

# STEWART MCKELVEY'S GUIDE TO THE ***PERSONAL HEALTH INFORMATION ACT*** (“PHIA”)

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## INTRODUCTION

Nova Scotia's [\*Personal Health Information Act\*](#), S.N.S. 2010, c 41 ("PHIA") is new provincial legislation which will govern the collection, use, disclosure, retention and disposal and destruction of personal health information in the province. PHIA comes into force on June 1, 2013.

The goal of this statute is to balance the privacy rights of individuals with respect to their personal health information and the need for 'custodians' as defined in PHIA to collect, use and disclose personal health information as part of providing strong healthcare services in Nova Scotia.

Stewart McKelvey has prepared this guide as a starting point for you to navigate the requirements of PHIA. While the guide has not been compiled to provide direction on every potential situation that may arise with respect to PHIA, we hope it serves as a valuable resource for you. Please contact us should have any questions or desire any additional assistance to ensure you are compliant with the provisions of PHIA and its regulations.

## DOES PHIA APPLY TO YOU?

PHIA applies to the collection, use and disclosure of personal health information by a custodian or an individual to whom a custodian has disclosed the information (s.5).

There are, however, notable exceptions to the scope of PHIA's application. PHIA does not apply to statistical, aggregate or de-identified health information. It also does not apply to an individual or organization that collects, uses or discloses personal health information for purposes other than health care and the planning and management of the health system, including employers, insurance companies and certain prescribed organizations (s. 6(1)).

To determine whether PHIA applies to you, you must understand what is meant by "personal health information". You must also determine whether you are a "custodian".

## WHAT IS PERSONAL HEALTH INFORMATION?

Personal health information is defined in PHIA to mean identifying information about an individual if the information:

- (a) relates to the physical or mental health of that individual,
- (b) relates to the health history of the individual's family,
- (c) relates to the provision of health care to the individual,
- (d) relates to payments or eligibility for health care in respect of the individual,

- (e) relates to the donation by the individual of any of their body parts or bodily substances,
- (f) is derived from the testing or examination of any such body part or bodily substance,
- (g) is the individual's registration information, including the individual's health card number, or
- (h) identifies an individual's substitute decision-maker (s.3(r)).

Personal health information includes information both in recorded and unrecorded form; it does not matter whether the person whose information is being collected or disclosed is alive or dead.

Even identifying oneself as a provider of healthcare to a person could constitute disclosure of that person's personal health information.

#### **ARE YOU A CUSTODIAN?**

A custodian is an individual or organization defined in PHIA who has custody or control of personal health information as a result of, or in connection with, performing the individual's or organization's powers or duties.

If you are any of the following, you are a custodian:

- a District Health Authority or the IWK;
- the Review Board under the *Involuntary Psychiatric Treatment Act*;
- Canadian Blood Services;
- Nova Scotia Hearing and Speech Centre;
- a pharmacy licensed under the *Pharmacy Act*;
- a continuing-care facility licensed by the Minister under the *Homes for Special Care Act* or approved by the Minister;
- a home care agency approved by the Department of Health and Wellness and with a service agreement with a District Health Authority under the *Health Authorities Act* or with the IWK;

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- a regulated health professional or an individual who operates a group practice of regulated health professionals;
- a home oxygen agency approved by and with a service agreement with the Department of Health and Wellness.

You are not a custodian if you are a health professional that is not regulated in Nova Scotia.

However, if you are a custodian and you are collecting, using or disclosing personal health information, PHIA applies to you.

### **a) Agents**

PHIA also applies to the agents of a custodian as defined in the *Act*.

An agent is a person who, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information. An agent must be acting for the purposes of the custodian, and not the agent's purposes.

Agents include 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.(s.3(a))

### **CONSENT IS KEY**

Under PHIA, custodians are required to obtain consent from an individual before collecting, using or disclosing the individual's personal health information, unless explicitly stated that consent is not required.

To ensure that consent is valid under PHIA, it must meet four necessary characteristics:

1. consent must be given by the individual receiving the service, or by their substitute decision-maker if the person lacks capacity to consent;
2. consent must be "knowledgeable" which requires the individual be informed of the scope of their consent and the ability to withhold it;
3. the consent must be related to specific information at issue; and
4. consent must be voluntary (s.13).

**a) Who can provide consent?**

In order to satisfy the requirement that consent is voluntary, the individual must have "capacity" to consent. This means the individual must have the mental 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.

Any individual with capacity, *regardless of their age*, may consent, or withdraw consent, for the purpose of PHIA (s.18).

PHIA recognized that the capacity of an individual must be considered with regard to the circumstances of the individual in each instance consent is being sought. An individual may have the capacity at a particular time to consent, but may be incapable of consenting at another time. Similarly, an individual may have the capacity to consent to the disclosure of some parts of the personal health information but incapable with respect to other parts (s.19).

**b) What if an Individual does not have capacity to consent?**

If an individual lacks the capacity to consent, a substitute decision-maker may provide or withhold consent on behalf of the individual (s.21).

A hierarchy of substitute decision-makers is outlined in section 21(2) of PHIA and should be referred to by all custodians of personal health information. Generally, the hierarchy is based on the personal relationship between the individual and the substitute decision-maker.

In order to act as a substitute decision maker, they must have had personal contact with the individual in the previous 12 months and must not know of any person in a category higher on the hierarchy. Substitute decision-makers must also sign a statement certifying their relationship with the individual.

**c) Withdrawal of consent**

PHIA allows individuals to request to limit or revoke consent for the collection, use or disclosure of personal health information in the custody or control of the custodian by giving notice to the custodian (s.17).

Although an individual may request to limit or revoke consent at any time, a limit of revocation is it is not retroactive. In other words, after withdrawal of consent, the custodian does not have to request that information previously disclosed be returned. However, if consent is withdrawn the custodian must inform the provider named by the individual that the individual's record is not complete.

A custodian is required to take reasonable steps to comply with an individual's request to limit or revoke consent and must also inform the individual of the consequences of revoking consent (s.17(3)). Each individual circumstance will determine what is reasonable.

**d) How to obtain consent**

There are two basic methods for a custodian to obtain consent from an individual: express consent or implied consent (s.12). Whether consent is express or implied, it must be knowledgeable consent.

**Knowledgeable Consent**

Whether express or implied, consent to the collection, use and disclosure of personal health information must be knowledgeable. The individual must be informed of the purpose of the collection, use or disclosure of their information to allow them to properly decide whether to provide or withhold their consent (s.14).

A custodian may assume that the individual is knowledgeable by:

- a) posting a notice describing the purposes why the individual's health information is being collected, how it is being used, and in what circumstances it would be disclosed;
- b) the right's of the individual to refuse consent
- c) where to locate more information about PHIA, and
- d) how to initiate a complaints process under PHIA (s.15).

This "notice of purposes" must be posted where it is likely to come to an individual's attention. Posters and notices in waiting rooms in plain view and in clear font would allow the custodian to assume that an individual is knowledgeable.

The assumption that a patient is knowledgeable can be made unless it would not be reasonable in the circumstances. What is "reasonable" will depend on the circumstances of each individual. PHIA makes clear that it would not be reasonable to make this assumption where the custodian *should have* known that an individual has a limited ability to read or understand the notice. In these circumstances, custodians are required to make "reasonable efforts" to assist an individual with understanding the notice. In this scenario, reasonable efforts would include using an interpreter or explaining the information in the notice directly to the individual.

**To ensure that consent is "knowledgeable", custodians are well-advised to 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 is readily available to the public.**

It is recommended that the notice contains the following statements:

1. Statement about the purpose of PHIA:
  - paraphrased or verbatim reproduction of the purpose, as stated in PHIA (if paraphrased, highlight the balance between the two objectives: privacy rights and use of information).
2. Statement that use and disclosure will be used and disclosed to enable:
  - provision of healthcare to the individual,
  - communication and consultation regarding the individual's healthcare, and
  - obtaining payment for the individual's healthcare.
3. A statement about the individual's rights under PHIA:
  - to request and receive a copy of the individual's personal health information,
  - to request corrections to personal health information that is not accurate, complete or up-to-date,
  - to request a complete record of who has access to the individual's personal health information on an electronic information system, and
  - to request that specific personal health information not be provided to other healthcare providers.

### **Express Consent**

Express consent may be oral or written (s.16). PHIA requires express consent of the individual when disclosure:

- is between a custodian to a non-custodian,
- is between a custodian to another custodian not for the purpose of providing healthcare (unless specifically required or authorized by law),
- is for fundraising activities,



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- is for market research or marketing any service for a commercial purpose,
- is to the media, or
- is to a person or organization for the example of research (s.43).

### Implied Consent

When a custodian discloses personal health information to another custodian for the purpose of providing healthcare, the consent of the individual may be implied, unless the individual has specifically withheld or withdrawn the consent.

In situations where a proper notice of purposes is posted and the custodian had no reason to believe that an individual could not have read or understood that notice, and that individual pursues services, the custodian may infer that the individual has consented to the collection, use and disclosure of their personal health information.

#### Example: Implied Knowledgeable Consent

Mark visits the ER with an open fracture of his leg. The attending ER physician draws routine blood work, the results of which indicate a possible infection. The ER physician forwards the test results to a specialist regarding the possible infection. In this instance the ER physician is not required to obtain express consent from Mark in order to forward the test results to the specialist.

This is disclosure of personal health information to another custodian or its agent for the purpose of providing healthcare or assisting in providing healthcare to the individual, therefore the ER physician may rely on implied consent, unless the custodian is aware that the individual has expressly withheld or withdrawn the consent.

### When is Consent not Required?

PHIA provides for certain circumstances where personal health information may be collected, used or disclosed without consent. Specific examples of when consent is not required is contained below in the "collection, use and disclosure" section of this guide.

#### COLLECTION, USE & DISCLOSURE OF PERSONAL HEALTH INFORMATION

There are two guiding principles that limit the collection, use and disclosure of personal health information:

A custodian cannot collect, use or disclose personal health information where other information will serve the custodian's purpose.

A custodian must collect, use and disclose the minimum amount of personal health information necessary to achieve the custodian's purpose (s.54).

**a) Collection of Personal Health Information**

Generally speaking, personal health information is collected directly from the individual.

PHIA outlines various circumstances when a custodian may collect personal health information ***other than directly from the individual***:

- the individual authorizes collection from another person,
- the collection is from a substitute decision-maker,
- the information is reasonably necessary for providing healthcare and it is not reasonably possible to collect directly from the individual accurate personal health information, i.e. doctor believes patient is withholding relevant information or lying,
- the custodian believes that collection from the individual would prejudice the safety of any individual,
- for the purpose of assembling a family history in the context of providing healthcare, or determining eligibility to receive a benefit, product or health service,
- the custodian is a public body (as defined by *Freedom of Information and Protection of Privacy Act* "FOIPOP"), and is collecting the information for a purpose related to an investigation, or legal proceeding,
- for the purpose of carrying out a research project that has been approved by a research ethics body, except if the person is prohibited by law from disclosing the information to the custodian;
- the custodian indirectly collects or collects from a person who is permitted or required by law,
- the collection is for a quality review program within the custodian's organization, and
- the collection is reasonably necessary for the administration of payments in connection with the provision of healthcare (s.31).

**b) How can Personal Health Information be used?**

Custodians may use personal health information for the purpose for which the information was collected or created and for all functions reasonably necessary for carrying out that purpose (s.33).

Personal health information may also be used for purposes authorized by law (i.e. pursuant to statute or court order) and for educating agents.

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Custodians must limit use by agents to those who need to know the information to carry out the authorized purpose (s.25(2)). Recipients (whether custodians or not) shall not use personal health information beyond the authority provided by the custodian (s.45).

There are also circumstances where personal health information can be used without the consent of the individual, such as:

- for detecting, monitoring or preventing fraud or any unauthorized receipt of services or benefits,
- for the purpose of a quality review program within the custodian's organization,
- for the purpose of disposing or modifying the information in order to conceal the identity of the individual,
- for the purpose of a proceeding in which the custodian or agent is, or is expected to be, a party or witness,
- for the purpose of obtaining payment or processing, monitoring, verifying or reimbursing claims for payment for the provision of healthcare or related goods and services,
- for research conducted by the custodian,
- if permitted or required by law, and
- for the purpose of risk management or patient safety within the custodian's organization (s.35).

### **c) When can Personal Health Information be Disclosed?**

Custodians may disclose personal health information to other custodians if reasonably necessary for healthcare for the individual (s.36).

Custodians are given discretion to disclose general personal health information about presence, location and general condition, to family members, and others believed to have a close personal relationship, if not otherwise contrary to express consent of the individual (s.37).

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.

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***Disclosure without consent*** is permitted under the following circumstances (s.38):

- to another custodian if 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,
- to persons acting on behalf of the individual, i.e. legal guardian,
- to a regulated health profession body or a prescribed professional body that requires the information for the purpose of carrying out its duties,
- 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(s),
- to an official of a correctional facility, or penitentiary, in which the individual is being lawfully detained if the purpose of the disclosure is to allow the provision of healthcare to the individual or to assist the correctional facility or penitentiary in making a decision concerning correctional services,
- to another custodian for the purpose of a quality review program within the custodian's organization,
- to the Nova Scotia Prescription Monitoring Board for monitoring prescriptions,
- to the Canadian Institute for Health Information to assist in the planning and management of the health system,
- if the disclosure is required or permitted by law,
- to another custodian for the purpose of determining or verifying an individual's eligibility for insured services,
- to a person carrying out an authorized inspection/investigation,
- to a proposed litigation guardian or legal representative 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 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 healthcare 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, or
- for the purpose of risk management or patient safety within the custodian's organization.

**Disclosure of health information without consent must be documented**, including a description or copy of the information, identity of recipient, date of disclosure, and authority for disclosure (s.42).

#### **ACCESS TO PERSONAL HEALTH INFORMATION**

Under PHIA, individuals have a right of access to their personal health records and can request correction of information (s.71). Individuals do not need to provide reasons for requesting their records.

If you receive a request from an individual to access and/or correct their personal health information, you must respond to this request within 30 days.

Access may be refused under certain circumstances such as legal privilege, risk of serious harm, release of other person's information (s.72). Custodians may also refuse requests for access or corrections which are frivolous, vexatious or abusive (s.64).

Custodians may charge fees for access, however custodians must first give individuals an estimate of the fee and the fee cannot exceed amounts prescribed by regulation, or if not prescribed amounts, to permit reasonable cost recovery (s.82). The fee schedule set out in the Regulations is found at <http://www.gov.ns.ca/just/regulations/rxam-z.htm#phia>.

#### **PROTECTION OF PERSONAL HEALTH INFORMATION**

If you are a custodian, you must have all of the following in place:

1. a written retention and destruction schedule for personal health information;
2. information practices to ensure personal health information is protected against theft, loss of information, or unauthorized access, use or disclosure; and
3. a complaints and privacy policy, made available to the public (ss.50 and 62).

You must also designate a person to facilitate the custodian's compliance with PHIA; to respond to enquiries, requests for access or correction of information, and complaints; and to train staff regarding policies and procedures under PHIA (s.67).

#### **WHAT TO DO IF THERE IS A BREACH OF PRIVACY**

Custodians **must** notify individuals at the first reasonable opportunity if a custodian believes on a reasonable basis that personal health information is stolen, lost or subject to unauthorized access, use, disclosure, copying or modification, **and**, as a result there is a potential for harm or embarrassment to the individual (s.69).

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Where a custodian determines that personal health information has been stolen, lost or subject to unauthorized access, use, disclosure, copying or modification, but a breach, harm or embarrassment is unlikely, then the custodian may decide not to notify the individual, but a review officer must be notified (s.70).

### **REVIEW PROCESS**

If you believe PHIA has been contravened, or access or corrections have been wrongly refused, you may ask a review officer for a review (s. 91). Review officers may investigate and make recommendations, but may only exercise their powers after the complainant has completed the internal complaint policy of the custodian (s. 92).

A review officer may decide not to review a complaint if under various circumstances, including if a custodian has responded adequately (s. 95). The review officer may attempt mediation (s. 96).

Within 30 days after receiving the review officer's report, a custodian must decide whether to follow the recommendations, and, must give written notice to the review officer and the individuals of the custodian's decision (s. 101(1)).

If a custodian decides not to follow the recommendation of the review officer, the custodian must inform the individual of their right to appeal to the Supreme Court of Nova Scotia (s. 101(2)).

### **OFFENCES AND PENALTIES**

PHIA includes a long list of offences, many of which require intentional acts, but the offences include:

- Failing to protect personal health information in a secure manner as required by PHIA.
- Requiring production of a health card number contrary to PHIA;
- Using personal health information to market any service for a commercial purpose or to solicit money, without consent;
- Breaches of the terms of an agreement with a custodian under PHIA (s.106).

Individuals may be liable to fines of not more than \$10,000 and/or up to six months imprisonment, and corporations may be liable to fines of not more than \$50,000 (s.107).

If a corporation commits an offence, every officer, member, employee or other agent of the corporation who authorized the offence or had the authority to prevent the offence but knowingly refrained from doing so, is guilty of the offence and liable upon conviction, whether or not the corporation has been prosecuted or convicted (s.108).

For further information regarding PHIA, please contact a member of the Stewart McKelvey Health Law Practice Group or IP/IT/Entertainment Practice Group.

