail
- have the records delivered to me by courier
- pick the records up in person

**4. SIGNATURE**

I consent to the **[name of custodian]** reviewing my personal health information in order to provide it to me as requested on this form. I understand that there may be a fee for access to my records, including any fee associated with delivery by regular mail or courier. The **[name of custodian]** must provide an estimate of any fees to me prior to release of my record(s), and fees may be payable by me in advance of any access.

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**Signature**

**Date**

**Please deliver or mail your form to:**

**Name of contact person**  
**Name of custodian**  
**Address of custodian**  
**Phone: 902-XXX-XXXX**  
**Fax: 902-XXX-XXXX**

The personal health information requested in this form is collected pursuant to s. 75 of the *Personal Health Information Act* for the purposes of processing your request for access to your information. If you have any questions about this form or the process for requesting access, please contact [name of contact person, name of custodian].

TEMPLATE 6-2

*Personal Health Information Act*

**ESTIMATE OF FEES – ACCESS TO PERSONAL HEALTH INFORMATION**

[Date]

This form is used to state the estimate of fees payable under section 82 of the *Personal Health Information Act (PHIA)* for access to your personal health information. **Please note that this is an estimate only.** The actual fees may be lower or higher, but will not exceed the amount prescribed in the *Personal Health Information Act Regulation*. Please direct any questions about this fee estimate to the contact listed below.

The estimate of fees for access to your record is:

General Fee (maximum \$30.00)	_____
Specific fees (see attached for detail)	_____
Direct costs	_____
HST	_____
<b>Total estimate of fees</b>	_____

Please acknowledge your acceptance of the above estimate by signing below and returning the **original** of this form to our office. In order to process your request for access, we require [ ] of the above fees.

I, \_\_\_\_\_ (*print name*) accept the fee estimate as stated on this form. I understand that the actual fee may be higher, but will not exceed the amount prescribed in the *Personal Health Information Act Regulations*.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date



Please deliver or mail your original form to:

**Name of contact person**

**Name of custodian**

**Address of custodian**

**Phone: 902-XXX-XXXX**

**Fax: 902-XXX-XXXX**

You have the right to request a review of this fee estimate decision by the Review Officer appointed pursuant to *PHIA*. The review must be filed with the Review Officer in writing within 60 days of the date of this letter. The Request for Review form is attached. The form should be sent to:

**Review Officer**

***Personal Health Information Act***

**P.O. Box 181**

**Halifax, Nova Scotia, B3J 2M4**

**Phone: 902-424-4684**

**Toll-free: 1-866-243-1564**

**Fax: 902-424-8303**

## Detail of Fee Estimate

### 1. General fee

The activities charged under the **General Fee** include:

- receiving and clarifying the request;
- locating and retrieving the record (including records held electronically);
- providing an estimate of the access fee to the requester;
- review of the record for not more than 15 minutes by a health information custodian or an agent of the custodian to determine if the record contains personal health information to which access may be refused under *PHIA* s. 72(1);
- severing of the record where access may be refused under *PHIA* s. 72(1);
- preparation of the record for photocopying, printing or electronic transmission for not more than 30 minutes;
- preparation of a response letter to the requester;
- supervising an individual's examination of original records for not more than 30 minutes; and
- the cost of mailing a record by regular mail to an address in Canada.

### 2. Specific Fees

In accordance with the *Personal Health Information Act* Regulation, additional specific fees may be charged in addition to the general fee, and any direct costs (see below). For your request, the additional specific fees are:

- Photocopies (@ \$.20/page)
- preparation of the record
- faxing a record
- Making a:
  - CD of the record;
  - microfiche copy of microfiche;
  - paper copy of microfiche;
  - copy of audio cassette;
  - copy of video cassette;
- producing a copy of medical film
- printing a photograph
- review for severing (over 15 minutes)
- supervision of your examination of your record (over 30 minutes)

### 3. Direct fees

In accordance with the *Personal Health Information Act* Regulation, direct cost fees may be charged in addition to the general fee and any specific fees. For your request, the direct costs are:

- individual's request for expedited access and retrieval
- individual's request for delivery by courier
- individual's request for mailing to an address outside Canada
- taxes payable on the services provided

***Personal Health Information Act***

**Request for Fee Waiver – Access to Personal Health Information**

[Date]

This form is used to request a reduction or waiver of the fee estimated by [name of custodian] to provide access to personal health information.

The *Personal Health Information Act* section 82(3) provides that a custodian has the discretion to determine whether to grant a fee waiver request if, in the custodian’s opinion, the individual cannot afford the payment or for any other reason it is fair to excuse payment.

Please attach a copy of the fee estimate provided by \_\_\_\_\_ or state below the fee amount estimated by \_\_\_\_\_ to fulfill your access request. You may attach other documents to support your request.

I am requesting a fee reduction/waiver of the following fee(s):

Reasons for request:

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Signature

Date

Please deliver or mail your **original** form to:

**Name of contact person**

**Name of custodian**

**Address of custodian**

**Phone: 902-XXX-XXXX**

**Fax: 902-XXX-XXXX**

*Personal Health Information Act*

**RESPONSE TO REQUEST FOR ACCESS TO PERSONAL HEALTH INFORMATION**

**REQUEST GRANTED IN FULL**

[Date]

I am writing in response to your request under the *Personal Health Information Act* for the following records:

*[restate information from individual request]*

Your request has been granted in full.

If you have any questions related to this response, you may contact:

**Name of contact person**

**Name of custodian**

**Address of custodian**

**Phone: 902-XXX-XXXX**

**Fax: 902-XXX-XXXX**

***Personal Health Information Act***

**RESPONSE TO REQUEST FOR ACCESS TO PERSONAL HEALTH INFORMATION**

**GRANTED IN PART**

[Date]

I am writing in response to your request under the *Personal Health Information Act (PHIA)* for the following records:

*[restate information from individual request]*

Your request has been granted in part. Information has been severed pursuant to section 72(1)(#) of *PHIA*, which states:

*[state relevant provision from PHIA]*

You have the right to request a review of this decision by the Review Officer appointed pursuant to *PHIA*. The review must be filed with the Review Officer in writing within 60 days of the date of this decision letter. The Request for Review form is attached. The Request for Review form should be sent to:

**Review Officer**  
***Personal Health Information Act***  
**P.O. Box 181**  
**Halifax, Nova Scotia**  
**B3J 2M4**  
Phone: 902-424-4684  
Toll-free: 1-866-243-1564  
Fax: 902-424-8303

If you have any questions related to this response, you may contact:

**Name of contact person**  
**Name of Custodian**  
**Address of Custodian**  
Phone: 902-XXX-XXXX  
Fax: 902-XXX-XXXX

*Personal Health Information Act*

**REQUEST FOR CORRECTION TO PERSONAL HEALTH INFORMATION**

[Date]

This form will be used to request correction to your own personal health information

**1. IDENTIFICATION OF INDIVIDUAL** (please print clearly)

\_\_\_\_\_  
Last Name First Name Middle initial

\_\_\_\_\_  
Previous surname (if applicable) Date of birth (YYYY/MM/DD)

\_\_\_\_\_  
Provincial Health Card Number

\_\_\_\_\_  
Mailing address

\_\_\_\_\_  
Daytime telephone number

**2. REQUEST FOR CORRECTION**

Please provide a detailed description of the personal health information you are seeking to correct. Please be as specific as possible, including the date of the record, the reason for seeking the correction (e.g. the information is not accurate, complete or up-to-date), and the specific correction(s) you are seeking. If possible, please attach the relevant portion of the specific record.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### 3. SIGNATURE

I consent to the **[name of custodian]** reviewing my request for correction and the personal health information I am seeking to correct.

---

**Signature**

**Date**

**Please deliver or mail your form to:**

**Name of contact person**

**Name of Custodian**

**Address of Custodian**

**Phone: 902-XXX-XXXX**

**Fax: 902-XXX-XXXX**

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The right to request a correction to your personal health information is pursuant to ss. 85 - 90 of the *Personal Health Information Act*. A custodian is not required to correct the information if:

- a. it consists of a record that was not originally created by **[name of custodian]** and **[name of custodian]** does not have sufficient knowledge, expertise and authority to correct the record;
- b. it consists of a professional opinion or observation that a custodian has made in good faith about an individual;
- c. the **[name of custodian]** believes on reasonable grounds that a request for a correction
  - i) is frivolous or vexatious; or
  - ii) is part of a pattern of conduct that amounts to an abuse of the right of correction,

If **[name of custodian]** does not correct the information for the reason(s) listed above, it shall provide written notice to you.

If you have any questions about this form or the process for requesting a correction, please contact [name of contact person, name of custodian].

***Personal Health Information Act***

**RESPONSE TO REQUEST FOR CORRECTION TO PERSONAL HEALTH INFORMATION**

**REQUEST GRANTED IN FULL**

[Date]

I am writing in response to your request under the *Personal Health Information Act (PHIA)* for the following correction to your personal health information:

*[restate information from individual's request]*

Your request has been granted in full. Pursuant to s. 88(a) of *PHIA*, your personal health information has been corrected as follows:

*[State how the correction has been made. Options are:*

1. *the information has been struck out without obliterating the record;*
2. *where that is not possible:*
  - a. *the information has been labeled as incorrect;*
  - b. *the incorrect information has been severed from the record;*
  - c. *the incorrect information has been stored separately from the record; and*
  - d. *a link has been maintained in the record that indicates that a correction has been made and enables a person to trace the incorrect information;*
3. *Where it is not possible to record the correct information in the record, ensuring that there is a practical system in place to inform a person who accesses the record that the information in the record is incorrect and to direct the person to the correct information].*
- 4.

I trust that this correction is satisfactory. If you have any questions related to this response, you may contact:

**Name of contact person**

**Name of Custodian**

**Address of Custodian**

**Phone: 902-XXX-XXXX**

**Fax: 902-XXX-XXXX**



If you are not satisfied with this response, you have the right to request a review of this decision by the Review Officer appointed pursuant to *PHIA*. The review must be filed with the Review Officer in writing within 60 days of the date of this decision letter. The Request for Review form is attached. The form should be sent to:

**Review Officer**  
***Personal Health Information Act***  
**P.O. Box 181**  
**Halifax, Nova Scotia**  
**B3J 2M4**  
Phone: 902-424-4684  
Toll-free 1-866-243-1564  
Fax: 902-424-8303

***Personal Health Information Act***

**RESPONSE TO REQUEST FOR CORRECTION TO PERSONAL HEALTH INFORMATION**

**REQUEST GRANTED IN PART**

I am writing in response to your request under the *Personal Health Information Act (PHIA)* for the following correction to your personal health information:

*[restate all information from individual's request]*

**REQUEST FOR CORRECTION – GRANTED**

Pursuant to s. 88(a) of *PHIA*, your personal health information has been corrected as follows:

*[State how the correction has been made. The options are:*

1. *the information has been struck out without obliterating the record;*
2. *where that is not possible:*
  - a. *the information has been labeled as incorrect;*
  - b. *the incorrect information has been severed from the record;*
  - c. *the incorrect information has been stored separately from the record; and*
  - d. *a link has been maintained in the record that indicates that a correction has been made and enables a person to trace the incorrect information;*
3. *Where it is not possible to record the correct information in the record, ensuring that there is a practical system in place to inform a person who accesses the record that the information in the record is incorrect and to direct the person to the correct information;*

**REQUEST FOR CORRECTION – NOT GRANTED**

The reason for not granting the remainder of your request for correction is as follows:

*[State the reason for the refusal. The options are:*

- a) *The information was not originally created by me/us, and I/we do not have sufficient knowledge, expertise and authority to correct the record; or*

TEMPLATE 6-8

- b) *The information is a professional opinion or observation that I/we have made in good faith about you.*

Pursuant to s. 90 of *PHIA*, for the portion of your request which was not granted, you are entitled to:

- a) prepare a concise statement of disagreement that sets out the correction that I/we have refused to make;
- b) require that the I/we attach the statement of disagreement as part of the records I/we hold of your personal health information;
- c) disclose the statement of disagreement whenever the I/we disclose information to which the statement relates;
- d) require that the I/we make all reasonable efforts to disclose the statement of disagreement to any person who would have been notified under clause 88(c) of the *Personal Health Information Act* [see below] if I/we had granted the requested correction; and
- e) make a complaint about the refusal to the Review Officer.

Section 88(c) of *PHIA* states that when a request for correction is granted, I/we shall, at your request, *“give written notice of the requested correction, to the extent reasonably possible, to the persons to whom the custodian has disclosed the information unless the correction cannot reasonably be expected to have an effect on the ongoing provision of health care or other benefits to the individual.”*

If you choose to prepare a statement of disagreement, or if you have any questions related to this response, you may contact:

**Name of contact person**

**Name of custodian**

**Address of custodian**

**Phone: 902-XXX-XXXX**

**Fax: 902-XXX-XXXX**

TEMPLATE 6-8

If you are not satisfied with this response, you have the right to request a review of this decision by the Review Officer appointed pursuant to *PHIA*. The review must be filed with the Review Officer in writing within 60 days of the date of this decision letter. The Request for Review form is attached. The form should be sent to:

**Review Officer**

***Personal Health Information Act***

**P.O. Box 181**

**Halifax, Nova Scotia**

**B3J 2M4**

**Phone: 902-424-4684**

**Toll-free 1-866-243-1564**

**Fax: 902-424-8303**

***Personal Health Information Act***

**RESPONSE TO REQUEST FOR CORRECTION TO PERSONAL HEALTH INFORMATION**

**REQUEST NOT GRANTED**

[Date]

I am writing in response to your request under the *Personal Health Information Act (PHIA)* for the following correction to your personal health information:

*[restate all information from individual's request]*

Your request for correction has not been granted for the following reason:

*[State the reason for the refusal. The options are:*

- a) *The information was not originally created by me/us, and I/we do not have sufficient knowledge, expertise and authority to correct the record; or*
- b) *The information is a professional opinion or observation that I/we have made in good faith about you.]*

Pursuant to s. 90 of *PHIA*, you are entitled to:

- a) prepare a concise statement of disagreement that sets out the correction that I/we have refused to make;
- b) require that the I/we attach the statement of disagreement as part of the records I/we hold of your personal health information;
- c) disclose the statement of disagreement whenever the I/we disclose information to which the statement relates;
- d) require that the I/we make all reasonable efforts to disclose the statement of disagreement to any person who would have been notified under clause 88(c) of *PHIA* [see below] if I/we had granted the requested correction; and
- e) make a complaint about the refusal to the Review Officer.

The *Personal Health Information Act*, section 90 requires that custodians make all reasonable efforts to disclose the statement of disagreement to any person who would have been notified if your request for correction had been granted.

If you choose to prepare a statement of disagreement, or if you have any questions related to this response, you may contact:

**Name of contact person**

**Name of Custodian**

**Address of Custodian**

**Phone: 902-XXX-XXXX**

**Fax: 902-XXX-XXXX**

If you are not satisfied with this response, you have the right to request a review of this decision by the Review Officer appointed pursuant to *PHIA*. The review must be filed with the Review Officer in writing within 60 days of the date of this decision letter. The Request for Review form is attached. The form should be sent to:

**Review Officer**

***Personal Health Information Act***

**P.O. Box 181**

**Halifax, Nova Scotia**

**B3J 2M4**

**Phone: 902-424-4684**

**Toll-free: 1-866-243-1564**

**Fax: 902-424-8303**

# RESEARCH

## DEFINITIONS

### RESEARCH

Research means a systematic investigation designed to develop or establish principles, facts generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research. (*PHIA* section 52(c)).

### PLANNING AND MANAGEMENT OF THE HEALTH SYSTEM

*Under PHIA* section 3 (s), planning and management of the health system means the analysis of information with respect to:

- the management, evaluation or monitoring of,
- the allocation of resources to, or
- planning for all or part of, the health system including the delivery of services.

Only the Minister of Health and Wellness is authorized to plan and manage the health system. Section 31(l) authorizes only the Minister to indirectly collect personal health information for the purposes of planning and management of the health system, and section 38(1)(g) states that a custodian may disclose personal health information without consent only to the Minister for the purposes of planning and management of the health system.

However, under section 35(1)(a), any custodian is authorized to use personal health information in its custody or control without consent for the purposes of:

- planning or delivering programs or services that the custodian provides;
- planning or delivering programs or services that the custodian funds in whole or in part;
- allocating resources to any of them;
- evaluating any of them; or
- monitoring any of them.

### EXAMPLE

Kevin, a chiropractor in private practice, wants to evaluate the effectiveness of a new technique to reduce neck pain. Kevin may use his patients' personal health information without their consent to review the outcomes of the technique.

## OTHER EXCEPTIONS

Pursuant to section 5(2)(a) of *PHIA*, the legislation does not apply to statistical, aggregate or de-identified health information.

Section 3(g) of *PHIA* defines “de-identified information” as “*information that has had all identifiers removed that:*

*(i) identify the individual; or*

*(ii) where it is reasonably foreseeable in the circumstances, could be utilized, either alone or with other information, to identify the individual.”*

*PHIA* does not apply to personal health information about an individual after the earlier of one hundred and twenty years after a record containing the information was created and fifty years after the death of the individual (section 5(2)(b)). This provision may be relevant to research where the personal health information being sought is outside the application period for *PHIA*.

Under section 49(2), retention schedules require that information no longer required to fulfill the purposes identified in the schedules (e.g. direct patient care) be securely destroyed, erased or de-identified. Section 49(3) allows information to be de-identified and retained for purposes other than the original purposes for which it was collected.

### EXAMPLE

Ingrid wants to do a research project on Alzheimer's disease using hospital records for patients who died 60 years before the research will be initiated. In this case, *PHIA* would not apply, as the personal health information is outside of the application period for *PHIA*.

Section 51 of *PHIA* requires that the hospital ensure that its retention and destruction schedule for personal health information has been followed. However, section 49(3) permits the hospital



to retain the information in a de-identified form to be used for secondary purposes, including research.

If the hospital has retained the information in a de-identified form, Ingrid would still be able to undertake the research.

## **USE OF PERSONAL HEALTH INFORMATION IN THE CUSTODY OR CONTROL OF A CUSTODIAN FOR RESEARCH**

*PHIA* has introduced rules to provide protection of personal health information in circumstances where a custodian wants to use personal health information in their custody or under their control for research.

Pursuant to section 55 of *PHIA* a custodian may use personal health information for research if, before commencing the research, the custodian:

- prepares a research plan that meets the requirements in section 59;
- submits the research plan to a research ethics board (REB);
- receives the approval of the research ethics board; and
- meets any conditions imposed by the REB.

“Use” is defined by *PHIA* as meaning to handle or deal with the information, but does not include disclosing the information.

Pursuant to section 55 of *PHIA*, a custodian may use personal health information in its custody or control if the custodian submits a research plan to a REB that meets the requirements of section 59. When developing a research plan, a custodian may reference the Research Plan Checklist to ensure they have satisfied all requirements. See Template 7-1 *Research Plan Checklist*.

In addition to submitting a research plan to a REB, the custodian must also receive approval from the REB, and meet any conditions imposed by the REB.

Unlike the *disclosure* of personal health information for research purposes, a custodian is not required to enter into a data disclosure agreement when using the personal health information in its custody or under its control.

Although the personal health information is in the custody and control of the custodian, consent of the subject individuals is still required unless a REB has determined that the consent of the subject individuals is not required, or that it is *impracticable* to obtain consent.

## “IMPRACTICABLE”

PHIA section 52(b) defines “impracticable” as “*a degree of difficulty higher than inconvenience or impracticality but lower than impossibility.*”

In the *Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada, Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*,<sup>1</sup> “impracticable” refers to “*undue hardship or onerousness that jeopardizes the conduct of the research.*” This is consistent with the intent in PHIA, which requires that the researcher consider and attempt all available means of requesting consent.

In practice, it may be helpful to consider circumstances where it is *impracticable* to obtain consent. The Canadian Institutes for Health Research has set out circumstances where this may be the case:

- the size of the population being researched;
- the proportion of prospective participants likely to have relocated or died since the time the personal information was originally collected; or
- the lack of an existing or continuing relationship between prospective participants and the data holder who would need to contact them (e.g. a patient database that does not have a regular follow-up program to maintain a complete and accurate record of changes in registrants’ contact information over time);

such that:

- there is a risk of introducing bias into the research because of the loss of data from segments of the population that cannot be contacted to seek their consent, thereby affecting the validity of results and/or defeating the purpose of the study; or

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<sup>1</sup> *Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada, Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, December 2010 available at <http://www.pre.ethics.gc.ca/eng/index/>

- the additional financial, material, human, organizational and other resources needed to obtain consent could impose a hardship or burden on the researchers or organization so burdensome that the research could not be done.<sup>2</sup>

## DISCLOSURE OF PERSONAL HEALTH INFORMATION IN THE CUSTODY OR CONTROL OF A CUSTODIAN FOR RESEARCH

Pursuant to section 56 of *PHIA* a custodian may disclose personal health information about an individual to a research if the researcher:

- (a) submits to the custodian:
  - (i) an application in writing;
  - (ii) a research plan that meetings the requirements of section 59; and
  - (iii) a copy of the submission to and decision of a research ethics board that approves the research plan; and
- (b) enters into the agreement required by section 60.

A researcher who seeks disclosure of personal health information for research must submit a research plan to a REB for approval. These conditions are clearly outlined in sections 56 - 60 of the Act and include, but are not limited to:

- a description of the research proposed to be conducted;
- a description of the personal health information required and the potential sources of the information; and
- a description of how the personal information will be used in the research.

See section 59 of *PHIA* or Template 7-1 *Research Plan Checklist* for a complete list of conditions.

Pursuant to section 57 of *PHIA*, within the research plan, the researcher must highlight if consent is being sought for subject individuals. If not, the researcher must provide an

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<sup>2</sup> *CIHR Best Practices for Protecting Privacy in Health Research 2005*, at page 7 [http://www.cihr-irsc.gc.ca/e/documents/et\\_pbp\\_nov05\\_sept2005\\_e.pdf](http://www.cihr-irsc.gc.ca/e/documents/et_pbp_nov05_sept2005_e.pdf)

explanation as to why seeking consent is impracticable – and the custodian must accept this explanation.

If the custodian is satisfied under section 57 that consent is not required, the custodian is required to inform the Review Officer that personal health information is being disclosed for research without consent. See Template 7-2 *Review Office Notification* for a sample letter to submit to the Review Office.

Where a custodian discloses personal health information to a researcher, the researcher shall enter into an agreement (see Template 7-3 *Data Disclosure Agreement*) with the custodian to adhere to requirements including:

- to comply with any terms and conditions imposed by a research ethics board or custodian;
- to use the information only for the purposes outlined in the research plan as approved by a research ethics board; and
- to notify the custodian immediately and in writing if the personal health information is stolen, lost or subject to unauthorized access, use, disclosure, copying or modification.

See section 60 of *PHIA* for a complete list of requirements.

## THE RESEARCH PLAN

The research plan referenced in the research sections of *PHIA* does not have to be a separate document from the existing research project protocol already created for other purposes, including submission to the REB, applications for funding or thesis approval provided that all the information required under section 59 is included in the existing document.

See Template 7-4 *Request for Access to Personal Health Information Held by Custodians*. This form includes all requirements under section 56(a)(i) of *PHIA* and can be used as a template application form for data held by custodians.

## SUMMARY OF REQUIREMENTS

*Note: For a complete list of requirements under section 59, see Template 7-1 Research Plan Checklist*

### CUSTODIAN USING PERSONAL HEALTH INFORMATION FOR RESEARCH

Before commencing research using personal health information in his/her custody or control, the custodian shall:

- (a) prepare a research plan that meets the requirements in section 59;
- (b) submit the research plan to a research ethics board;
- (c) receive the approval of the research ethics board; and
- (d) meet any conditions imposed by the research ethics board.

### RESEARCHER REQUESTING PERSONAL HEALTH INFORMATION FROM CUSTODIAN – WITH CONSENT OF SUBJECT INDIVIDUALS

Before commencing the research, the researcher shall:

1. submit to the custodian
  - a) an application in writing;
  - b) a research plan that meets the requirements of Section 59; and
  - c) a copy of the submission to and decision of a research ethics board that approves the research plan; and
2. enter into the agreement required by Section 60.

RESEARCHER REQUESTING PERSONAL HEALTH INFORMATION FROM CUSTODIAN  
– WITHOUT CONSENT OF SUBJECT INDIVIDUALS

Before commencing the research:

1. the researcher shall submit to the custodian:
  - a) an application in writing;
  - b) a research plan that meets the requirements of Section 59; and
  - c) a copy of the submission to and decision of a research ethics board that approves the research plan;
  - d) enter into the agreement required by Section 60
2. A research ethics board has determined that the consent of the subject individuals is not required;
3. the custodian is satisfied that:
  - a) the research cannot be conducted without using the personal health information;
  - b) the personal health information is limited to that necessary to accomplish the purpose of the research;
  - c) the personal health information is in the most de-identified form possible for the conduct of the research;
  - d) the personal health information will be used in a manner that ensures its confidentiality; and
  - e) it is impracticable to obtain consent; and
4. the custodian informs the Review Officer that personal health information is being disclosed without the subject individuals' consent (see Template 7-2 *Review Officer Notification letter*).

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***Personal Health Information Act***

**RESEARCH PLAN CHECKLIST**

Section 59 of the *Personal Health Information Act (PHIA)* requires a researcher seeking to conduct research utilizing personal health information to submit a research plan to a Research Ethics Board<sup>i</sup>. The research plan must be in writing, and in order to meet the requirements for a custodian under the *Act*, the research plan must include the following:

1. a description of the research<sup>ii</sup> proposed to be conducted;
2. a statement regarding the duration of the research;
3. a description of the personal health information required and the potential sources of the information;
4. a description as to how the personal health information will be used in the research;
5. where the information will be linked to other information, a description of the other information as well as how the linkage will be conducted;
6. where the researcher is conducting the research on behalf of or with the support of a person or organization, the name of the person or organization;
7. the nature and objectives of the research and the public or scientific benefit anticipated as the result of the research;
8. where consent is not being sought, an explanation as to why seeking consent is impracticable;
9. an explanation as to why the research cannot reasonably be accomplished without the use of personal health information;
10. where there is to be data matching<sup>iii</sup>, an explanation of why data matching is required;
11. a description of the reasonably foreseeable risks arising from the use of personal health information and how those risks are to be mitigated;
12. a statement that the personal health information is to be used in the most de-identified form possible for the conduct of the research;
13. a description of all individuals who will have access to the information, and:
  - a) why their access is necessary;
  - b) their role in relation to the research; and
  - c) their qualifications;

## TEMPLATE 7-1

14. a description of the safeguards that the researcher will impose to protect the confidentiality and security of the personal health information;
15. information as to how and when the personal health information will be destroyed or returned to the custodian;
16. the funding source of the research;
17. whether the researcher has applied for the approval from another research ethics board and, if so, the response to or status of the application; and
18. whether the researcher's interest in the disclosure of the personal health information or the conduct of the research would potentially result in an actual or perceived conflict of interest on the part of the researcher.

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<sup>i</sup> "Research Ethics Board" means a research ethics board established and operating in conformity with the Tri-Council Policy Statement (*PHIA* section 52(d)).

<sup>ii</sup> "Research" means a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research (*PHIA* section 52(c)).

<sup>iii</sup> "Data matching" means the creation of individual identifying health information by combining individual identifying or non-identifying health information or other information from two or more databases without the consent of the individuals who are the subjects of the information (*PHIA* section 52(a)).



**NOTIFICATION TO REVIEW OFFICER**

**Research – *Personal Health Information Act* section 57(d)**

(Date)

Review Officer  
*Personal Health Information Act*  
Box 181  
Halifax, NS  
B3J 2M4

Dear [name of Review Officer]:

Please accept this letter as notification that [name of custodian] has approved the attached research plan from [name of researcher].

The [name of researcher] has met the requirements of the *Personal Health Information Act* to the satisfaction of [name of custodian] which includes use or disclosure of personal health information without consent of the subject individuals.

Yours truly,

(signature)

Custodian

## DATA DISCLOSURE AGREEMENT FOR RESEARCH PURPOSES

NOTE TO USER: This Sample Data Release Agreement is intended to be used for retrospective research when a custodian discloses personal health information to an external researcher. It would not be used when a researcher who is an agent of the custodian (e.g. an employee of the custodian uses personal health information collected by the same custodian).

### I. PARTIES

This Agreement is made between (*insert name of Custodian*) hereinafter known as “the Custodian” and (*insert name of Researcher*) hereinafter known as “the Researcher”.

### II. GENERAL

The *Personal Health Information Act (PHIA)* allows for the use and disclosure of personal health information for research purposes, but places strict guidelines on the release of this information.

### III. BACKGROUND

- (a) (*identify Custodian*)
- (b) (*identify Researcher*)
- (c) Outline the details of the proposed disclosure of personal health information and the Research Plan:

### IV. PURPOSE

The purpose of this document is to set out terms and conditions about the collection, use, disclosure, retention, disposal and destruction of personal health information provided by the Custodian to the Researcher.

### V. INFORMATION RELEASE

The Custodian will provide the Researcher with the records that contain personal health information for the Research Project titled (*insert title*) under the following terms and conditions where the Researcher agrees:

- a. to comply with any terms and conditions imposed by a Research Ethics Board;
- b. to comply with any terms and conditions imposed by the Custodian;
- c. to use the information only for the purposes outlined in the research plan as approved by a Research Ethics Board;
- d. not to publish the information in a form where it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual;
- e. to allow the Custodian to access or inspect the researcher’s premises to confirm that the researcher is complying with the terms and conditions of *PHIA* and of this agreement;

TEMPLATE 7-3

- f. to notify the Custodian immediately and in writing if the personal health information is stolen, lost or subject to unauthorized access, use, disclosure, copying or modification;
- g. to notify the Custodian immediately and in writing of any known or suspected breach of the agreement between the Custodian and the Researcher; and
- h. not to attempt to identify or contact the individuals unless the Custodian or Researcher has obtained prior consent by the individuals.

**VI. AMENDMENTS**

This Agreement may be amended only by written agreement of the parties.

**VII. SIGNATURES**

The parties have caused this Agreement to be executed as of the dates indicated below:

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature/Researcher)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature/Custodian)

**Request for Access to Personal Health Information Held by the**  
\_\_\_\_\_ (insert name of custodian) \_\_\_\_\_

Definitions from *the Personal Health Information Act (PHIA)* and regulations:

**"custodian"** means an individual or organization described below who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties:

- (i) a regulated health professional or a person who operates a group practice of regulated health professionals,
- (ii) the Minister,
- (iii) the Minister of Health Promotion and Protection,
- (iv) a district health authority under the Health Authorities Act,
- (v) the Izaak Walton Killam Health Centre,
- (vi) the Review Board under the Involuntary Psychiatric Treatment Act,
- (vii) a pharmacy licensed under the Pharmacy Act,
- (viii) a continuing-care facility licensed by the Minister under the Homes for Special Care Act or a continuing-care facility approved by the Minister
- (ix) Canadian Blood Services,
- (x) any other individual or organization or class of individual or class of organization as prescribed by regulation as a custodian
  - a. Nova Scotia Hearing and Speech Centres
  - b. a home care agency that is approved by the Department of Health and Wellness and has a service agreement with a district health authority under the *Health Authorities Act* or with the Izaak Walton Killam Health Centre;
  - c. a home oxygen agency that is approved by and has a service agreement with the Department of Health and Wellness.

**"Data linkage"** means the bringing together of 2 or more records of personal health information to form a composite record

**"Data matching"** means the creation of individual identifying health information by combining individual identifying or non-identifying health information or other information from two or more databases without the consent of the individuals who are the subjects of the information

TEMPLATE 7-4

“**Impracticable**” means a degree of difficulty higher than inconvenience or impracticality but lower than impossibility

“**Research**” means a systematic investigation design to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research

“**Research Ethics Board**” means a research ethics board established and operating in conformity with the Tri-Council Policy Statement

“**Tri- Council Policy Statement**” means the Tri-Council Policy Statement “Ethical Conduct for Research Involving Humans” adopted in August 1998 by the Medical Research Council of Canada, the Natural Sciences and Engineering Research Council of Canada and the Social Sciences and Humanities Research Council of Canada and includes any amendments or successor statements.

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Documents	Version Number	Date (yyyy,mm,dd)
Completed Request Form		
Research Ethics Application & Supporting Documents		
Research Ethics Board Approval		
Research Proposal		
Letters of Support		
Researcher’s Current CV(abbreviated)		
Confidentiality Agreement (template attached)		

**1. APPLICANT INFORMATION:**

**Researcher:**

Organization:

Address:

Email:

Phone:

Fax:

**Academic Advisor (if Researcher is a student)**

Organization:

Address:

Email:

Phone:

Fax:

**2. CO-INVESTIGATORS**

List all co-investigators, their affiliation and *specific* role (e.g., data analyst, statistical or clinical consultant, data collection) in the proposed research project. If the Researcher is a student, please list all Advisory Committee Members. A signed confidentiality agreement will be required of each individual before the data are released.

**1. Name:**

Organization:

Primary role on the project including a brief paragraph describing recent similar projects involving the use of personal health information:

Will he/she have access to person identifying data?

- If yes, please provide rationale

**2. Name:**

Organization:

Primary role on the project including qualifications:

Will he/she have access to line identifying data?

- If yes, please provide rationale

**3. Name:**

Organization:

Primary role on the project including qualifications:

Will he/she have access to line identifying data?

- If yes, please provide rationale

**3. STUDY FUNDER**

**Has funding been obtained for this study?**

Yes  No

If yes, or pending please indicate the funding source(s):



**4. RESEARCH PROJECT**

- (a) Research Project Title (please include research proposal):**
- (b) Study objectives/outcome measurers of the Research (please include specific research questions):**
- (c) Provide, in plain language, a brief summary of your proposed methodology including the analysis plan (maximum 3 pages):**
- (d) What is the proposed public or scientific benefit of this research?**
- (e) Are there any foreseeable harms/risks arising from the use of personal health information?**  
 If yes, how will the risks be mitigated?

**5. STUDY PARTICIPANTS**

- (a) Will the study involve direct access to potential study participants?** Yes  No 
  - i. If no, please move to section 6.
  - ii. If yes, will the study involve mailing correspondence to potential participants?  
 Yes  No 

If yes, include a copy of the introductory letter that will be sent to the potential participants as well as the Information, questionnaires, and any other materials that potential participants will receive.
- (b) Will (insert name of custodian) be asked to facilitate a blind mail-out?** Yes  No
- (c) Will participants be asked to provide informed consent for this study?** Yes  No 

If yes, please include consent form.
- (d) If consent is not being sought, please indicate why.**  
*PHIA* requires consent to be sought unless a Research Ethics Board (REB) has determined consent is not required - please see section 57 of *PHIA* for all requirements.

**6. SPECIFIC DATA REQUIRED**

**(a) Please complete the following table which allows (*insert name of custodian*) to clearly identify the objectives and corresponding variables required:**

*The Personal Health Information Act (PHIA) places the highest importance on the protection of privacy and security of the data held by custodians. PHIA requires that only the minimum information necessary to accomplish the purpose of the research project be released to researchers.*

Variable Required	Clearly define Objective	Rationale	Years of data required	Database/Source
Example				
e.g. Age of each person	e.g. Do wait times vary for hip replacement surgery in Nova Scotia by age?	e.g. To calculate age adjusted incidence rates. Categorized age variable cannot be used for calculating age adjusted incidence rates	e.g. 1999-Present	e.g. Cancer Registry held by Cancer Care Nova Scotia

**(b) Will data from another source(s) be requested for this research study?** Yes  No

If yes, please provide a list of data sources and the variables requested

**(c) Will data held by (*insert name of custodian*) be linked/matched with the above data?** Yes  No

If yes, please describe the nature of the linkage, including the process for linking data from varied sources. Please include a flow diagram if multiple linkages will occur, as well as the specific data fields you are requesting.

**(d) Estimated time period for need of data:** (specify the time: one year, five years, etc. that this data will be used for, or how often this data has to be forwarded to your organization)

**7. CONSENT**

**Will you be obtaining consent from the individuals whose personal health information you are requesting access?** Yes  No



If no, please provide an explanation as to why seeking consent is impracticable. Please provide supporting documentation presented to the REB that led them to determine that the consent of the subject individuals is not required.

## 8. INFORMATION PRACTICES

**(a) Indicate the physical location where the data will reside (complete address, including room/office number).**

**(b) Will the data be accessed remotely?** Yes  No   
If yes, by whom? Where is the remote terminal located? What level of data (aggregate vs. line-level) will be accessed? Describe the specific security measures in place to ensure that data security is not compromised by remote access.

**(c) Describe the administrative, physical and technical measures taken to safeguard the information.** Please include security measures (e.g. physical, technical and administrative controls and safeguards – passwords, firewall, encryption, audits etc.)

**(d) Where and how will participants' personal information be stored after the study ends?**

**(e) How will the information be securely destroyed?**

## 9. PUBLICATION OF THE STUDY RESULTS

**Describe how you intend to share and/or publish the results of your research, providing detail on audiences and the format in which data/results will be presented.**

For example, the results might be presented to supervising professors, published in academic journals, distributed within an organization, or forwarded to a sponsoring or funding agency; the data/results might be presented in aggregate or de-identified form.

If the results will be published, a copy of the report must be sent to *(insert name of custodian)*

## 10. CONFLICT OF INTEREST

**Will the researcher's interest in the disclosure of the personal health information or the conduct of the research potentially result in an actual or perceived conflict of interest on the part of the researcher?** Yes  No

If yes, please explain how the researcher intends to address the potential conflict.

## 11. OTHER INFORMATION

Please describe any other information relevant to this application.

## ATTACHMENTS

The following documents must be provided:

- Research Proposal
- Research Ethics review application and any supporting documents (all applicable REBs)
- Research Ethics Board review approval and any interim approvals
  - pending
- Peer review support documents, if applicable.
- Confidentiality Agreement(s) (template attached)
- Researchers' Current CV
- Consent Form

## DECLARATION

I declare that:

- a. This research complies with the Nova Scotia *Personal Health Information Act*;
- b. The information received will only be used for the purposes of the study;
- c. The research cannot reasonably be accomplished without the use of personal health information;
- d. The information is to be used in the most de-identified form possible for the conduct of the research;
- e. The protocol ensures the security of the personal health information and its destruction when finished;
- f. The researcher's interest in the disclosure of the personal health information or the conduct of the research will not potentially result in an actual or perceived conflict of interest on the part of the researcher except as noted in section 10 (above); and
- g. A copy of all published reports and articles will be provided to the (*insert name of custodian*).

---

Signature of Principal Investigator

Date

**Confidentiality Agreement for  
(insert custodian & party)**

As a condition of my project work agreement with the (insert custodian)  
I agree to:

- (a) keep private;
- (b) treat as being confidential; and
- (c) not make public or divulge to any person

any information or material to which I become privy during the term of this project.

I agree to uphold this obligation during, as well as after the completion of my project and abide by all (insert custodian) policies.

Any product resulting from my work at the (insert custodian) remains property of (insert custodian) and cannot be used unless I request to and receive permission from the Manager of the program.

Failure to uphold this obligation of confidentiality will result in my immediate termination with (insert custodian), as well as appropriate communication to (insert name of privacy officer) and to my program Chair regarding the breach of confidentiality.

**Signed by:**

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Name	Signature	Date
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**Witnessed by:**

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Name	Signature	Date
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# INFORMATION PRACTICES:

## ELECTRONIC HEALTH RECORD AND ELECTRONIC INFORMATION SYSTEMS

While the provisions of the *Personal Health Information Act (PHIA)* apply to both paper and electronic information, this section focuses on factors around personal health information in an electronic format. It reviews the requirements in the *Act* and its regulations as they relate to electronic health information and provides guidelines around information practices that custodians can put in place to ensure compliance with the legislation.

### DEFINITIONS

#### ELECTRONIC HEALTH RECORD

An Electronic Health Record (EHR) as defined in the regulations means *“an electronic information system that is approved by the Minister and integrates data from multiple electronic information systems for the purpose of providing a comprehensive record of an individual’s personal health information.”* (PHIA regulation section 2(1))

Examples of an electronic health record for Nova Scotia include the Secure Health Access Record (SHARE) and, once implemented, the Nova Scotia Drug Information System (DIS).

#### ELECTRONIC INFORMATION SYSTEM

An Electronic Information System is defined in regulation as *“a computer system that generates, sends, receives, stores or otherwise processes personal health information”* (PHIA regulation section 2(2)). Many custodians use electronic information systems in documenting the treatment and/or scheduling of individuals under their care.

An example of an electronic information system would be the Nightingale™ system, an electronic medical record used by many physicians in their practices, as well as the Nova Scotia Hospital Information System (NSHIS). An electronic information system can also be a single



computer which tracks appointments, billings or a patient's personal health information in a sole practitioner's office.

## OVERVIEW

*PHIA* requires that custodians implement, maintain and comply with information practices for both paper and electronic information that:

- (a) meet the requirements of the Act and the regulations;*
- (b) are reasonable in the circumstances; and*
- (c) ensure that personal health information in the custodian's custody or under its control is protected against*
  - a. theft or loss of the information, and*
  - b. unauthorized access to or use, disclosure, copying or modification of the information. (PHIA section 62)*

## INFORMATION PRACTICES IN AN ELECTRONIC ENVIRONMENT

Under *PHIA* regulations, custodians must implement additional safeguards for personal health information held in an electronic information system maintained by the custodian as outlined:

- (a) protection of network infrastructure, including physical and wireless networks, to ensure secure access;*
- (b) protection of hardware and its supporting operating systems to ensure that the system functions consistently and only those authorized to access the system have access;*
- (c) protection of the system's software, including the way it authenticates a user's identity before allowing access. (PHIA regulation section 10 (1))*

In addition, a "*custodian must create and maintain written policies to support and enforce the implementation of the safeguards...*" (*PHIA* regulation section 10 (2)).

Ensuring that personal health information is protected requires the successful integration of three types of security measures:

- administrative safeguards;
- physical safeguards; and
- technical safeguards.

Administrative safeguards, along with physical and technical safeguards are the technologies, policies and procedures that protect personal health information and control access to it.

*PHIA* requires that custodians take steps, appropriate to their organization, to protect the personal health information that is under their custody or control. Custodians may choose to conduct a risk assessment of all their electronic information systems to evaluate the potential risks and vulnerabilities to the privacy, confidentiality and integrity of the personal health information. Once conducted, custodians can then consider how best to implement the administrative, physical, and technical safeguards necessary to adequately protect the personal health information. Factors to consider may include the sensitivity of the information, the risks associated with exposure of the information, the size of the organization or of the electronic system itself as well as the number of users of the system.

#### EXAMPLE

Louise is the Chief Information Officer of a District Health Authority with hundreds of electronic information systems holding thousands of patient records, along with thousands of potential users. Louise may consider purchasing an advanced audit system able to accept feeds from the many systems and produce audit reports to ensure that the systems are being accessed appropriately.

In contrast, Louise's brother, Andrew, is a physician in his own practice with one additional employee, his receptionist. He may choose to use strong password protection and lock his office whenever he steps out to prevent anyone else accessing his patients' information as part of his information safeguards.

## ADMINISTRATIVE SAFEGUARDS

According to the Treasury Board of Canada, administrative safeguards are “*the written policies, directives, rules, procedures and processes for the protection of personal information throughout the life cycle of both the personal information and the program or activity.*”<sup>1</sup>

Administrative safeguards may include the establishment of appropriate security policies, procedures and practices, supported by adequate training and education of staff, and appropriate enforcement. The following are some examples, including those that are required under *PHIA*

- appointment of a privacy officer/*PHIA* contact person (*PHIA* section 67)
- written security policies/guidelines (*PHIA* regulation section 10(2))
- written privacy statement (*PHIA* section 15)<sup>2</sup>
- staff privacy and confidentiality training to maintain awareness of policies and guidelines;
- audits (including an audit schedule) for compliance with security policies;
- confidentiality agreements for employees and agents; and
- contracts with agents that ensure compliance with the *Act* and regulations.

The most robust physical and technical safeguards can be compromised if the custodian’s agents, including employees, consultants and volunteers are not aware of proper information practices - or if they disregard them. Breaches of personal health information held electronically are most likely to be committed by authorized users of the systems, who therefore pose the greatest risk.<sup>3</sup> Regular updating of the policies and guidelines and a schedule for regular training may help mitigate that risk.

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<sup>1</sup> Treasury Board of Canada Secretariat. Directive on Privacy Practices. <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=18309#appA>

<sup>2</sup> See Chapter 3: *Duties of a Custodian* and Template 3-4 *Written Privacy Statement*

<sup>3</sup> Veriphry: Survey of Patient Privacy Breaches, August 2011. <http://blog.veriphry.com/2011/08/over-70-of-healthcare-providers.html>

Physical safeguards are designed to protect both your system and the personal health information stored on it from unauthorized use, loss or damage. When assessing and implementing physical safeguards, custodians should consider the risks associated with *all* access to personal health information which may include access within the facility, but also all other physical locations where it may be accessed or stored.

Physical safeguards may include:

- Establishing secure areas and using identity badges in secure areas (where required and feasible).
- Maintaining access records for individuals who have access to secure areas. The access records should be meaningful in the event of a security audit.
- Ensuring that appropriate security mechanisms are used at any unattended entrance to a secure area (e.g. locks on doors, card access control, monitored surveillance cameras).
- Placing monitors, printers and fax machines where others cannot see personal health information (e.g. away from waiting rooms, ground floor windows or busy passageways).
- Ensuring equipment is kept in a locked office whenever you are out of the office or away for extended periods of time (e.g. overnight, vacation).
- Keeping portable equipment secure (e.g. do not leave laptops in your vehicle).
- Keeping USB memory devices, CDs, and other media in a secure place (e.g. a locked drawer).
- Maintaining the ability to quickly restore critical systems in the event of equipment loss or failure.
- Disposing of all media containing sensitive information in a secure manner, which includes shredding, disintegration and incineration.<sup>4</sup>

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<sup>4</sup> COACH: *Putting it in Practice: Privacy and Security for Health care Providers Implementing Electronic Records*  
[http://www.ehealthontario.on.ca/images/uploads/pages/documents/Putting-it-into-Practice\\_PrivacySecurityHealthcareProviders.pdf](http://www.ehealthontario.on.ca/images/uploads/pages/documents/Putting-it-into-Practice_PrivacySecurityHealthcareProviders.pdf)



## TECHNICAL SAFEGUARDS

Technical safeguards protect the personal health information in computer systems, networks and other information resources. Implementation of technical safeguards and standards represent good business practices to protect the personal health information under a custodian's custody or control.

### a) Measures to protect network infrastructure

Custodians should review their network's protection against unauthorized access to protect network infrastructure from external (e.g. malware and hackers) and internal threats (e.g. network operational centres should be kept locked).

#### EXAMPLE

At the Northeast Grace Hospital the firewall prevents users from accessing certain high risk websites to minimize the risk of hackers. Melissa, a registration clerk at the hospital, logs on to the system at work and wants to check her horoscope. She receives a message stating that she is not allowed to access this website.

### b) Measures to protect hardware/operating systems

Various measures can be utilized to protect hardware and their supporting operating systems to ensure security by avoiding unauthorized access. For example, back-up information should be stored in a secure, locked environment off-site. Information intended for long-term storage on electronic media should be reviewed on a regular basis to ensure the data is retrievable, and to migrate the data to another storage medium if necessary.

### c) Measures to protect a system's software and data

There are a number of measures that can be used to protect a system's software:

- Disaster recovery models can be implemented by having up-to-date backups of all data securely stored in a location other than where the data is normally stored.
- Encryption and authentication minimizes the risk of access by unauthorized individuals.

- Encryption or cryptography is the general term for mechanisms to convert data for secure transmission or storage.
- Authentication is any process that verifies the source of a request or response for information in a computing environment. Authentication can be based on one or more of the following criteria:
  1. something you have – e.g. a key, card
  2. something you know – e.g. password, personal I.D. number
  3. something related to who you are – e.g. signature, iris pattern, voiceprint, thumb print
  4. something indicating where you are located – e.g. terminal connected by hardwired line, phone number
- Antivirus/antimalware software can protect against unauthorized modification, loss, access, or disclosure. As viruses and malware threats are constantly changing and advancing, it is important to ensure antivirus/antimalware software is up-to-date to protect from such threats.
- Internet access should be through a firewall implemented through hardware (e.g. on a network router) or software residing on the user machine.
- Particular attention is required to protect data during transport or on a mobile device. There are different considerations that should be taken into account to ensure the security of the data.
  - Devices such as laptops, memory sticks and smart phones may facilitate mobility; however these devices should only be utilized for personal health information if the appropriate security measures are in place.
  - Encryption may mitigate the risk of transporting data and it is recommended that, when taking data from a secure office location and putting it onto a mobile device or transporting it otherwise, data should be encrypted.
- Security is also dependent on the person not sharing their access directly or indirectly, through careless storage of user IDs and passwords. For example post-it notes on monitors can lead to unauthorized access. Another element of security is restricting access to personal health information by staff on a need-to-know basis; only those who need to have access to the personal health information for the purpose of carrying out their job functions should have access.

## SECURITY AND PRIVACY BREACHES

The *PHIA* regulations state that:

*“A custodian shall create and maintain a record of every security breach of the custodian’s electronic information system that the custodian determines on a reasonable basis is likely to pose a risk to an individual’s personal health information. (PHIA regulation section 10 (3))*

*A record of security breaches must include details of all corrective procedures taken by the custodian to diminish the likelihood of future security breaches.” (PHIA regulation section 10 (4))*

Security breaches that pose a risk to personal health information should be thoroughly documented and analyzed to determine the root cause or causes of the breach. Once the root cause has been identified, corrective action is required to minimize the risk of the event happening in the future. The effectiveness of the corrective measures as a mitigation strategy should also be evaluated over time as part of a continuous improvement cycle.

Information regarding privacy breaches can be found in Chapter 3 of the Toolkit, *Duties of a Custodian*.

## RECORD OF USER ACTIVITY

In subsection 63(3) of the *Act*, a “*record of user activity related to an individual’s personal health information*” means a report produced at the request of an individual for a list of users who accessed the individual’s personal health information on an electronic information system for a time period specified by the individual. (*PHIA* regulation section 11(1))

Section 63 of *PHIA* gives individuals the right to request a record of user activity for any electronic information system that a custodian uses to maintain the individual’s personal health information. The record of user activity may be generated manually or electronically. It is important to note that the record of user activity must be made available within 30 days and at no charge.

The PHIA regulation section 11 (2) provides that the record of user activity “...must include at least all of the following information:

- (a) the name of the individual whose personal health information was accessed;*
- (b) a unique identification number for the individual whose personal health information was accessed, including their health-card number or a number assigned by the custodian to uniquely identify the individual;*
- (c) the name of the person who accessed the personal health information;*
- (d) any additional identification of the person who accessed the personal health information, including an electronic information system user identification name or number;*
- (e) a description of the personal health information accessed or, if the specific personal health information accessed cannot be determined, all possible personal health information that could have been accessed;*
- (f) the date and time the personal health information was accessed or, if specific dates and times cannot be determined, a range of dates when the information could have been accessed by the person.*

As per PHIA regulation 11(2), a custodian must be able to capture at least the above information within the record of user activity. Given that not all custodians have (or should have) an elaborate electronic information system with robust audit functionality, the regulation allows for a broad response to the specific type of personal health information accessed along with ranges for the dates and times.

Therefore, custodians unable to extract this information electronically from their electronic information system are still able to comply with the regulation by providing a more general description. This information may be captured through the custodians scheduling system (date and time) along with a detailed list of the personal health information captured by the applicable system.

#### EXAMPLE

Herbert is a naturopathic doctor operating a clinic with two support staff, an electronic scheduling system, and paper records. Eileen, a patient of the clinic, requests a record of

user activity. Herbert explains to Eileen that his system is not able to produce a record detailing the specific times of access and by whom, but based on his hours of operation, and having only two staff members – he gives Eileen a record of user activity highlighting the following information:

- Herbert and his two staff members (Shirley and Tina) may have accessed Eileen’s personal health information contained in the electronic system (demographics, medical conditions, allergies) at any point during the clinic’s hours of operation (Monday – Friday, 8 a.m.-5p.m.) during the past six months.
- Both staff members have legitimate work reasons to access the personal health information for scheduling appropriate appointment times and for filing any follow-up test results.

## AUDIT LOG VERSUS RECORD OF USER ACTIVITY

Individuals should be made aware that under *PHIA* they have the right to request a record of user activity that shows who has looked at their personal health information in an electronic format. Information about this right could be included in the custodian’s privacy statement.

It is important to distinguish between an “audit log” and a “record of user activity” referenced in section 63 of *PHIA*:

*A record of user activity “means a report produced at the request of an individual for a list of users who access the individual’s personal health information on an electronic information system for a time period specified by the individual” (PHIA regulation section 11 (1)).*

An audit log, if one exists, is an electronic file or record which details, during a given period of time, who has accessed patient information in an electronic information system. The audit log may or may not contain more fields than those required by regulation to produce a record of user activity.

A record of user activity may be generated by taking specific fields from a system’s audit log and forming a report that could be provided to an individual. The *PHIA* regulations require that the audit logs used to generate a record of user activity, if they exist, must be kept for at least

one year from the date they were used to create a record of user activity (*PHIA* regulation section 10(2)). A custodian will determine the retention period for the audit logs on an ongoing basis and this can be included in their written policies.

#### EXAMPLE

Nadine is the Privacy Manager at a hospital that has purchased an advanced audit system capable of producing audit reports to ensure that systems are being accessed appropriately. Norman, a previous patient at one of the hospitals, requests a record of user activity. He is concerned that his neighbour, who is a nurse at the hospital, may have looked at his personal health information.

Nadine is able to produce a record of user activity from the audit logs it runs on a monthly basis and retains for a three year period (as outlined in their policy). The hospital will be required to keep all audit logs used to produce the record of user activity for one year from the date his record of user activity was created.

Custodians may also consider capturing the following elements in their audit logs:

- the location of the user when the information was accessed;
- the specific action performed or conducted by the user (e.g. viewing, modifying, deleting, printing, editing, signing off, writing); and
- the length of time the action took place.

## SECURE DESTRUCTION

Under section 49(2) of *PHIA*, retention schedules require that information no longer required to fulfill the purposes identified in the schedules (e.g. direct patient care) be securely destroyed, erased or de-identified.

Section 49 (1) of *PHIA* states that "securely destroyed" means destroyed in such a manner that reconstruction is not reasonably foreseeable.

It is important to be aware that physically destroying hardware and patient information records in an electronic form can be difficult. Secure destruction of electronic records requires professional expertise. There are four main options described below for secure destruction of personal health information held electronically:

### **1. Wiping Hard Drives**

Data-wiping software is available to wipe hard drives previously used in your practice or clinic.

### **2. Degaussing Hard Drives**

Degaussing uses a reverse magnetic field to scramble electronic data in a hard drive and make stored information unreadable.

### **3. Secure Erase**

Secure erase permanently removes information from a hard drive by prompting a pre-existing protocol coded into the hard drive by the manufacturer.

### **4. Physical Destruction**

Physical destruction of a hard drive means to physically destroy in an irreversible manner so that the record(s) cannot be reconstructed in any way.<sup>5</sup>

Please note that "regular" deletion of files is not adequate (including any "Empty Trash" feature) - the data may still exist on the media. Given the technological expertise to securely destroy electronically stored information, consideration should be given to hiring an accredited service provider when destroying personal health information.

Acceptable methods of secure destruction for electronic records containing personal health information will evolve over time. It should be recognized that these approaches are separate from the ultimate destruction of the hardware itself (e.g. to securely remove the information at the end of life cycle of the hardware).

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<sup>5</sup>Alberta Netcare (Physician Office System Program) Hardware and Information Disposal.

[www.posp.ca/media/307163/hardware\\_destruction.pdf](http://www.posp.ca/media/307163/hardware_destruction.pdf)

# PRIVACY COMPLAINTS UNDER *PHIA*

*Note: This chapter refers to the “custodian” throughout the commentary. However, a custodian is required to designate a contact person for PHIA, who is responsible to “receive and process complaints under this Act”( section 67(e))*

## PRIVACY PROVISIONS OF *PHIA*

An individual may make a complaint about any aspect of the custodian’s conduct in relation to the privacy provisions of *PHIA*. Under section 92(1)(a) of *PHIA*, the “privacy provisions” of the Act are sections 11-70. These sections include:

- consent (sections 11 - 20);
- substitute decision-maker (sections 21-23);
- collection, use and disclosure - general (sections 24-29);
- collection (sections 30- 32);
- use (sections 33-35);
- disclosure (sections 36 - 46);
- retention, destruction, disposal and de-identification (sections 47 - 51);
- research (sections 52-60);
- practices to protect personal health information (sections 61 - 68); and
- reporting of a privacy breach (sections 69 - 70).

## REQUIREMENT FOR A PRIVACY COMPLAINT POLICY

Pursuant to section 62(2), every custodian is required to implement, maintain and comply with a complaints policy which outlines the process under which an individual may make a complaint. This requirement is part of the custodian’s responsibilities to protect the personal health information of the individuals it serves.





### ***Personal Health Information Act Regulation***

**8 (1)** A complaints policy implemented by a custodian under subsection 62(2) of the Act must include the following:

- (a) a requirement that an individual submit a complaint to the custodian in writing; and
- (b) a statement of the time period following receipt of a written complaint during which the custodian must process, investigate and make a decision on the complaint and reply to the complainant.

**(2)** Subject to subsection (3), the time period referred to in clause (1)(b) must be no longer than 60 days.

**(3)** A custodian who receives a complaint may, by written notice to the complainant before the end of the time period specified in the custodian's complaints policy, extend the time period

- (a) by no more than 30 days; or
- (b) with the Review Officer's permission, by a period longer than 30 days, if either of the following apply:
  - i. replying to the complaint within the 30-day extension period would unreasonably interfere with the activities of the custodian,
  - ii. the time required to undertake the consultations necessary to reply to the request within the 30-day extension period would make it not reasonably practical to reply within that time.

[www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) for the official text of the regulation

## **BEST PRACTICES FOR A PRIVACY COMPLAINT POLICY**

A complaint policy should include:

- the name and full contact information for the contact person(s) responsible for receiving and processing complaints under the Act;
- the process for an individual to make a complaint to the custodian. This may include whether a prescribed form will be required;

- any timelines that the custodian will follow in processing and responding to a complaint;
- any timelines that the individual must follow as part of the complaints process;
- a form for an individual to use to make a complaint<sup>1</sup>;
- an outline of the process for investigating the complaint. This may include meeting with the individual making the complaint, and speaking with individuals within the custodian’s organization who may be able to provide additional information related to the complaint;
- the method of communicating the resolution to the individual (e.g. by letter, by phone, by e-mail); and
- information about the individual’s rights in terms of a review of the complaint by the Review Officer.

Under section 92(4) of the *Act*, an individual must complete the internal complaint process of a custodian before the individual can initiate a review with the Review Officer. In other words, a custodian must make a decision in order for the Review Officer to consider initiating a review.

The following points may be helpful to consider when developing the policy:

**a) Informal resolution of complaints is encouraged**

Complaints can often be resolved informally by meeting or speaking with the individual to understand his/her concerns. A custodian may provide as much information as possible to the individual to help them understand how the custodian determined why the relevant action was taken.

For example, if a custodian has collected personal health information that the individual thinks is not relevant to their health care, the custodian should explain the reasons supporting the collection.

**EXAMPLE**

The Manor Nursing Home collects personal health information for every resident, including contact information on each resident’s next-of-kin. They collect this information in order to

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<sup>1</sup> PHIA regulations require that complaint be in writing. See [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) for current regulations.

contact a member of his family should his care team need information or support from the family related to his care.

Kevin doesn't see why the nursing home needs to collect this information, and complains to the Administrator.

The Administrator should explain to Kevin the purpose for collecting the information. However, they should also inform him that the information doesn't have to be collected, but he should also understand that information from his family may support the care he receives.

If the custodian believes a resolution has been reached, it may be helpful to confirm with the individual whether they are satisfied with the explanation of the issue.

An informal resolution to a complaint should always be documented by the custodian. Documentation should include the following:

- date(s) of any discussions or meetings with the individual;
- who participated in the discussion or meetings; and
- outcomes of the discussions or meetings.

Custodians may state in their complaints policy that a documented informal resolution is a decision, and represents the completion of the custodian's internal complaint process. This would allow an individual to proceed directly to a review by the Review Officer, as the individual would have met the requirement in section 92(4).

The individual should be advised that they have the right to request a review by the Review Officer once they have completed the custodian's internal complaint process. All discussions related to this direction should be documented by the custodian.

#### **b) Complete information is critical to fully investigating a complaint**

An individual making a complaint should be encouraged to provide as much **relevant** information as possible to the custodian. This may include:

- names of all individuals within the custodian's organization who may have information related to the complaint;
- all dates relevant to the complaint;

- copies of all documents or materials relevant to the complaint, including any previous correspondence between the individual and the custodian, and any background materials relevant to the complaint;
- any attempts the individual has made to resolve the complaint;
- any harm or embarrassment that has been caused to the individual as a result of the custodian's actions; and
- the outcome the individual is seeking from the custodian in relation to the complaint.

**c) The individual may be asked to provide written consent to allow the custodian to fully investigate the complaint**

In order for a custodian to fully understand the background to and potential causes of the individual's complaint, the custodian must be able to discuss the complaint with anyone who can provide information **relevant to the complaint**. The individual making the complaint must be made aware if the custodian intends to do this.

Where possible and appropriate, the custodian should provide the following information to the individual:

- the name and title of the person(s) who will be consulted;
- the information about the complaint that the custodian will provide to the person(s); and
- why the person is being consulted.

The individual must be assured that only information relevant to the complaint will be discussed and documented. If the individual has any concerns about specific information being discussed, or with the custodian having discussions with specific person(s), these concerns should be discussed with, and documented by the custodian. However, the individual should be advised that a full investigation may not be possible if all **relevant** information is not available to the custodian.

**EXAMPLE**

Dominique is a patient of Rachael, a dentist in a medium-sized practice. Dominique has a complaint about the treatment she received from Kelly, her dental hygienist.

Dominique reviews her dentist's complaint policy, and makes a complaint, in writing, as required by the dentist's policy. She also writes that she does not want her dentist to discuss the complaint with the hygienist's colleagues in the practice.

Rachael's dentist would have to determine whether it is necessary to discuss the complaint with Kelly's colleagues, or whether the information provided on the complaint form is sufficient to make a fair decision. If it is, no discussion with Kelly's colleagues is required.

If information known to the colleagues is necessary to help Rachael understand the complaint, Rachael should advise Dominique that the information from the colleagues is necessary to gain a full understanding of the alleged conduct of the hygienist.

It is possible that the information may be gathered from another source, and Dominique should be asked whether she can offer any alternate sources of information. If she can't, she should be advised that a full investigation may not be possible, and be provided with the reasons why the limited information may not be sufficient.

**d) Information related to a complaint should be kept as separate record**

In order to ensure that an individual's complaint does not negatively impact their care and treatment by the custodian, all documents related to the complaint should be kept in a record separate from the individual's personal health information record.

See Template 9-1: *Privacy Complaint Form*.

***Personal Health Information Act***

**Complaint Form**

This form is provided to you to allow you to provide all information related to your complaint. You may also send a letter outlining your complaint to the *Personal Health Information Act* contact person for our organization (see below for contact information).

**1. PATIENT/CLIENT/RESIDENT NAME AND CONTACT INFORMATION** (please print clearly)

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Last Name	First Name	Middle initial
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Mailing address

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Daytime telephone number

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E-mail address (only required if you wish to be contacted by e-mail)

How do you wish to be contacted? Please check one  Phone  Regular mail  E-mail

**If you are making the complaint on behalf of someone else, please provide your name and contact information:**

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Last Name	First Name	Middle initial
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Relationship to patient/client/resident

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Mailing address

---

Daytime telephone number

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E-mail address (only required if you wish to be contacted by e-mail)

How do you wish to be contacted? Please check one  Phone  Regular mail  E-mail

**You must attach a copy of the document authorizing you to make the complaint.**

Example: written consent of the individual, guardianship documents.

## 2. DETAILS OF THE COMPLAINT

**Please provide as much information as you can about the complaint you are making.** Please include details of the incident(s) leading to your complaint, the name of any individuals who are involved in the incident(s), the date when the incident(s) occurred, and any information about your efforts to attempt to resolve this complaint outside of this complaint process (e.g. informal discussions with someone involved in the incident).

**Please attach any documents relevant to the complaint**

## 3. RESOLVING THE COMPLAINT

What do you think should happen to resolve your complaint?

## 4. CONSENT AND SIGNATURE

**In order to fully investigate your complaint, we will need to review your personal health information relevant to your complaint. Please check and initial your response.**

\_\_\_  I consent to the [name of custodian] reviewing my personal health information in order to fully investigate my complaint

\_\_\_  I **do not** consent to the [name of custodian] reviewing my personal health information in order to fully investigate my complaint

We may also need to discuss the facts presented on this form and any other information related to the complaint with individuals in our organization. **We would only disclose information relevant to the complaint.**

\_\_\_  I consent to the [name of custodian] discussing the facts presented on this form and any other information related to the complaint with individuals in [name of custodian]. I understand that [name of custodian] will only disclose information relevant to my complaint.

\_\_\_  I **do not** consent to the [name of custodian] discussing the facts presented on this form and any other information related to the complaint with individuals in [name of custodian].

TEMPLATE 9-1

Please note that we may not be able to fully investigate your complaint if we do not have access to all the relevant information related to your complaint.

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**Signature**

**Date**

Please deliver or mail your original form to:

**Name of contact person**

**Name of custodian**

**Address of custodian**

**Phone:** 902-XXX-XXXX

**Fax:** 902-XXX-XXXX

If you have any questions about this form or the process for making a complaint,  
please contact the [name of contact person, name of custodian].



# THE REVIEW OFFICER, REVIEWS AND MEDIATION

## THE PRIVACY REVIEW OFFICER

The *Personal Health Information Act* defines the “Review Officer” as “the Privacy Review Officer under the Privacy Review Officer Act” (s. 3(z)). In 2009, the *Privacy Review Officer Act* was proclaimed providing for independent oversight of privacy complaints for provincial public bodies subject to the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. Prior to 2009, an individual would not be guaranteed the ability to request a privacy review, as there was no right to make a complaint related to privacy matters under *FOIPOP*.

In September 2009, the *FOIPOP* Review Officer was appointed as the Privacy Review Officer under the *Privacy Review Officer Act*. The appointee to this position will also serve as the Review Officer for *PHIA*.

Prior to *PHIA* coming into force, individuals wishing to request a privacy review in relation to the actions of a health professional or health organization subject to the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)* would lodge their complaint with the federal Officer of the Privacy Commissioner of Canada. Since *PHIA* came into force on June 1<sup>st</sup>, 2013, individuals with a privacy complaint will have to determine which oversight body – federal or provincial – would be appropriate to review their complaint. Once Nova Scotia receives an order from Industry Canada that *PHIA* has been declared “*substantially similar*” to *PIPEDA*, all complaints would be directed to the provincial Review Officer.<sup>1</sup>

## REVIEWS UNDER PHIA

There are two streams of review under *PHIA*:

1. reviews under the privacy provisions of *PHIA* (sections 11 – 70); and
2. reviews under the access and correction provisions of *PHIA* (sections 71 – 90).

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<sup>1</sup> See Chapter 2: *PHIA* and *PIPEDA*, page 2 for information on “*substantially similar*”.

If an individual feels that a custodian has contravened a provision of *PHIA* or the regulations, or the custodian has refused an individual access to a record or correction of the record as requested, the individual may ask the Review Officer to conduct a review (section 91).

## PRIVACY REVIEWS UNDER *PHIA*

A privacy review by the Review Officer can be initiated in three ways:

1. the Review Officer initiates an investigation. This may only be undertaken where the Review Officer has reasonable grounds to believe that a custodian has contravened or is about to contravene the privacy provisions of the *Act*, and the subject matter of the review relates to the contravention (section 92(b));

### EXAMPLE

The Review Officer reads about a significant health information privacy breach at a local hospital. The article indicates that the hospital did not notify the individuals affected by the breach, and no one has notified the Review Officer. Under the Review Officer's authority in section 92(b) the Review Officer can initiate an investigation.

2. an individual who receives a decision from a custodian under the custodian's complaints process is not satisfied with the decision may ask for a review by the Review Officer (section 94(1)); or

### EXAMPLE

Katarina has noticed that Elizabeth, her family physician, throws improperly completed prescriptions in the garbage, instead of using a secure shredding device. She has made a complaint to her physician (who is the designated privacy contact person), but was assured that all garbage is taken directly to an incinerator.

Katarina is not satisfied with the decision, and has requested that the Review Officer undertake a review.

3. a custodian fails to follow the response timelines in the custodian's own complaints policy, resulting in a deemed refusal to respond to the complaint (section 94(3)).

### EXAMPLE

Lexie submitted a request for correction to her personal health record in the custody and control of Elise, her dentist, on January 4<sup>th</sup>. By April 5<sup>th</sup>, Elise had yet to respond within the 60 day time period outlined in her Complaints Policy. In this case, Lexie could make a request for a review to the Review Officer.

## REVIEW OFFICER INITIATES A REVIEW

Pursuant to section 92(1)(b), the Review Officer may initiate an investigation if there are reasonable grounds to believe:

- that a custodian has contravened a privacy provision of the *Act*; or
- that a custodian is about to contravene a privacy provision of the *Act* (see below for example).

The subject-matter of the review must relate to the contravention of the privacy provision.

This authority under the *Act* includes both past contraventions and contraventions which are about to occur. Past contraventions may include a dentist disposing of patient records in regular garbage or a nursing home selling its resident lists to a commercial enterprise.

Contraventions which are about to occur may include a hospital planning to implement an electronic patient information system with no password requirements. In circumstances like this, it is important for the Review Officer to have the authority to investigate the alleged contravention before it occurs to prevent privacy breaches which could result from the use of the system.

Where the Review Officer initiates an investigation under section 92(2)(b), the process for other reviews should be followed (see below).

## AN INDIVIDUAL REQUESTS A REVIEW

An individual may request a review once a custodian has made a decision in respect of a privacy complaint, or has failed to respond to the complaint within its own timelines.

At that point, the individual must file a written request to the Review Officer within:

- a) sixty days of being notified of the decision of the custodian; or
- b) a longer period determined by the Review Officer (section 94(1)(1)).

## CUSTODIAN FAILS TO RESPOND TO A COMPLAINT

Pursuant to section 94(3), if a custodian receives a complaint and fails to follow the response timelines in the custodian's own complaints policy, the result is a deemed refusal to respond to the complaint. This would be considered a decision of the custodian against which the individual would be entitled to request a review.

## NOTICE OF REVIEW

For all types of reviews outlined above, the Review Officer shall immediately give a copy of the request to the custodian concerned and to any other person that the Review Officer considers appropriate under section 94(4).

## REVIEW OFFICER'S DISCRETION NOT TO REVIEW: PRIVACY

Pursuant to section 95, for reviews requested by the individual or where the custodian has failed to respond to a complaint, the Review Officer may decide not to review a privacy complaint for whatever reason the Review Officer reasonably considers appropriate, including if:

- the custodian has responded adequately to the individual's concerns;
- the concerns have been or could be more appropriately dealt with by means of a procedure other than a request for a review;
- the length of time that has elapsed between the date when the subject-matter of the review arose and the date the review was requested is such that a review would likely result in undue prejudice to any person;

***Note:** "Undue prejudice" would include prejudice to the custodian, who, in following their retention and destruction policy, may not have the information available to respond to the complaint or review.*

- the person requesting a review does not have a sufficient personal interest in the subject-matter of the review;

- the request for a review is ‘frivolous or vexatious’<sup>2</sup>; or
- the request for review is part of a pattern of conduct that amounts to an abuse of the right of review.

If the Review Officer decides not to conduct a review for any of the above reasons, the Review Officer shall give written notice to the custodian and any other person the Review Officer considers appropriate (section 95(2)).

## ACCESS AND CORRECTION REVIEWS UNDER PHIA

The requirements and process for an individual to request access to and correction of their records are set out in Chapter 6: *Access to and Correction of Personal Health Information*.

If an individual is not satisfied with a custodian’s decision on an access or correction request, the individual may request a review by the Review Officer. The individual must file a written request to the Review Officer within:

- sixty days after being notified of the decision of the custodian; or
- a longer period determined by the Review Officer (section 94(1)).

## REVIEW OFFICER’S DISCRETION NOT TO REVIEW: ACCESS AND CORRECTION

Pursuant to section 95, the Review Officer may decide not to review a privacy complaint for whatever reason the Review Officer reasonably considers appropriate, including if:

- the custodian has responded adequately to the individual’s concerns;
- the concerns have been or could be more appropriately dealt with by means of a procedure other than a request for a review;
- the length of time that has elapsed between the date when the subject-matter of the review arose and the date the review was requested is such that a review would likely result in undue prejudice to any person;

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<sup>2</sup> See Chapter 6: *Access to and Correct of Personal Health Information*, page 2 for more information on “frivolous or vexatious” requests.

- the person requesting a review does not have a sufficient personal interest in the subject-matter of the review;
- the request for a review is “frivolous or vexatious”,<sup>3</sup> or
- the request for review is part of a pattern of conduct that amounts to an abuse of the right of review.

If the Review Officer decides not to conduct a review for any of the above reasons, the Review Officer shall give written notice to the custodian and any other person the Review Officer considers appropriate (section 95(2))

## MEDIATION

When an individual makes a request for a review relating to a complaint about a custodian’s privacy practices or a response to an access or correction request, the Review Officer may try to settle the matter through mediation. To proceed, mediation would require the consent and participation of both the individual and the custodian.

If the mediation proceeds, the Review Officer has 30 days from the date the request is received by the Review Office to effect a settlement. If the matter is not settled within 30 days, the matter shall proceed to review.

### ***Personal Health Information Act Regulation***

#### ***Mediation***

*9 (1) Mediation under subsection 96(1) of the Act must be agreed to by both the individual whose personal health information is the subject of the review and the custodian.*

*(2) The 30-day period referred to in subsection 96(2) of the Act begins on the date on which the Review Officer contacts the applicant and the custodian to initiate mediation.*

*(3) The Review Officer must remain neutral and impartial during the mediation process.*

*(4) If mediation is not successful, the documents that were produced and discussions that took place during the mediation process must not form part of the records of any ongoing review.*

**See [www.novascotia.ca/DHW/PHIA](http://www.novascotia.ca/DHW/PHIA) for the official text of the regulation**

<sup>3</sup> See Chapter 6: *Access to and Correct of Personal Health Information*, page 4 for more information on “frivolous or vexatious” requests.

## REVIEWS: GENERAL REQUIREMENTS

The following requirements apply to both reviews of the custodian's compliance with the privacy provisions of *PHIA* and reviews related to the access and correction provisions.

### REPRESENTATIONS TO A REVIEW

The following are entitled to make representations to the Review Officer:

- the individual who applies for the review;
- the custodian whose decision or action is the subject of the review; and
- any other person the Review Officer considers appropriate.

The Review Officer may decide whether the representations are to be made orally or in writing, and who may be present at a review or have access to or comment on representations made by another person.

### REVIEW OF RECORDS AND INSPECTION OF PREMISES

Pursuant to section 99, the Review Officer may require to be produced and examine any record relevant to the matter that is in the custody or control of the custodian. The exception to this is where documents are protected by solicitor-client privilege.

Solicitor-client privilege applies to communications between a lawyer and client for the purpose of legal advice.<sup>4</sup> Legal counsel for the custodian should review all documents that have the potential to fall under this exception before records are released to the Review Officer.

If a custodian does not comply with an order to produce documents or make premises available for inspection, the Review Officer may apply to the Supreme Court of Nova Scotia to order the custodian to do so (sections 99(2) – (5)).

### REVIEW OFFICER'S REPORT

Upon completing a review, the Review Officer shall write a report with recommendations and the reasons for the recommendations. A copy of the report shall be sent to the custodian and to the individual whose information was the subject of the review.

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<sup>4</sup> *Frequently Asked Questions about Solicitor-Client Privilege and Confidentiality* The Canadian Bar Association Ethics and Professional Responsibility Committee November 2010.

If the Review Officer has requested representations from a third party pursuant to section 98(1)(c), the Review Officer may send a copy of the report to the third party if the report has been de-identified (section 100(2)).

If the Review Officer initiated the review and a class of persons is the subject of review, the Review Officer may make the report available to the public in lieu of notice. For example, if the Review Officer initiated the review of an electronic information system which holds health information on thousands of patients, the Review Officer may make the report public. In practice, all reports of the Review Officer are published on the Review Office website at <http://www.foipop.ns.ca/>.

## CUSTODIAN'S RESPONSE TO REVIEW OFFICER'S REPORT

Pursuant to section 101(1), within 30 days of receiving a report of the Review Officer, the custodian shall:

- a) make a decision whether or not to follow, in whole or in part, the recommendation of the Review Officer; and
- b) give written notice of the custodian's decision to the Review Officer and to the individuals who were sent a copy of the Review Officer's report.

If the custodian decides not to follow the recommendation of the Review Officer, the custodian shall contact in writing any person who had been sent a copy of the Review Officer's report, informing them of the custodian's decision and the right of the "applicant" to appeal. Under *PHIA*, only the individual whose information was the subject of the review has the right to appeal.

## APPEALS

### APPLICANT'S APPEAL TO THE SUPREME COURT OF NOVA SCOTIA

Pursuant to section 102, an applicant may appeal the custodian's decision to the Supreme Court of Nova Scotia. The applicant is required to give notice to the custodian. The Review Officer is not a party to the appeal.

The Supreme Court of Nova Scotia may determine the matter "*de novo*;" this means that the Court may choose to hear the appeal "anew" or from the beginning. If the Court chooses to do this, the Court does not have to rely only on the information contained in the complaint or review. The Court may examine any record in the custody or control of the custodian





notwithstanding any other *Act* or any privilege that is available at law. This means that the Court may examine records including, but not limited to, records subject to solicitor-client privilege.

The Supreme Court shall take every reasonable precaution including, where appropriate:

- a) receiving representations *ex parte*. This means the Court may choose to hear a presentation at the request of or for the benefit of one party to the appeal, without the presence of the other party.
- b) conducting hearings *in camera*. This means the hearing may be held in the judges' chambers without spectators or jurors.

Pursuant to section 103(4), the Court may disclose to the Minister of Justice or to the Attorney General of Canada information that may relate to the commission of an offence.

#### ORDER OF THE SUPREME COURT OF NOVA SCOTIA

Where the Supreme Court determines that the custodian has contravened the *Act* or is not authorized to refuse to give access to or correct a record, the Court shall make any order it considers appropriate, including ordering that the custodian provide the individual with access to the record.

# 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 information<sup>1</sup> 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;*

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<sup>1</sup> 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*”<sup>2</sup> act in a manner that contravenes the legislation. “*Wilful*” has been defined as intending the result which actually comes to pass<sup>3</sup>. 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.

<sup>2</sup> “*Wilfull*” can also be spelled “*willfull*”

<sup>3</sup> Black’s Law Dictionary (2<sup>nd</sup> 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.



# *PERSONAL HEALTH INFORMATION ACT*

## TOOLKIT FOR CUSTODIANS

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# PERSONAL HEALTH INFORMATION ACT TOOLKIT FOR CUSTODIANS

## DEFINITIONS

Note: All definitions are reproduced directly from the *Personal Health Information Act* and regulations. Additional definitions from other sources are noted in red.

### **Agent**

*Agent*, in relation to a custodian, means a person who, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent's purposes, whether or not the agent has the authority to bind the custodian, is paid by the custodian or is being remunerated by the custodian, and includes, but is not limited to, an employee of a custodian or a volunteer who deals with personal health information, a custodian's insurer, a lawyer retained by the custodian's insurer or a liability protection provider.

### **Capacity**

*Capacity* means the ability to understand information that is relevant to the making of a decision related to the collection, use or disclosure of personal health information and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

### **Collect**

*Collect*, in relation to personal health information, means to gather, acquire, receive, gain access to or obtain the information by any means from any source.

### **Common Client Registry**

*Common Client Registry* means a Provincial database that is a master index for

- (i) all residents eligible to receive insured services, and

(ii) all non-residents who have received insured services in the Province.

**Common-law partner**

*Common-law partner* of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least one year;

**Custodian**

*Custodian* means an individual or organization described below who has custody or control of personal health information as a result of or in connection with performing the person's or organization's powers or duties:

- i. a regulated health professional or a person who operates a group practice of regulated health professionals,
- ii. the Minister,
- iii. a district health authority under the *Health Authorities Act*,
- iv. the Izaak Walton Killam Health Centre,
- v. the Review Board under the *Involuntary Psychiatric Treatment Act*,
- vi. a pharmacy licensed under the *Pharmacy Act*,
- vii. a continuing-care facility licensed by the Minister under the *Homes for Special Care Act* or a continuing-care facility approved by the Minister,
- viii. Canadian Blood Services,
- ix. any other individual or organization or class of individual or class of organization as prescribed by regulation as a custodian.

**De-identified information**

*De-identified information* is information that has had all identifiers removed that

- (i) identify the individual, or
- (ii) where it is reasonably foreseeable in the circumstances, could be utilized, either alone or with other information, to identify the individual

## **Disclose**

*Disclose*, in relation to personal health information in the custody or under the control of a custodian or a person, means to make the information available or to release it to another custodian or to another person, but does not include to use the information;

## **Domestic partnership**

*Domestic partnership* means a domestic partnership as defined in the *Vital Statistics Act*:

*Vital Statistics Act section 2(ha) Domestic partnership means a relationship between two persons who have filed a domestic-partner declaration in accordance with Part II [of the Vital Statistics Act].*

## **Health-card number**

*Health-card number* means a unique identification number assigned by the Minister to individuals insured under the *Health Services and Insurance Act*.

## **Health care**

*Health care* means an observation, examination, assessment, care, service or procedure in relation to an individual that is carried out, provided or undertaken for one or more of the following health-related purposes:

- (i) the diagnosis, treatment or maintenance of an individual's physical or mental condition,
- (ii) the prevention of disease or injury,
- (iii) the promotion and protection of health,
- (iv) palliative care,
- (v) the compounding, dispensing or selling of a drug, health-care aid, device, product, equipment or other item to an individual or for the use of an individual, under a prescription, or
- (vi) a program or service designated as a health-care service in the regulations;

## **Identifying information**

*Identifying information* means information that identifies an individual or, where it is reasonably foreseeable in the circumstances, could be utilized, either alone or with other information, to identify an individual.

## **Individual**

*Individual*, in relation to personal health information, means the individual, whether living or deceased, with respect to whom the information was or is being collected or created.

## **Information practices**

*Information practices*, in relation to a custodian or a prescribed entity, means the policies of the custodian or a prescribed entity for actions in relation to personal health information, including

- (i) when, how and the purposes for which the custodian routinely collects, uses, discloses, retains, de-identifies, destroys or disposes of personal health information, and
- (ii) the administrative, technical and physical safeguards and practices that the custodian maintains with respect to the information.

## **Insured services**

*Insured services* means insured hospital services and insured professional services as defined in the *Health Services and Insurance Act*.

## **Minister**

*Minister* means the Minister of Health and Wellness.

## **Person**

*Person* includes a partnership, association or other entity;

## **Personal health information**

*Personal health information* means identifying information about an individual, whether living or deceased, and in both recorded and unrecorded forms, if the information

- (i) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
- (ii) relates to the application, assessment, eligibility and provision of health care to the individual, including the identification of a person as a provider of health care to the individual,
- (iii) relates to payments or eligibility for health care in respect of the individual,
- (iv) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

- (v) is the individual's registration information, including the individual's health-card number, or
- (vi) identifies an individual's substitute decision-maker.

### **Planning and management of the health system**

*Planning and management of the health system* means the analysis of information with respect to

- (i) the management, evaluation or monitoring of,
- (ii) the allocation of resources to, or
- (iii) planning for all or part of,

the health system, including the delivery of services.

### **Prescribed**

*Prescribed* means prescribed by the regulations.

### **Proceeding**

*Proceeding* means a proceeding held before, in or under the rules of a court, a tribunal, a commission, a justice of the peace, a regulated health-profession body, an arbitrator or a mediator.

### **Record**

*Record* means a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record.

### **Regulated health professional**

*Regulated health professional* means a health professional who is licensed or registered to provide health care under an Act of the Province specific to his or her profession and who provides health care or who is a member of a class of persons prescribed as regulated health professionals.

### **Regulated health profession body**

*Regulated health profession body* means a body with statutory authority for the discipline of a regulated health professional.

### **Resident**

*Resident* means a resident as defined in the *Health Services and Insurance Act*:

*Health Services and Insurance Act – Hospital Insurance regulations* [N.S. Reg. 11/58 (December 1, 1958) as amended up to and including O.I.C. 90-659 (May 31, 1990), N.S. Reg. 148/90]

### Interpretation

**1(m) "resident"** means a person who is legally entitled to remain in Canada and who makes his home and is ordinarily present in Nova Scotia, but does not include a tourist, a transient, or a visitor to Nova Scotia; for the purposes of the Act and these regulations a person who is a resident of Nova Scotia and who moves from Nova Scotia to acquire residence in another part of Canada, herein called the "new province", shall be deemed to continue to be a resident of Nova Scotia during normal travelling time and any waiting period, not exceeding three months, which may be necessary in order to qualify for benefits under the hospital insurance legislation of the new province if the new province is a participating province, as defined in subsection (2) of Regulation 7, or shall be deemed to continue to be a resident of Nova Scotia for a period of three months from the date of his departure from Nova Scotia if the new province is not a participating province,

### Insured services outside Nova Scotia

**7(2)** Where in-patient services were provided in a hospital in a province that provides insured services under an agreement with the Government of Canada under the Hospital Insurance and Diagnostic Services Act (Canada), in these regulation[s] called a "participating province", the amount payable under these regulation[s] shall not exceed an amount calculated on the basis of the per diem rate payable to the hospital by the authority administering the plan for providing insured services in that province.

### Review Officer

*Review Officer* means the Privacy Review Officer under the *Privacy Review Officer Act*.

### Spouse

*Spouse*, with respect to any person, means a spouse, registered domestic partner or common-law partner who is cohabiting with that person in a conjugal relationship.

### Use

*Use*, in relation to personal health information in the custody or under the control of a custodian or a person, means to handle or deal with the information, but does not include to disclose the information.



# PERSONAL HEALTH INFORMATION ACT TOOLKIT FOR CUSTODIANS

## RESOURCES

The following resources may be helpful to custodians when reviewing their obligations and rights under the *Personal Health Information Act (PHIA)*.

**Disclaimer:** The websites listed below are external to the Department of Health and Wellness, and are therefore outside of the Department's control. The purpose of listing the links is to provide easy and convenient access to information. In no way does the listing constitute an endorsement of those websites, their contents, or the services provided on those sites. The Department of Health and Wellness is not responsible for the accuracy, currency, or the reliability of the content in any of the links below related to the *Personal Health Information Act* or any other matter.

When consulting these websites, take care to read that website's privacy policy before disclosing any personal information. The personal information you provide on these links may be stored outside of Canada and subsequent use and disclosure of your personal information would not be subject to the protections or provisions of Nova Scotia privacy laws.

Please note that as external websites are updated, the links listed in this appendix may become outdated. Please contact the Department of Health and Wellness by e-mail at [phia@gov.ns.ca](mailto:phia@gov.ns.ca) or by phone at 1-855-640-4765 (toll-free) or 424-5419 to report broken links and to request updated information on the *Personal Health Information Act*.

### **Regulated Health Professions – Nova Scotia**

#### Chiropractors

Nova Scotia College of Chiropractors

<http://www.knowyourback.ca/>

<http://www.chiropractors.ns.ca/>



### Counselling Therapists

Nova Scotia College of Counselling Therapists

<http://www.nscct.ca/index.html>

### Medical Laboratory Technicians

Nova Scotia College of Medical Laboratory Technologists

<http://www.nscmlt.org/>

### Dental Hygienists

College of Dental Hygienists of Nova Scotia

<http://www.cdhns.ca/>

### Dentists

Provincial Dental Board of Nova Scotia

<http://www.pdbns.ca/>

Nova Scotia Dental Association

<http://www.nsdental.org/>

Nova Scotia Dental Assistants Association

<http://www.nsdaa.ca/>

### Denturists

Denturist Licensing Board of Nova Scotia

<http://www.nsdenturistboard.ca/>

Denturists Society of Nova Scotia

<http://www.nsdenturistsociety.ca/>

### Dieticians

Nova Scotia Dietetic Association

<http://www.nsdassoc.ca/>

### Licensed Practical Nurses

College of Licensed Practical Nurses of Nova Scotia

<http://www.clpnns.ca/>

### Medical Radiation Technologists

Nova Scotia Association of Medical Radiation Technologists

<http://nsamrt.ca/>

### Midwives

Midwifery Regulatory Council of Nova Scotia

<http://mrcns.ca/>



### Naturopathic Doctors

Nova Scotia Association of Naturopathic Doctors

<http://nsand.ca/>

### Occupational Therapists

College of Occupational Therapists of Nova Scotia

<http://www.cotns.ca/home.html>

Nova Scotia Society of Occupational Therapists

<http://www.nssot.ca/>

### Dispensing Opticians

Nova Scotia College of Dispensing Opticians

<http://www.nscdo.ca/>

Nova Scotia Society of Dispensing Opticians

<http://www.opticians.ns.ca/>

### Optometrists

Nova Scotia College of Optometrists

<http://nsco.ca/>

Nova Scotia Association of Optometrists

<http://www.nsoptometrists.ca/>

### Pharmacists

Nova Scotia College of Pharmacists

<http://www.nspharmacists.ca/>

Pharmacy Association of Nova Scotia

<http://pans.ns.ca/>

### Physicians

College of Physicians and Surgeons of Nova Scotia

<http://www.cpsns.ns.ca/>

Doctors Nova Scotia

<http://www.doctorsns.com/>

Canadian Medical Protective Association

<http://www.cmpa-acpm.ca/>

### Physiotherapists

Nova Scotia College of Physiotherapists

<http://nsphysio.com/>

Nova Scotia Physiotherapy Association

<http://www.physiotherapyns.ca/>

### Psychologists

Nova Scotia Board of Examiners in Psychology

<http://www.nsbep.org/>

Association of Psychologists of Nova Scotia

<http://www.apns.ca/>

### Registered Nurses

College of Registered Nurses of Nova Scotia

<http://www.crnns.ca/>



### Respiratory Therapists

Nova Scotia College of Respiratory Therapists

<http://www.nscrt.com/>

### Social Workers (Medical)

Nova Scotia Association of Social Workers

[www.nsasw.org](http://www.nsasw.org)

## ***Information and Privacy Commissioner websites***

### *Nova Scotia*

The Review Officer's website (includes legislation, all Review reports, Annual Reports and forms)

<http://www.foipop.ns.ca/>

### *Federal*

Office of the Privacy Commissioner of Canada

<http://www.priv.gc.ca/>

### *Alberta*

Office of the Information and Privacy Commissioner of Alberta

<http://www.oipc.ab.ca/>

### *British Columbia*

Office of the Information and Privacy Commissioner of British Columbia

<http://www.oipc.bc.ca/>

### *Manitoba*

Ombudsman Manitoba – Access and Privacy Division

<http://ombudsman.mb.ca/access.htm>

### *New Brunswick*

Office of the Access to Information and Privacy Commissioner

<http://www2.gnb.ca/content/gnb/en/contacts/>

### *Newfoundland and Labrador*

Office of the Information and Privacy Commissioner

<http://www.oipc.nl.ca/>

### *Northwest Territories*

Information and Privacy Commissioner of the Northwest Territories

<http://www.justice.gov.nt.ca/ATIPP/>



### *Nunavut*

Office of the Information and Privacy Commissioner

<http://www.info-privacy.nu.ca/>

### *Ontario*

Office of the Information and Privacy Commissioner

<http://www.ipc.on.ca/>

### *Prince Edward Island*

Office of the Information and Privacy Commissioner

<http://www.assembly.pe.ca/>

### *Québec*

Commission d'accès à l'information

<http://www.cai.gouv.qc.ca>

### *Saskatchewan*

Office of the Saskatchewan Information and Privacy Commissioner

<http://www.oipc.sk.ca/>

### *Yukon*

Yukon Information and Privacy Commissioner

<http://www.ombudsman.yk.ca/ipc/>

## ***Provincial health information legislation links***

Alberta – *Health Information Act*

<http://www.health.alberta.ca/about/health-legislation.html>

British Columbia – *Personal Information Protection Act*

*Note:* The *Personal Information Protection Act* is private sector legislation which also applies to personal health information in the health sector.

[http://www.cio.gov.bc.ca/cio/priv\\_leg/pipa/](http://www.cio.gov.bc.ca/cio/priv_leg/pipa/)

Manitoba – *Personal Health Information Act*

<http://www.gov.mb.ca/health/phia/>

New Brunswick – *Personal Health Information Privacy and Access Act*

<http://www.gnb.ca/0051/acts/>

Newfoundland and Labrador – *Personal Health Information Act*

<http://www.health.gov.nl.ca/health/phia/>



Ontario – *Personal Health Information Protection Act*

[http://www.health.gov.on.ca/english/providers/legislation/priv\\_legislation/priv\\_legislation.html](http://www.health.gov.on.ca/english/providers/legislation/priv_legislation/priv_legislation.html)

Saskatchewan – *Health Information Protection Act*

<http://www.health.gov.sk.ca/hipa>

### ***Personal Information Protection and Electronic Documents Act***

Industry Canada (Electronic Commerce branch) - *PIPEDA*

[http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/h\\_gv00045.html](http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/h_gv00045.html)

Industry Canada (Electronic Commerce branch) - *PIPEDA* Awareness Raising Tools (PARTS)

<http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00235.html>

Federal government criteria for provincial act to be recognized as “*substantially similar*” to *PIPEDA*

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

### ***Electronic Information Systems/Electronic Health Records***

Alberta

Alberta Netcare

<http://www.albertanetcare.ca/>

College of Physicians & Surgeons of Alberta. Data Stewardship Framework.

[http://www.cpsa.ab.ca/Libraries/Res/CPSA\\_Data\\_Stewardship\\_Framework.sflb.ashx](http://www.cpsa.ab.ca/Libraries/Res/CPSA_Data_Stewardship_Framework.sflb.ashx)

British Columbia

eHealth Program

<http://www.health.gov.bc.ca/ehealth/>

BC Medical Association Privacy Toolkit

<https://www.bcma.org/publications-media/privacy-toolkit>

Securing Personal Information: A Self-Assessment Tool for Organization

[http://www.oipc.bc.ca/pdfs/private/Security\\_selfassessmenttool\(2012\).pdf](http://www.oipc.bc.ca/pdfs/private/Security_selfassessmenttool(2012).pdf)

Canadian Security Establishment. *Canadian Handbook on Information Technology Security*

<http://www.cse-cst.gc.ca/documents/publications/itsg-csti/mg9-eng.pdf>

COACH

*Putting it in Practice: Privacy and Security for Health care Providers Implementing Electronic Records*

<http://www.coachorg.com/>

Canada Health Infoway

<https://www.infoway-inforoute.ca/>

ISO/IEC 27001:2005 Information technology - Security techniques – Information security management systems -- Requirements

[http://www.iso.org/iso/iso\\_catalogue/catalogue\\_tc/catalogue\\_detail.htm?Csnumber=42103](http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?Csnumber=42103)

ISO/IEC 27002:2005 Information technology - Security techniques - Code of practice for information security management

[http://www.iso.org/iso/iso\\_catalogue/catalogue\\_tc/catalogue\\_detail.htm?Csnumber=50297](http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?Csnumber=50297)

ITAC (Information Technology Association of Canada) - Health

<http://www.itac.ca/health>

Ontario

e-Health Ontario

<http://www.ehealthontario.on.ca/>

National e-Pharmacy Task Force - Recommendations for the Implementation of Electronic Prescriptions in Canada. <http://www.pharmacists.ca/cpha-ca/assets/File/cpha-on-the-issues/PPePrescriptionImplementation.pdf>

Newfoundland and Labrador

Centre for Health Information

<http://www.nlchi.nl.ca/>

Saskatchewan

e- Health Saskatchewan

<http://www.health.gov.sk.ca/ehealth-saskatchewan>

### ***Health Information Management***

ARMA International – Nova Scotia chapter

<http://www.armanovascotia.org/>



Canadian Health Information Management Association  
<https://www.echima.ca/>

2011 COACH Guidelines for the Protection of Health Information. Chapter 15 Security Safeguards  
<http://www.coachorg.com/>

### **Research/Planning and Management**

Population Health Research Unit (Dalhousie University)  
<http://www.phru.dal.ca/index.cfm>

Nova Scotia Health Research Foundation  
<http://www.nshrf.ca/>

Canadian Institute for Health Information  
<http://www.cihi.ca/>

Canadian Institutes of Health Research  
<http://www.cihr-irsc.gc.ca/>

### **Research Ethics Boards – Nova Scotia**

Annapolis Valley Health Authority  
<http://www.avdha.nshealth.ca/research-ethics>

Cape Breton District Health Authority  
[http://www.cbdha.nshealth.ca/IC2/Intranet/documents/detail\\_view.cfm?MenuID=6&ID=62](http://www.cbdha.nshealth.ca/IC2/Intranet/documents/detail_view.cfm?MenuID=6&ID=62)

Capital District Health Authority  
<http://www.cdha.nshealth.ca/discovery-innovation/services-researchers/research-ethics>

Colchester East Hants Health Authority  
<http://www.cehha.nshealth.ca/About%20CEHHA/ethics.htm>

Cumberland Health Authority  
[http://www.cha.nshealth.ca/ccha/about\\_us/ethics.htm](http://www.cha.nshealth.ca/ccha/about_us/ethics.htm)

Guysborough Antigonish Strait Health Authority  
<http://gasha.nshealth.ca/st-marthas-regional-hospital-ec.htm>

IWK Health Centre

<http://www.iwk.nshealth.ca/index.cfm?objectid=C107FB97-C614-BA77-180A7868F581037F>

Pictou County Health Authority

<http://www.pcha.nshealth.ca/pictoucounty/ethics/>

South Shore Health Authority

<http://www.southshorehealth.ca/resources-general/ethics-resources.html>

South West Health

<http://www.swndha.nshealth.ca/pages/ethics.htm>

### **General – Privacy**

Canadian Association of Professional Access and Privacy Administrators

<http://www.capapa.org/index.html>

Privacy Lawyer (David Fraser’s privacy law website). David Fraser is a privacy lawyer at McInnes Cooper in Halifax. His site includes a privacy blog and privacy resources and articles.

<http://privacylawyer.ca/>

### **General - Health**

Health Association of Nova Scotia

<http://www.healthassociation.ns.ca/>

Canadian Association of Chain Drug Stores

<http://www.cacds.com/>



# PERSONAL HEALTH INFORMATION ACT TOOLKIT FOR CUSTODIANS

## REGULATED HEALTH PROFESSIONS

The following are the health professions currently regulated in Nova Scotia.

**Note:** All health professions listed below are regulated under Department of Health and Wellness' legislation, with the exception of the Social Workers (medical). Social Workers (medical) are regulated under Department of Community Services' legislation.

Chiropractors	Occupational Therapists
Counselling Therapists	Dispensing Opticians
Medical Laboratory Technicians	Optometrists
Dental Hygienists	Paramedics
Dentists	Pharmacists
Denturists	Physicians
Dieticians	Physiotherapists
Licensed Practical Nurses	Psychologists
Medical Radiation Technologists	Registered Nurses
Midwives	Respiratory Therapists
Naturopathic Doctors	Social Workers (medical)

*Updated December 1, 2012*





# PERSONAL HEALTH INFORMATION ACT TOOLKIT FOR CUSTODIANS

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