

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 is anticipated that it will be proclaimed by December 2012, coming into force in June 2013.¹

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.

¹ 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,² *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;

² *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;³
- 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.⁴ 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.”

³ 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 for a full list of programs.

⁴ 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)).

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

PHIA applies to the collection, use and disclosure of personal health information by health 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.