

# ***Personal Health Information Protection Act, 2004: An Overview***

*Note: This overview is presented for the convenience of reference only. Nothing in this overview should be construed as legal advice. You should consult the Act and your own solicitors for all purposes of interpretation.*

November 2004



# BACKGROUND

- ? As of January 1, 2004, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to all organizations that collect, use or disclose personal information in the course of commercial activities, unless provinces have enacted legislation deemed to be substantially similar
- > Stakeholders expressed concerns about impact of PIPEDA
- > Health care providers requested made-in-Ontario legislation

# PAST ONTARIO CONSULTATIONS

- > June 1996 - a consultation paper, a *Legal Framework for Health Information* released, followed by regional roundtable sessions
- > November 1997 - a draft *Personal Health Information Protection Act* released, followed by regional roundtable sessions
- > October 2000 - a consultation paper, *Ontario's Proposed Personal Health Information Privacy Legislation for the Health Sector (Health Sector Privacy Rules)* distributed to 5000 organizations and individuals
- > December 2000 - *Personal Health Information Privacy Act, 2000* (Bill 159) was introduced
- > 2002 - MCBS with MOHLTC developed and conducted public consultation on a draft *Privacy of Personal Information Act, 2002*

# TIMELINE

- > December 17, 2003 - The *Health Information Protection Act* (Bill 31) was introduced, addressing the issues raised by stakeholders, members of the public, and elected representatives during consultations on previous initiatives
- > Public hearings at Standing Committee on General Government held the week of January 26, 2004 in Toronto and the week of February 2, 2004 in Sault Ste. Marie, Kingston and London
- > February 9, 2004 and April 28, 2004 - Clause-by-clause consideration of the Bill
- > Clause-by-clause consideration resulted in amendments to Bill
- > May 17, 2004 - Bill 31 passed third and final reading with unanimous support in the legislature
- > May 20, 2004 - Bill 31 received Royal Assent
- > July 3 - September 3, 2004 - Public consultation on regulations

# BILL 31 SCHEDULES

- > Schedule A - *The Personal Health Information Protection Act, 2004* (PHIPA)
- > Schedule B - *The Quality of Care Information Protection Act, 2004* (QCIPA)\*
- > Both Schedules came into force on November 1, 2004

# UNDERLYING PRINCIPLES

> PHIPA is informed by the 10 principles set out in the *Canadian Standards Association Model Code for the Protection of Personal Information*

- Accountability
- Identifying Purposes
- Consent
- Limiting Collection
- Limiting Use, Disclosure and Retention
- Accuracy
- Safeguards
- Openness
- Access
- Challenging Compliance

# ORGANIZATION OF PHIPA

- Part I** Interpretation and Application
- Part II** Practices to Protect Personal Health Information
- Part III** Consent, Capacity and Substitute Decision Making
- Part IV** Collection, Use and Disclosure
- Part V** Access and Correction
- Part VI** Administration and Enforcement
- Part VII** General (Immunity, Offences, Regulations)
- Part VIII** Complementary Amendments
- Part IX** Commencement and Short Title

# SCOPE OF PHIPA

- > Health information custodians (HICs) that collect, use and disclose personal health information (PHI)
- > Non-health information custodians where they receive personal health information from a HIC
- > In the event of a conflict, PHIPA and its regulations prevail over any other Act unless PHIPA, its regulations or the other Act specifically provide otherwise (s. 7(2), p.15)
- > There is no conflict if can comply with both Acts. Regulations clarify when “it is not possible to comply with both” (s.7(3), p.15)

# WHO IS A HEALTH INFORMATION CUSTODIAN (s.3, p.8)?

- > Health care practitioners, including
  - a member defined under *Regulated Health Professions Act*
  - a drugless practitioner under *Drugless Practitioners Act*
  - a member of Ontario College of Social Workers and Social Service Workers who provides health care
  - a person whose primary function is to provide health care for payment
- > a service provider within the meaning of the *Long-Term Care Act, 1994* (s.2, p.6)
- > Minister (together with Ministry) of Health and Long-Term Care
- > Medical officers of health or boards of health
- > A person who operates a:
  - hospital or independent health facility
  - approved charitable home for the aged, home for the aged, nursing home
  - pharmacy
  - laboratory
  - ambulance service
  - home for special care
  - a centre, program or service for community health or mental health whose primary purpose is the provision of health care
  - community care access centre
- > Any other prescribed person or class of persons

# WHO IS AN AGENT?

- > “**Agent**”, in relation to a HIC, means a person that, with the authorization of the HIC, acts for or on behalf of the HIC in respect of PHI for the purposes of the HIC, and not the agent’s own purposes, whether or not the agent has authority to bind the HIC, whether or not the agent is employed by the HIC and whether or not the agent is being remunerated
- > Except as permitted or required by law, or as prescribed, an agent shall not collect, use or disclose PHI, unless permitted by the HIC (s.17, p.21)
- > Provision of PHI by a HIC to an agent is a use by the HIC, not a collection by nor a disclosure to an agent

# WHAT IS “HEALTH CARE”?

> “**Health care**” means any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that is carried out or provided:

- to treat or maintain an individual’s physical or mental condition
- prevent disease or injury or to promote health
- as part of palliative care

and includes

- the compounding, dispensing or selling of a drug, a device or equipment
- a community service that is described in the *Long-Term Care Act, 1994* (s.2, p.6)

# WHAT IS PERSONAL HEALTH INFORMATION?

- > PHI (s.4, p.12) includes identifying information about an individual in oral or recorded form that:
  - relates to his or her physical or mental health
  - relates to providing health care, including identifying a provider of health care
  - is a plan of service within the meaning of the *Long-Term Care Act*
  - relates to the donation of a body part or bodily substance
  - relates to payments or eligibility for health care in respect of the individual
  - is a health number
  - identifies a substitute decision-maker of that individual
  - is in a record held by a HIC where the record contains any of the above information
  
- > PHI does not include a record of information about an employee or other agent of the HIC, unless the record is primarily related to the provision health care to the employee/agent

# INTERPLAY BETWEEN PHIPA AND FIPPA/MFIPPA

- > HICs covered under PHIPA include some FIPPA/MFIPPA institutions, such as
  - ! MOHLTC (under FIPPA)
  - ! Boards of Health (under MFIPPA)
  - ! Municipal Homes for the Aged (under MFIPPA)
  - ! Municipal ambulance services (under MFIPPA)
  
- > These institutions are subject to
  - ! PHIPA with respect to PHI (including mixed records)
  - ! FIPPA/MFIPPA with respect to Personal Information (PI) that is not PHI
  - ! Selected provisions of FIPPA/MFIPPA with respect to all PI (including PHI) (s.8, p.15)

# PRACTICES TO PROTECT INFORMATION

- > Must have information practices in place that comply with the Act (s.2, p.7; s.10, p.17)
- > Must take reasonable steps to ensure accuracy (s.11, p.17)
- > Must maintain the security of PHI in its custody or control (s.12, p.17)

**“Information Practices”** means the policy of the HIC for actions in relation to PHI, including,

- (a) when, how and the purposes for which the HIC routinely collects, uses, modifies, discloses, retains or disposes of PHI, and
- (b) the administrative, technical and physical safeguards and practices that the HIC maintains with respect to the information

# PRACTICES TO PROTECT INFORMATION (cont'd)

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## ACCOUNTABILITY AND OPENNESS

- > Must have a contact person to ensure compliance with Act, respond to access requests, inquiries and complaints from public (s.15, p.19)
- > Must make available to the public a written statement describing the HIC's information practices, how to make a complaint, etc. (s.16, p.19)
- > Must be responsible for its PHI and for actions of agents (s.17, p.20)

# GENERAL LIMITATIONS AND REQUIREMENTS

- > HIC shall not collect, use or disclose PHI if other information will serve the purpose (s.30(1), p.32)
- > HIC shall not collect, use or disclose more PHI than is reasonably necessary to meet the purpose (s.30(2))
- > HIC shall not charge fees for collection or use unless authorized by regulations. For disclosure or for access requests, a HIC shall not charge fees that exceed the prescribed amount, if any, or reasonable cost recovery if no fees prescribed (s.35, p.35; s.54(11), p.58)

# DEFINITIONS - COLLECT, USE AND DISCLOSE

“**Collect**”, means to gather, acquire, receive or obtain phi by any means from any source

“**Use**”, in relation to PHI in the custody or under the control of HIC or a person, means to handle or deal with the information, but does not include to disclose the information. Transferring PHI between an agent of the HIC and the HIC is a use and not a disclosure

“**Disclose**”, in relation to PHI in the custody or under the control of a HIC or a person, means to make the information available or to release it to another HIC or to another person, but does not include to use the information

# CONSENT

- > Consent is required for the collection, use, disclosure of PHI subject to specific exceptions (s.29, p.32)
- > Consent must
  - be a consent of the individual
  - be knowledgeable (s.18(5), p.22)
  - relate to the information
  - not be obtained through deception or coercion (s.18(1), p.21)
- > Consent may be express or implied except where it must be express (s.18(2), 18(3), p.21)
- > Consent is knowledgeable if it is reasonable in the circumstances to believe that the individual knows the purposes of the collection, use or disclosure and that the individual may give or withhold consent (s. 18(5), p. 22)

# CONSENT (cont'd)

- > HIC may rely on notice of purposes (posted or made readily available) as reasonable belief of the individual's knowledge of the purposes, where reasonable in the circumstance (s.18 (6), p.22)
- > HIC who has obtained an individual's consent or who receives a document purporting to record the individual's consent is entitled to assume that the consent fulfils the requirements of the Act and the individual has not withdrawn it, unless it is not reasonable to assume so (s.20(1), p.22)
- > Consent may be assumed to be implied between HICs for health care purposes, unless HIC is aware the individual has expressly stated otherwise (s.18(3), s.20(2), p.23)  
[Applies only to listed HICs, whose core function is provision of health care.]
- > Express consent is required for disclosure to non-HICs (e.g. to an employer/insurer) or to HICs for non-health care purposes (s.18(3), p.21)
- > Express consent is required for the collection, use and disclosure of PHI for marketing, subject to the prescribed requirements and restrictions, if any (s.33, p.33)

# HEALTH CARE

- Individuals may expressly instruct that their PHI not be used or disclosed for the purpose of health care (s.37(1)(a), p.37; s.38(1)(a), p.38; or s.50(1)(e), p.52)
- Hospitals are not required to comply with an express instruction for one year (November 1, 2005)
- However, nothing prevents a hospital from complying (s.31, p.33)
- Other uses and disclosures authorised by the Act without consent are not affected by such an express instruction

# RELIGIOUS AFFILIATION

- > Where a patient provides to a facility, such as a hospital or nursing home, information about their religious or other organizational affiliation, the facility may assume implied consent to provide information about their name and location, to representatives of the religion/organization unless requested otherwise
- > HIC must offer the patient an opportunity to withhold or withdraw consent (s.20(4), p.23)

# FUNDRAISING

- > A HIC may collect, use or disclose PHI about an individual for the purpose of fundraising activities only where,
  - (a) the individual expressly consents; or
  - (b) the individual consents by way of an implied consent and the information consists only of the individual's name and mailing address, or the name and mailing address of the individual's substitute decision-maker, where applicable (s.32, p.33; Reg., s. 10(3))
  
- > Collection, use and disclosure of phi for fundraising purposes subject to additional requirements set out in regulations

# COLLECTION

- > Collection of PHI directly from individual requires consent, which will usually be implied by the fact that the individual is giving the information
- > Individual may consent to an indirect collection (s.36, p.35)
- > Indirect collection without consent is permitted where specified, such as (s. 36(1), p. 35)
  - the information is reasonably necessary for providing health care and it is not reasonably possible to collect PHI
    - that can reasonably be relied on as accurate directly from the individual; or
    - directly from the individual in a timely manner
  - collection is by a FIPPA/MFIPPA HIC for the purpose of a proceeding, investigation of breach or related to its statutory function
  - the Information and Privacy Commissioner authorizes another manner of collection
  - collection is from a person who is permitted or required by law to disclose it to the HIC
  - a HIC is permitted or required by law to collect indirectly, subject to prescribed requirements or restrictions

# USE

- > Consent is required for the use of PHI subject to specific exceptions, including where the use is (s.37, p.36)
- for purpose for which it was collected or created and for all functions reasonably necessary (unless collected with consent or under s.36(1)(b) and individual expressly instructs otherwise)
  - for planning or delivering programs or services of the HIC
  - for the purpose of obtaining payment, processing, monitoring, verifying or reimbursing claims for payment
  - for risk management, for error management, in order to improve or maintain quality of services (s.37(1)(d))
  - for research (with REB approval)
  - if permitted or required by law, subject to prescribed requirements and restrictions

# DISCLOSURE

- > Consent is required for disclosure of PHI subject to specific exceptions such as where the disclosure is
- reasonably necessary for the provision of health care to the individual and it is not possible to get consent in a timely manner, unless the individual has expressly instructed otherwise (s.38(1)(a), p.38)
  - in order for the Minister or another HIC to determine or provide funding or payment to the HIC for the provision of health care (s.39(1)(a), p.39))
  - for determining or verifying statutory eligibility for health care or related benefits or services (s.39(1)(a), p.39)
  - upon the request of the Minister, a disclosure to the Minister for the purpose of monitoring or verifying claims for payment for health care funded by the Ministry (directed disclosure) (s.46, p.47)
  - to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or under an Act (s.43(1)(g), p.42)

# DISCLOSURE (cont'd)

## > Exceptions to consent for disclosure continued:

- A HIC may disclose personal health information about an individual,
  - (a) to the Chief Medical Officer of Health or a medical officer of health within the meaning of the *Health Protection and Promotion Act* if the disclosure is made for a purpose of that Act; or
  - (b) to a public health authority that is similar to the persons described in clause (a) and that is established under the laws of Canada, another province or a territory of Canada or other jurisdiction, if the disclosure is made for a purpose that is substantially similar to a purpose of the *Health Protection and Promotion Act*. (s.39(2), p.39)

# DISCLOSURE (cont'd)

- > Exceptions to consent for disclosure continued:
- for contacting a relative, friend or substitute decision maker of an individual who is incapacitated, injured, or ill and unable to consent (s.38(1)(c), p.38)
  - to a prescribed person who compiles and maintains a PHI registry (s.39(1)(c), p.39)
  - necessary to eliminate or reduce a significant risk of serious bodily harm to a person or group (s.40, p.40)
  - permitted or required by law, subject to prescribed requirements and restrictions (s.43(1)(h), s.43(2), p.42)

# DISCLOSURE FOR PROCEEDINGS

HIC may disclose PHI about an individual in the context of a proceeding:

- Subject to the requirements and restrictions, if any, that are prescribed, for the purpose of a proceeding or contemplated proceeding in which the HIC or the agent or former agent of the HIC 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 (s.41(1)(a), p.41)
  
- For the purpose of complying with,
  - (i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or
  - (ii) a procedural rule that relates to the production of information in a proceeding (s.41(1)(d))

# DISCLOSURE FOR RESEARCH

- > Disclosure of PHI for research requires approval of researcher's research plan by a research ethics board (REB)
  
- > A researcher shall (s.44, p.43)
  - ∇ comply with the conditions imposed by the REB
  - ∇ use PHI only for purpose set out in the research plan
  - ∇ not publish information in a form that could identify individual
  - ∇ not disclose information unless required by law and subject to prescribed exceptions and additional requirements
  - ∇ not make contact or attempt to make contact with the individual unless the HIC first obtains consent
  - ∇ notify HIC of any breach
  - ∇ comply with the agreement entered into with HIC

# DISCLOSURE FOR PLANNING AND MANAGEMENT OF HEALTH SYSTEM

- > HIC may disclose to a prescribed entity PHI for the purpose of analysis or compiling statistical information with respect to the management of, evaluation or monitoring of, the allocation of resources to or planning for all or part of the health system, including the delivery of services (s.45, p.46)
- > The prescribed entity must have in place practices and procedures to protect the privacy of the individuals whose PHI it receives and to maintain the confidentiality of the information
- > The Information and Privacy Commissioner must approve those practices and procedures (has one year to do so from November 1, 2004)
- > Where a HIC may disclose PHI to a prescribed entity, that entity is authorized to collect it

# DIRECTED DISCLOSURE TO HEALTH DATA INSTITUTE

- > PHIPA authorizes the Minister to direct a HIC to disclose PHI to an approved health data institute for analysis of the management of, evaluation or monitoring of, the allocation of resources to or planning for all or part of the health system (s.47, p.47, s.48, p.50)
- > Before requiring information from a HIC, the Minister must provide to the IPC a proposal for review and comment
- > Data institute must have practices and procedures approved by the Information and Privacy Commissioner
- > Data institute may release only non-identifying information to the Minister or another person as approved by the Minister, unless specifically approved by IPC as in the public interest

# RECIPIENT RULE

- > Non-HICs that receive PHI from a HIC shall not use or disclose it for any purpose other than the purpose for which the HIC was authorized to disclose the PHI under this Act, or for the purpose of carrying out a statutory or legal duty, subject to the regulations or any other law (s.49(1), p.51)
- > Regulations set out specific exceptions
- > A non-HIC shall not use or disclose more PHI than is reasonably necessary to meet the purpose of the use or disclosure, as the case may be (exceptions may be prescribed)
- > Recipient rules do not apply to FIPPA/MFIPPA institutions

# PERSONS WHO MAY CONSENT

- > A capable individual, regardless of age, can consent to collection, use or disclosure of own PHI. Capacity is presumed. (s. 21(4), p.24)
  
- > Where a consent is required of an individual, the following may consent on that individual's behalf ("substitute decision-makers")
  - if the individual is capable and 16 or over, anyone who is 16 or over who the individual has authorized to act on his or her behalf
  - if the individual is less than 16 years of age, a parent of the child, with some exceptions
  - if the individual is incapable of consenting, a person authorized to consent on behalf of the individual under this Act
  - if the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the estate
  - a person whom an Act of Ontario or Canada authorizes or requires to act on behalf of the individual (s.23, p.25)
  
- > Where this Act permits or requires an individual to make a request, express an instruction or take a step, a substitute decision-maker may make the request, express an instruction or take the step (s.25, p.27)

# CAPACITY

- > Capacity is the ability to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure and ability to appreciate the reasonably foreseeable consequences of giving, not giving, or withholding or withdrawing consent (s.21, p.23)
- > Incapacity determination is reviewable by Consent and Capacity Board (s.22, p.24)

# CAPACITY (cont'd)

- > Substitute decision makers authorized to consent on behalf of an incapable individual in PHIPA, in order of priority (s.26(1), p.28)
  - guardian of the person or guardian of property (with authority)
  - attorney for personal care or attorney for property (with authority)
  - the representative appointed by the Consent and Capacity Board
  - the spouse or partner
  - a child's parent
  - a parent with only a right of access
  - a brother or sister
  - any other relative
  - Public Guardian and Trustee (as last resort)
  
- > A substitute decision maker who makes decisions for an incapable person under the *Health Care Consent Act* has priority over the persons in the list above with respect to information decisions necessary for, or ancillary to, a decision about treatment, a long term care admission or a personal assistance service in a LTC facility, as the case may be (s.26(11), p.30)

# ACCESS

- > Every individual has a right to access his/her record of PHI, subject to limited exceptions (s.52, p.53)
- > Where a restriction on access applies, an individual has a right of access to that part of the record that can be severed
- > A HIC must respond as soon as possible to a written access request, but no later than 30 days after receiving the request, subject to a 30-day extension
- > An individual can request that the HIC expedite the request where necessary (s.54(5), p.57)
- > Nothing prevents a HIC from granting an individual access to a record based on an oral request or without an access request

# CORRECTION

- > An individual may request a HIC to make a correction to his/her record (s.55, p.58)
- > A HIC must correct the record where the individual demonstrates that the record is incomplete or inaccurate for the purposes for which the HIC uses the record unless an exception applies in the circumstances
- > A HIC is not required to correct a professional opinion or observation made in good faith or a record that was not originally created by the HIC where the HIC has insufficient knowledge or authority to make the correction
- > Where a HIC refuses to make a correction, HIC must inform individual of refusal, provide reasons and inform of right to appeal the refusal or the right to attach a statement of disagreement

# ADMINISTRATION AND ENFORCEMENT

- > Information and Privacy Commissioner, established under the *Freedom of Information and Protection of Privacy Act*, is the oversight body for the Act
- > The IPC may appoint an Assistant Commissioner for Personal Health Information
- > IPC may investigate a complaint or investigate on own motion where there are reasonable grounds to believe that a person has contravened or is about to contravene the Act or the regulations (s.56, p.60; s.58, p.62)
- > Provides IPC with powers to enter and inspect premises (without warrant, unless a dwelling), require access to PHI and compel testimony (by summons) (s.60, p.63)

# ADMINISTRATION AND ENFORCEMENT (cont'd)

- > The IPC shall not inspect a record of PHI, require evidence or inquire into PHI without the consent of the individual to whom it relates, unless the IPC
  - determines it is reasonably necessary to do so and the public interest justifies dispensing with obtaining the individual's consent; and
  - provides a statement to the HIC setting out the IPC's determination, together with brief reasons and any restrictions and conditions the IPC has specified
  
- > IPC may make orders resulting from a complaint or own motion investigation (s.61, p.66)
  
- > IPC orders, other than for access or correction, may be appealed on questions of law (s.62, p.68)

# ACTION FOR DAMAGES

- > An individual affected by an IPC's order may bring an action in the Superior Court of Justice for damages for actual harm suffered as a result of a contravention of the Act or regulations (s.65, p.70)
- > Where the harm suffered was caused by a breach that the defendant engaged in willfully or recklessly, the compensation may include an award not exceeding \$10,000 for mental anguish
- > No action or other proceeding for damages may be instituted against a HIC or any other person for anything done, in good faith and reasonably in the circumstances, in the exercise of any powers or duties under the Act or any alleged neglect or default that was reasonable in the circumstances (s.71, p.73)

# OFFENCES AND PENALTIES

- > Creates offences for contravention of the legislation, including:
  - wilfully collecting, using or disclosing PHI in contravention of the Act
  - once access request made, disposing of a record of personal information in an attempt to evade the request
  - wilfully failing to comply with an order made by the IPC (s.72, p.74)
  
- > Maximum penalty of \$50,000 for an individual and \$250,000 for a corporation
  
- > A person who complains to the IPC about a contravention of the Act is protected from retaliation (s.70, p.72)

# REGULATIONS

- > The Lieutenant Governor in Council may make regulations, such as
  - exempting or adding persons or classes of persons under the definition of HIC
  - specifying that certain types of information shall or shall not be included in the definition of PHI
  - setting requirements for information practices including specifying the requirements for using electronic means to collect, use, modify, disclose, retain or dispose of PHI
  - defining any word or expression used in the Act and not otherwise defined
  - exempting any Act from the general rule that PHIPA prevails (s.73, p.75)
  
- > PHIPA includes a public consultation process for regulation-making that requires
  - publishing a notice of proposed regulation
  - giving the public information on where to review written information about proposed regulation
  - giving the public at least 60 days to submit written comments (s.74, p.77)

# COMPLEMENTARY AMENDMENTS

- > PHIPA makes complementary amendments to other Acts, including:
  - *Mental Health Act*
  - *Public Hospitals Act*
  - *Health Protection and Promotion Act*
  - *Long-Term Care Act, 1994*
  - *Occupational Health and Safety Act*
  - *Child and Family Services Act*
  
- > The *Health Cards and Numbers Control Act, 1991* is repealed

# MORE INFORMATION?

- Text of the *Personal Health Information Protection Act, 2004* and regulations:  
<http://www.e-laws.gov.on.ca>
- Related Ministry of Health and Long-Term Care documents:  
<http://www.health.gov.on.ca>
- Related Information and Privacy Commissioner / Ontario documents:  
<http://www.ipc.on.ca>