

*School Psychologists:
What You Should Know about the
Personal Health Information Protection Act*

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Presentation Outline

1. *Personal Health Information Protection Act (PHIPA)*
2. Application of *PHIPA* to school psychologists
3. Special considerations for HICs working for non-HICs or *FIPPA/MFIPPA* institutions
4. Access rights of parents and minors
5. Disclosure in emergency or urgent circumstances
6. Circle of Care
7. Conclusions



Personal Health Information Protection Act (PHIPA)

- Came into force on November 1, 2004;
- Applies to organizations and individuals involved in the delivery of health care services (including the Ministry of Health and Long-Term Care);
- The only health sector privacy legislation in Canada based on consent: implied consent within the “circle of care,” otherwise, express consent;
- The only health sector privacy legislation that was declared substantially similar to the federal legislation in 2005.



Mandate of the Legislation

- Requires consent for the collection, use and disclosure of PHI, with necessary but limited exceptions;
- Requires that health information custodians treat all PHI as confidential and keep it secure;
- Codifies an individual's right to access and request correction of his/her own PHI;
- Gives a patient the right to instruct health information custodians not to share any part of his/her PHI with other health care providers;
- Establishes clear rules for the use and disclosure of personal health information for secondary purposes including fundraising, marketing and research;
- Ensures accountability by granting an individual the right to complain to the IPC about the practices of a health information custodian; and
- Establishes remedies for breaches of the legislation.



“Health Care” as Defined in *PHIPA*

- Any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that:
 - Is carried out or provided to diagnose, treat or maintain an individual’s physical or mental condition;
 - Is carried out or provided to prevent disease or injury or to promote health.



Who is Covered?

- Health Information Custodians (HICs) (s. 3(1));
- The Minister of Health and Long-Term Care;
- Provincially-operated community or mental health centers;
- Municipal homes for the aged and rest homes;
- Municipally run ambulance services;
- Medical Officers of Health;
- Health professionals who are employed by school boards and correctional facilities.



Who is Covered? (Cont'd)

Health care practitioners, including:

- Members defined under *Regulated Health Professions Act* who provide health care;
- Drugless practitioners under the *Drugless Practitioners Act* who provide health care;
- Members of the Ontario College of Social Workers and Social Service Workers who provide health care;
- Persons whose primary function is to provide health care for payment.



Agents and Recipients

- **Agents who use PHI** - 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.
- **Recipients** – non-HICs where they receive PHI from a HIC (e.g., employers, insurers).



General Rules for Agents

- Only permitted to collect, use, disclose, retain or dispose of PHI on custodian's behalf (e.g., rehab. centre) if:
 - the custodian is permitted to do so; and
 - it is in the course of the agent's duties.
- Must notify the custodian at the first reasonable opportunity if PHI is stolen, lost or accessed by unauthorized persons;
- Must comply with custodians information policies and practices.



The 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)).
- A non-HIC shall not use or disclose more PHI than is reasonably necessary to meet the purpose of the use or disclosure (s. 49(2)).



HICs Working for Non-HICs

- In many cases, school psychologists (HICs) will be working for a person/organization that is not a health information custodian (non-HIC), such as a nurse working for a manufacturing company;
- There are many special considerations that are outlined in our Fact Sheet *Health Information Custodians Working for Non-Health Information Custodians*. For example, special considerations for HICs working for non-HIC employers:
 - Required not to share personal health information with non-HIC employers, except with the consent of the individual, or as permitted by law;
 - May need to store health information records in a place that is not within their own direct custody and control (e.g., psychologists working for school boards may be required to keep records in a central location in the school, accessible to other health care providers).



Agents of HICs Working for Non-HICs

- Agents (e.g., a file clerk) of a HIC (e.g., the school psychologist) may include persons working for a non-HIC employer (e.g., school board);
- Example: a school psychologist working for a school board may use the services of a staff person employed by the school board to schedule appointments, manage records and perform filing; this staff person would be considered an “agent” of the psychologist, thus also falling under *PHIPA*.



Disclosures to Non-HIC Employers

- A HIC (e.g., school psychologist) cannot disclose personal health information to a non-HIC employer (e.g., school board) unless:
 - The individual patient consents (e.g., where information is needed by the employer to accommodate a student);
 - The disclosure is permitted or required by *PHIPA* (e.g., to prevent harm; for the purpose of contacting next of kin in circumstances where the individual is unable to consent, in the event of an injury or illness);
 - The disclosure is permitted or required by another law (e.g., nurse must report to superintendent of correctional facility if an inmate is seriously ill).



Records Storage

- Normally, custodians keep records in a location under their direct custody and control (i.e., a locked filing cabinet in the psychologist's office);
- S. 14(2) of PHIPA permits records to be kept in a location other than a place in the psychologist's control (e.g., central file room) *if*:
 - The record is kept in a reasonable manner (files kept locked); and
 - **The individual consents** (consent may be implied).



HICs as Agents of *FIPPA/MFIPPA* Institutions

- HICs as agents (working for) *FIPPA/MFIPPA* institutions:
 - A psychologist/social worker providing health care in school is governed by *PHIPA*; the school board is governed by *MFIPPA*;
 - If a HIC is an agent of *FIPPA/MFIPPA* institution, within the meaning of s.51(3), *PHIPA* access provisions do not apply.



Access

- *FIPPA/MFIPPA* access rules preserved for HICs who work in institutions (s. 51(3));
- *FIPPA/MFIPPA* HIC may refuse access to PHI on some grounds set out in *FIPPA/MFIPPA* (s.52(1)(f)):
 - Cabinet information;
 - Advice to government;
 - Prejudicial to law enforcement.



Access to a Minor's Personal Health Information

- Section 52 gives an individual the right of access, subject to certain exemptions, *without reference to their age or capacity*;
- List of persons who may consent to the collection, use or disclosure of PHI (s. 23);
- For cases of incapacity, there is a ranked list of substitute decision-makers (s. 26).



Persons who may consent...

- Capable child who is at least 16 years old may authorize someone else to act on his or her behalf (s. 23(1)[1]ii);
- Parent may consent where child is capable and under 16 years old unless the information relates to:
 - treatment decision, made by the child, under *Health Care Consent Act* (s. 23(1)[2]i); or
 - Counseling, in which the child has participated on his or her own under *Child and Family Services Act* (s.23(1)[2]ii);
- In the event of a conflict between capable child and parent, child's decision prevails (s. 23(3)).



Substitute Decision-Makers (SDMs)

Ranked list of SDMs in order of priority:

1. Guardian of person or of property;
2. Attorney for personal care or property;
3. Representative appointed by Consent and Capacity Board;
4. Spouse or partner;
5. Child's custodial parent;
6. Parent with right of access only;
7. Brother or sister;
8. Any other relative;
9. Public Guardian and Trustee (as last resort).



Permissible Disclosures: *Safety and Law Enforcement Purposes*

Derogations from the consent principle are allowed in limited circumstances, for example:

- To protect the health or safety of the individual or others (s. 40(1));
- To a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by law (s. 43(1)(g));
- As required by law (s. 43(1)(h)).



Raising Awareness about the Discretion to Disclose

THE GLOBE AND MAIL

Privacy laws don't forbid it

The Globe And Mail
Friday, April 25, 2008
Page: A18

Section: Letter To The Editor
Byline: Ann Cavoukian

THE GLOBE AND MAIL

Privacy piracy

The Globe And Mail
Monday, June 23, 2008
Page: A14

Section: Letter To The Editor
Byline: Ann Cavoukian

NATIONAL POST

Don't make a mockery of privacy

National Post
Thursday, Nov. 8, 2007
Page: A25

Section: Letters
Byline: Ann Cavoukian

NATIONAL POST

Privacy not an absolute

National Post
Friday, April 25, 2008
Page: A13

Section: Letters
Byline: Ann Cavoukian

VOICE of the GTA TORONTO STAR

A blow to personal privacy

The Toronto Star
Friday, April 18, 2008
Page: AA05

Section: Letter
Byline: Ann Cavoukian

VOICE of the GTA TORONTO STAR

Privacy laws not to blame

The Toronto Star
Thursday, April 24, 2008
Page: AA05

Section: Letter
Byline: Ann Cavoukian



Disclosure of Information Permitted in Emergency or other Urgent Circumstances

- Public Interest and Grave Hazards
- Health and Safety of an Individual/ Risk of Serious Harm to Person or Group
- Disclosures to Public Health Authorities
- Compassionate Circumstances
- Providing Health Care
- Liability protection



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Fact Sheet

Disclosure of Information Permitted in Emergency or other Urgent Circumstances

Privacy legislation in Ontario does not prevent the rapid sharing of personal information in certain situations. While it is appropriate to recognize that personal information is protected by Ontario's privacy and access laws, it is also important to realize that these protections are not intended to stand in the way of the disclosure of vital – and in some cases, life-saving – information in emergency or other urgent situations.

In emergency and limited other situations, personal information, including personal health information, may need to be disclosed in a timely fashion, even if the person's consent has not been obtained. In such circumstances, the head of a public sector institution or a health information custodian (a defined term under the *Personal Health Information and Protection Act* or *PHIPA*), or those acting on their behalf, can – and in some cases must – disclose information that would normally be protected by Ontario's access to information and privacy laws. This information may be a record or

records containing personal information or personal health information, and the circumstances may include emergencies or critical situations affecting individuals or public health and safety, as well as situations calling for compassion.¹ Although these disclosures are the responsibility of the head of an institution or a health information custodian, it is important for anyone working in such settings to understand what is permitted in certain situations.

A head of a public sector institution or a health information custodian is given the authority by Ontario's access to information and privacy laws to disclose such information. These laws also protect a health information custodian or a head from damages, provided that the custodian or head has acted in good faith.

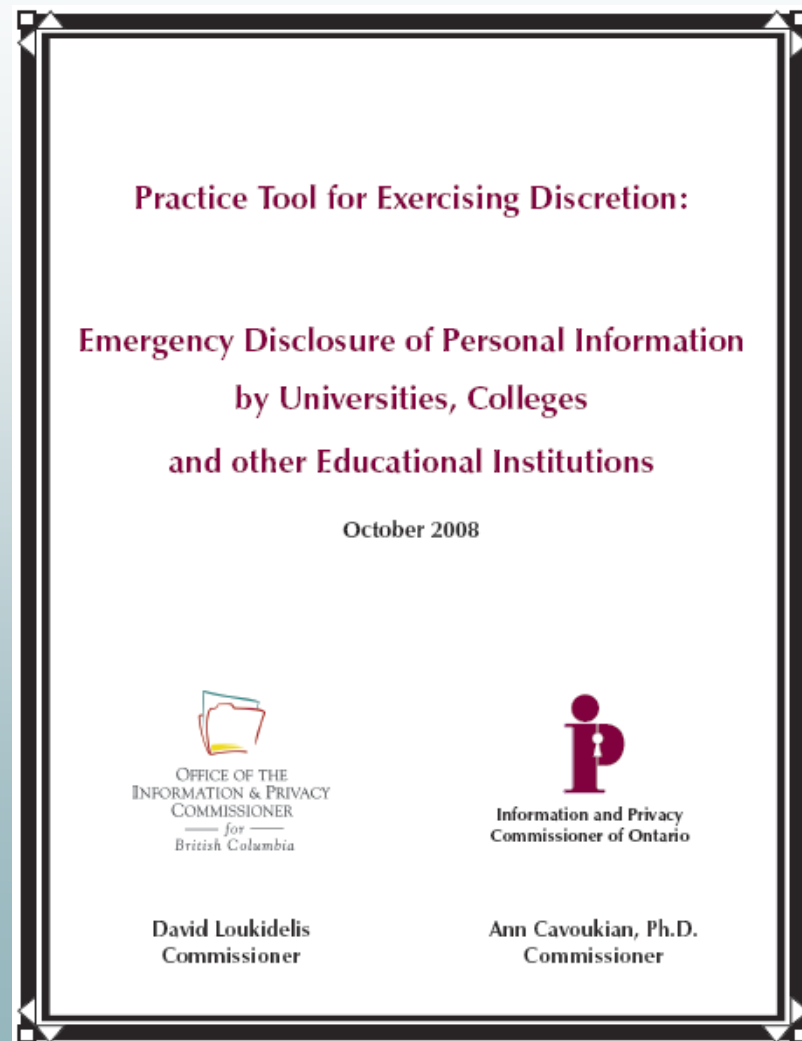
Listed below are some circumstances under which a custodian can disclose personal information or personal health information, in the absence of an individual's consent.

¹ "Head" and "personal information" are defined terms under the *Freedom of Information and Protection of Privacy Act* (FIPPA) and the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). "Health information custodian" and "personal health information" are defined in the *Personal Health Information Protection Act* (PHIPA). Please see <http://www.e-laws.gov.on.ca/>.



Practice Tool for Exercising Discretion

- Disclosure of Personal Health Information;
- Disclosure of Personal Information in the Public Interest;
- Notification of Disclosure;
- Be Prepared – have a clear policy and procedure;
- Tips for developing policies and taking action in emergencies.





Circle of Care: Sharing Personal Health Information for Health Care Purposes

- The IPC is launching a new paper to clarify the circumstances in which a health information custodian may assume implied consent and the options available to a custodian where consent cannot be implied;
- The term “circle of care” is not a defined term in *PHIPA*;
- The term commonly used to describe the ability of certain health information custodians to *assume* an individual’s *implied consent* to collect, use or disclose personal health information for the purpose of providing health care, in circumstances defined in *PHIPA*.



Circle of Care Working Group

- Office of the Information and Privacy Commissioner;
- Ontario Medical Association;
- Ontario Hospital Association;
- College of Physicians and Surgeons of Ontario;
- Ministry of Health and Long Term Care;
- Ontario Association of Community Care Access Centres;
- Ontario Long Term Care Association;
- Ontario Association of Non-Profit Homes and Services for Seniors.

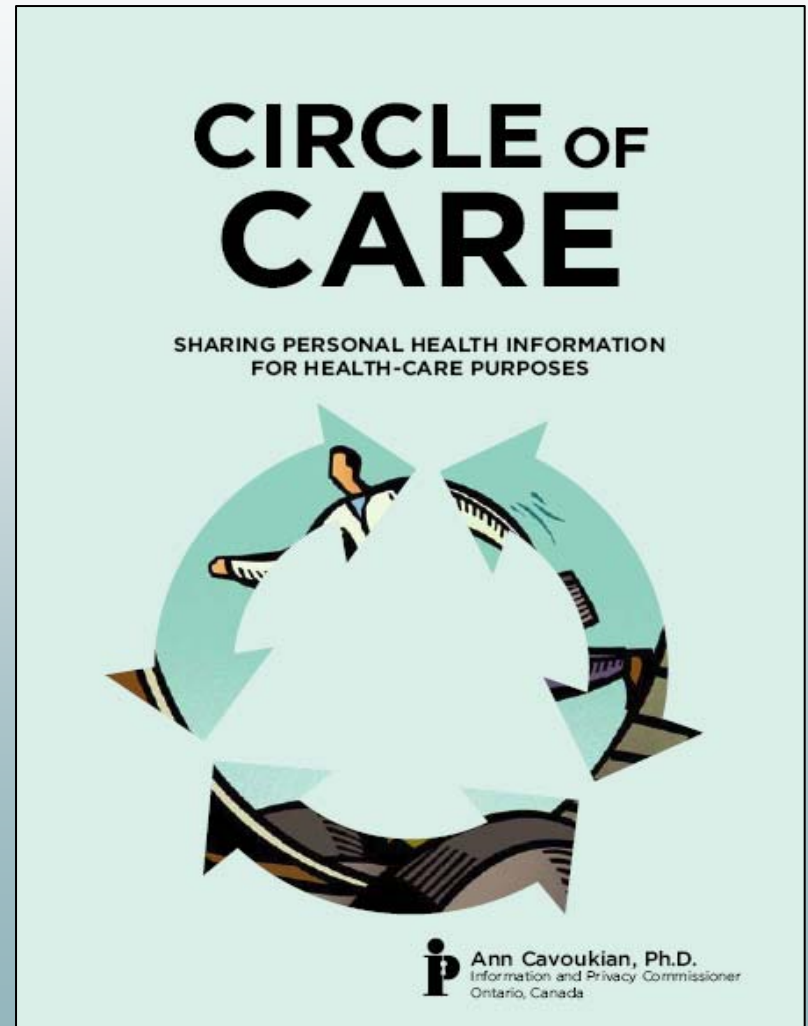


Circle of Care: Sharing Personal Health Information for Health Care Purposes

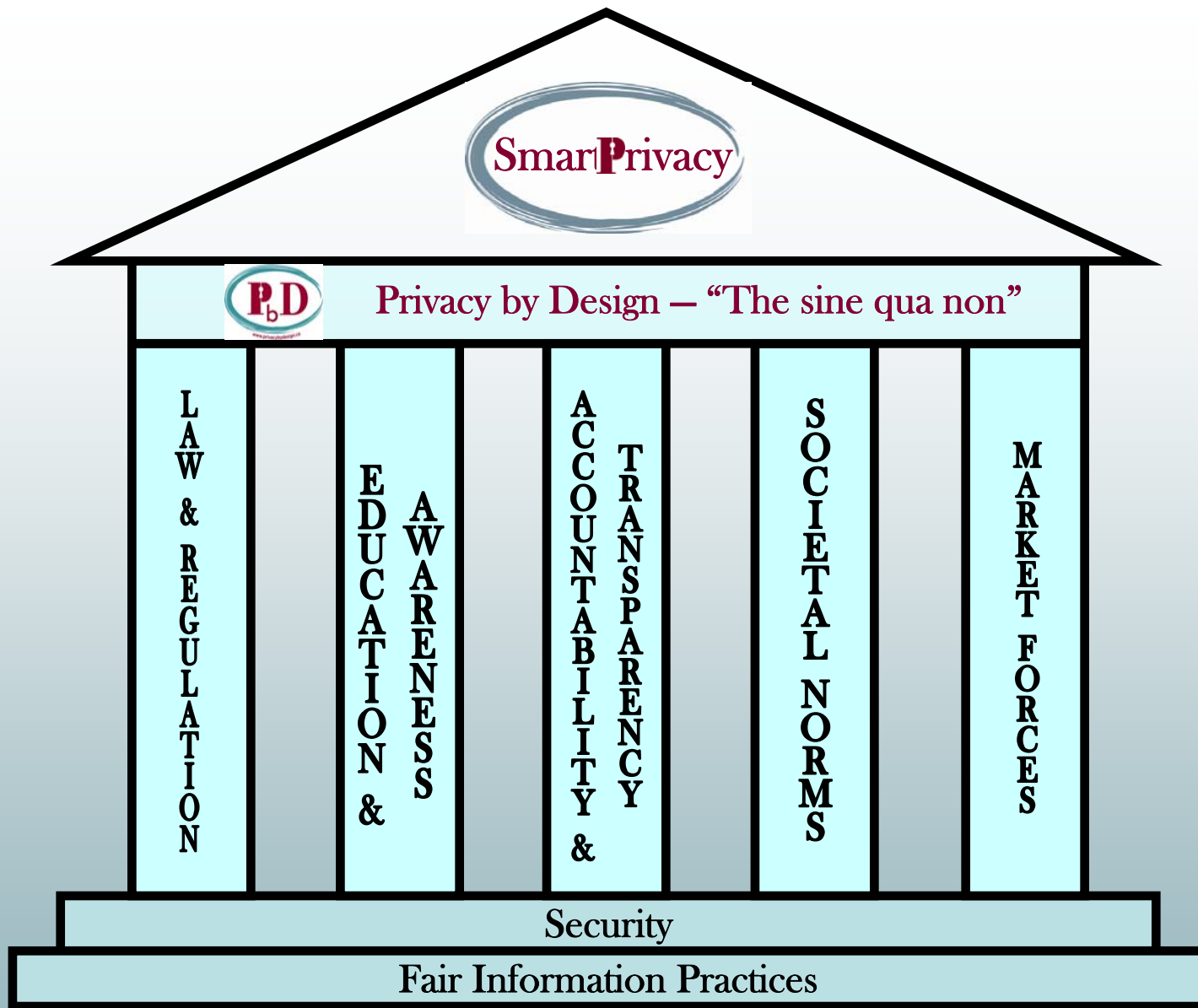
Elements of Consent

The consent of an individual for the collection, use or disclosure of personal health information by a health information custodian:

- must be a consent of the individual or his or her substitute decision maker;
- must be knowledgeable;
- must relate to the information that will be collected, used or disclosed; and
- must not be obtained through deception or coercion.



Available at www.ipc.on.ca



“SmartPrivacy is the umbrella that offers the complete suite of protections to ensure data privacy. It consists of multiple measures ranging from regulatory protections to education and awareness, but one measure stands out as the sine qua non: *Privacy by Design*. Dr. Ann Cavoukian, *Information & Privacy Commissioner of Ontario, Canada, August 13, 2009.*”

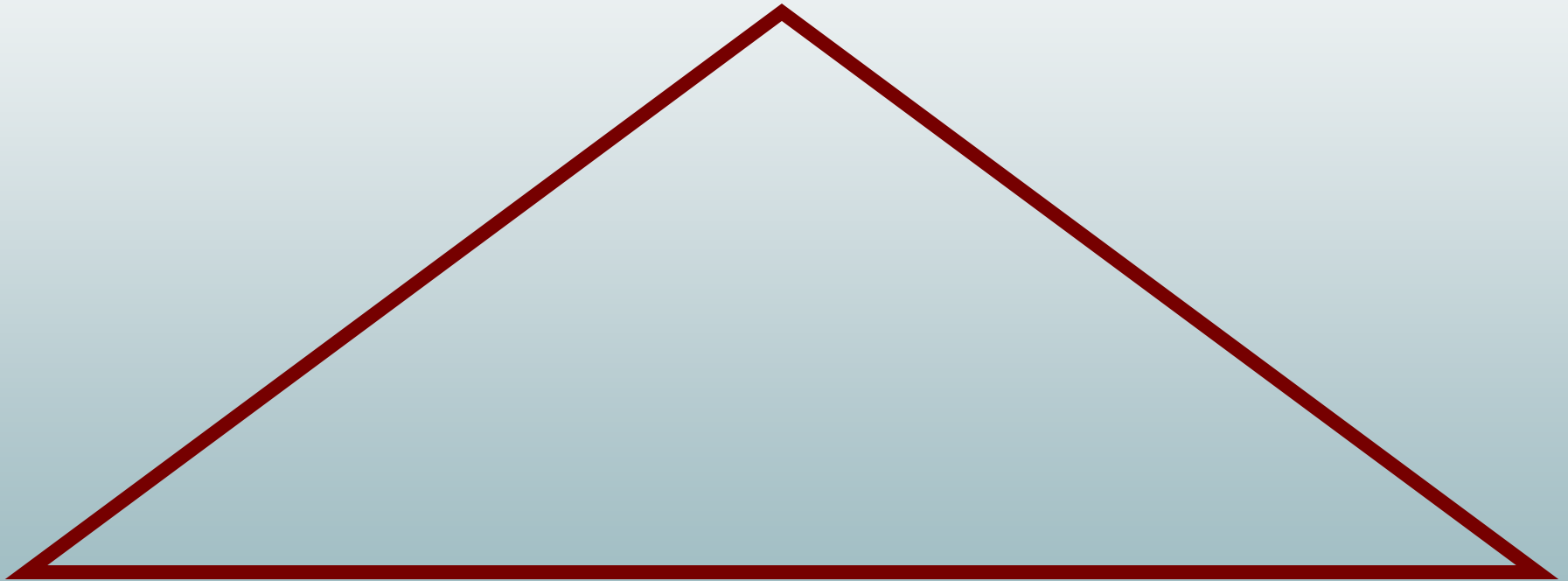


www.privacybydesign.ca



Privacy by Design: *The Trilogy of Applications*

Information Technology



**Accountable
Business Practices**

**Physical Design
& Infrastructure**




Privacy by Design: *Focus for 2009*

- **Information Technology** – Building privacy directly into technology, at the earliest developmental stage;
- **Accountable Business Practices** – Incorporating privacy into competitive business strategies and operations;
- **Physical Design and Infrastructure** – Ensuring privacy in organizational and health care settings.



Privacy by Design: Principles and Properties

1. *Proactive* not Reactive;
Preventative not Remedial
2. Privacy as the *Default*
3. Privacy *Embedded* into Design
4. Full Functionality: Positive-Sum, not Zero-Sum
5. End-to-End Lifecycle Protection
6. Visibility and Transparency
7. Respect for User Privacy



Privacy by Design

Principles and Properties

Privacy by Design is a concept that was developed by Ontario's Privacy Commissioner, Dr. Ann Cavoukian, in the 90's, to address the ever-growing and systemic effects of Information and Communication Technologies, and of large-scale networked data systems.

Privacy by Design asserts that the future of privacy cannot be assured solely by compliance with regulatory frameworks; rather, privacy assurance must become an organization's default mode of operation.

Initially, deploying Privacy-Enhancing Technologies (PETs) was seen as the solution. Today, we understand that a more substantial approach is required; extending the use of PETs to taking a positive-sum, not zero-sum, approach.

Privacy by Design now extends to a "Trilogy" of encompassing applications: 1) IT systems; 2) accountable business practices; and 3) physical design.

Principles of *Privacy by Design* may be applied to all types of personal information, but should be applied with special vigour to sensitive information such as medical information and financial data. The strength of privacy protection requirements tend to be commensurate with the sensitivity of the data.

The objectives of *Privacy by Design* – ensuring privacy and personal control over one's information and, for organizations, gaining a sustainable competitive advantage – may be accomplished by practicing the following principles:



Conclusions

- School psychologists are health information custodians who must be aware of multiple special considerations under *PHIPA*;
- Employers are *not* health information custodians under *PHIPA*;
- Employers are institutions under *MFIPPA*;
- School psychologists must be aware of both children's and parents' rights under *PHIPA*, their discretion to disclose PHI in urgent circumstances, and their right to share PHI on the basis of implied consent, within the circle of care.



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