Information
and Privacy
Commissioner/
Ontario

Submission to the Standing Committee on General Government:

Bill 31: *Health Information Protection Act*

Ann Cavoukian, Ph.D.
Commissioner
January 27, 2004

Information and Privacy
Commissioner/Ontario

2 Bloor Street East
Suite 1400
Toronto, Ontario
M4W 1A8

416-326-3333
1-800-387-0073
Fax: 416-325-9195
TTY (Teletypewriter): 416-325-7539
Website: www.ipc.on.ca

This publication is also available on the IPC website.

Table of Contents

Introduction

The Office of the Information and Privacy Commissioner/Ontario (IPC) has a mandate under the *Freedom of Information and Protection of Privacy Act* to review and comment on the privacy implications of proposed legislative schemes. Bill 31, the *Health Information Protection Act* (the *Act*) will have a significant impact on the privacy of every individual in the province of Ontario.

We are pleased that this Government has moved promptly to introduce a comprehensive legal framework to protect personal health information. Our office has advocated the need for such legislation for many years. Members of the public, health care providers and other stakeholder groups have anticipated introduction of legislation of this nature since the *Report of the Royal Commission on Confidentiality of Health Information in Ontario* (the Krever Commission Report) in 1980.

We support the general approach that has been taken in balancing the individual's right to privacy with the legitimate needs of the health care sector to collect, use and disclose personal health information. Some of the positive improvements over previous legislative initiatives in the province include:

- an open and transparent regulation-making process;
- the creation of a health data institute to limit the government's access to personal health information for the purpose of health system analysis;
- a single oversight body to receive complaints about refusals to provide access to the individual's own personal health information, regardless of the reason for the denial of access;
- consistent rules for the collection, use and disclosure of all types of personal health information (e.g., long-term care records, mental health records, genetic information);
- a requirement for implied consent as opposed to no consent for the collection, use and disclosure of personal health information for the purpose of providing health care; and
- the individual's right to prohibit the disclosure of personal health information from one health care provider to another (i.e., a lock box).

We applaud the significant improvements. We also are pleased that this office has been identified as the oversight body for this legislation. This provides the public with a single point of contact for both public sector and health sector privacy matters. This will facilitate implementation of the legislation and minimize confusion on the part of the public.

However, with regard to the Commissioner's powers in conducting reviews under the legislation, we believe that further improvement is necessary. It is our view that the powers that have been provided are not sufficient to allow the Commissioner to efficiently and effectively oversee and enforce the legislation, nor do they match the powers of comparable privacy oversight bodies in other jurisdictions in Canada.

The comments and recommendations in this submission support three primary goals – to enhance the privacy protections provided by the legislation; to promote harmonization of this legislation with federal privacy legislation and with other provincial health information privacy legislation; and to facilitate implementation, administration and enforcement of the legislation. Our comments are organized in accordance with the corresponding parts of the legislation. Additional recommended technical amendments are outlined in Appendix B.

Part I: Interpretation and Application

In general we support the purposes of the legislation set out in section 1. These purposes recognize the unique character of personal health information – as one of the most sensitive types of personal information that is frequently used for a broad range of purposes that go beyond the provision of health care.

Definitions

Health Information Custodian

Subsection 3(1) defines a health information custodian. However, some organizations that routinely collect, use and disclose personal health information have not been specifically mentioned in the list of health information custodians. It is our view that the privacy protection provisions of the legislation should apply to the broadest range of health information custodians possible. We recommend including the following organizations or types of organizations under the definition:

- Cancer Care Ontario;
- Institute for Clinical Evaluative Sciences;
- Canadian Institute for Health Information;
- any organization that maintains a registry relating to a specific disease or condition or relating to the storage or donation of body parts or bodily substances; and
- any organization that maintain a repository of personal health information for the primary purpose of research.

The intention may be to include these organizations in the definition by way of regulation. However, it is our view that it would be preferable to specifically include these organizations in the definition, at the outset.

In addition, the sixth person on the list is the Minister of Health and Long-Term Care, together with the Ministry of Health and Long-Term Care, “if the context so requires.” This needs to be clarified by specifying the exact contexts that would require the Minister to be included in the definition of a health information custodian.

Part II: Practices to Protect Personal Health Information

Contact Person

Subsection 15(3) describes the duties of a contact person designated by a health information custodian. Subsection 15(4) states that a health information custodian that is a natural person and does not designate a contact person must perform certain of the functions set out in subsection 15(3). Specifically, a health information custodian must respond to inquiries from the public, respond to access and correction requests, and receive complaints from the public. One function of the contact person, set out in subsection 15(3)(b), that is not specifically mentioned in subsection 15(4) is ensuring that all agents of the custodian are appropriately informed of their duties under this *Act*. We recommend including this function in the list of functions set out in subsection 15(4).

Part IV: Collection, Use and Disclosure of Personal Health Information

General Limiting Principles

Section 29 sets out some general limiting principles for the collection, use and disclosure of personal health information. Specifically, a health information custodian should not collect, use or disclose personal health information if other information will serve the purpose and a health information custodian should not collect, use or disclose more personal health information than is reasonably necessary to meet the purpose. However, subsection 29(3) states that this section does not apply to personal health information that a health information custodian is required to collect, use or disclose by law.

It is not clear why the general limiting principles to protect privacy should not apply in the context of the collection, use or disclosure of personal health information that is required by law. We recommend the general limiting principles should apply to all dealings with personal health information, especially those that are required by law and take place without the individual's consent.

Fundraising

Section 31 prohibits the collection, use and disclosure of personal health information for fundraising activities unless the individual expressly consents. In previous consultations on health information privacy legislation, it became clear that a requirement for express consent would have an adverse impact on a health care organization's ability to raise much-needed funds. We prefer and support a requirement that would allow for an initial contact of the patient by the health care organization for fundraising purposes. At that point, the patient must be offered an opt-out opportunity. Additionally, patients must be offered an opt-out opportunity each time their name and address are used for fundraising purposes. An exception could be made where the very nature of the care provided by a specific health care facility could be viewed as being especially sensitive. In such cases, express consent should be required. Express consent should also be required whenever a health information custodian uses or discloses personal health information for marketing purposes and whenever personal health information is disclosed outside of the health care organization or its related foundation for fundraising purposes.

Health Cards and Health Numbers

Section 33 sets out the privacy protection requirements for the collection, use and disclosure of the health card and health number. It is our understanding that these provisions were intended to replace the privacy protections for the health card and health number set out in the *Health Cards and Numbers Control Act*.[1] However, we note that provisions in the proposed legislation are not comparable to those currently in effect in that the restrictions only apply to health care practitioners who are not providing provincially-funded health resources, prescribed health information custodians and non-health information custodians. There are virtually no restrictions on the purposes for which health information custodians who are providing provincially-funded health resources may collect, use or disclose the health card and health number. To ensure that the health number does not become a multi-purpose identification number, we recommend the general limitations on the collection, use or disclosure of health cards and health numbers set out the *Health Cards and Numbers Control Act* be reflected in the new legislation. Specifically, health numbers should only be collected, used or disclosed for purposes related to health administration or planning, health research or epidemiological studies.

We also find subsection 33(5) to be unclear. We recommend that this subsection simply state that only a person who provides a provincially-funded health resource to a person who has a health card may require its production.

Disclosure

Deceased Individual

Subsection 37(4) allows a health information custodian to disclose personal health information about an individual who is deceased for certain purposes. These provisions are very narrow and would essentially prohibit family members from obtaining timely information about the circumstances of a relative's death. In our 1999 Annual Report,[2] the IPC discussed the problems that family members encounter in obtaining timely information about a loved one's death under the existing public sector access and privacy legislation, and included suggested legislative amendments. Consistent with the recommendation made in our Annual Report, we recommend that the disclosure of personal health information allowed under subsection 37(4) of the *Health Information Protection Act* be expanded to ensure that health information custodians have the authority to disclose information about the circumstances surrounding the death of a family member, where it is appropriate to do so. The suggested amendments in our Annual Report may be of assistance in this regard.

---

[1] www.e-laws.gov.on.ca/DBLaws/Statutes/English/91h01_e.htm

[2] www.ipc.on.ca/docs/ar-99e.pdf

Paragraph (c) of subsection 37(4) permits a health information custodian to disclose personal health information about an individual who is deceased to family members, if the recipients of the information reasonably require the information to make decisions about their own health care or their children's health care. In disclosing information about a deceased individual, the custodian should have regard for the views that the individual previously expressed that are known to the custodian. However, it is not clear why the views of the deceased should be a consideration where a family member requires the personal health information to make decisions about their own health care or their children's health care. We recommend removing this consideration from the legislation.

Research

The proposed legislation incorporates a number of safeguards for the use and disclosure of personal health information for research purposes. Central to the proposed framework is the review and approval of research projects by a research ethics board. The IPC agrees, in general, that this approach provides the right balance between protecting the privacy of personal health information and the public interest served by health research. However, we recommend a number of additions and modifications to section 43 in order to strengthen the safeguards to protect privacy, clarify the rules and obligations for researchers, and enhance transparency and accountability in the research review process.

Criteria for assessing the public interest in the research

Subsection 43(3) sets out matters for the research ethics board to consider in approving a research plan. Paragraph (c) of subsection 43(3) requires a research ethics board to consider the public interest in conducting the research and the public interest in protecting privacy. It would be helpful if the legislation were to set out some criteria for the research ethics board to consider in assessing the public interest in the research. We recommend adopting the wording in Alberta's *Health Information Act*. Under that legislation, the review body must consider the extent to which the research contributes to the following:

- identification, prevention or treatment of illness or disease;
- scientific understanding relating to health;
- promotion and protection of the health of individuals and communities;
- improved delivery of health services; or
- improvements in health system management.

Criteria for assessing whether consent should be required

The legislation should include a requirement for a research ethics board to consider whether consent should be required before personal health information is used or disclosed for research purposes. In assessing whether the research should be permitted without consent, the research ethics board should consider the purposes for which the personal health information will be used. In our view, it may not be necessary to require a researcher to obtain consent if the personal health information is only needed for the purpose of linking or matching information across time and/or sources, provided that the following safeguards are in place:

- the personal health information will be used only for the purpose of linking or matching across time and/or sources;
- the personal health information will be de-identified as soon as the linking or matching procedure has taken place; and
- the personal identifiers will be destroyed, in a manner such that they could never be recreated or reconstituted, or, where the personal identifiers must be retained (e.g., for audit by a research sponsor), safeguards are in place to limit access to the personal identifiers once the linking or matching procedure has occurred.

Criteria for assessing whether it is reasonably practical to obtain consent

Subsection 43(3)(d) requires a research ethics board to consider whether obtaining the consent of the individuals would be impractical. The Canadian Institutes of Health Research (CIHR), in its *Recommendations for the Interpretation and Application of the Personal Information Protection and Electronic Documents Act (S.C. 2000, c.5) in the Health Research Context*, outlined a number of criteria to be considered when assessing the practicality of obtaining consent. In our view, it would be helpful to the research community if similar criteria were incorporated into Ontario's proposed legislation. Borrowing from the work of CIHR, we recommend research ethics boards be required to consider the following factors when assessing whether it is reasonably practical for the researcher to obtain consent:

- the size of the population involved in the research;
- the proportion of individuals who are likely to have moved or died since the personal health information was originally collected;
- the risk of introducing potential bias into the research, thereby affecting the generalizability and validity of the results;
- the risk of creating additional threats to privacy by having to link personal health information with other personal information in order to contact individuals to seek their consent;

- the risk of inflicting psychological, social or other harm by contacting individuals with particular conditions or in certain circumstances;
- the difficulty of contacting individuals directly when there is no existing or continuing relationship between the organization and the individuals;
- the difficulty of contacting individuals indirectly through public means, such as advertisements and notices; and
- whether the additional resources needed to obtain consent will impose an undue hardship on the organization.

Disclosures of personal health information originating outside Ontario

Subsections 43(10) and 43(11) relate to disclosures of personal health information originating wholly or in part outside Ontario for research purposes. Subsection 11 appears to exempt this type of personal health information from many of the requirements that would apply to information originating from within Ontario. For example, research using personal health information originating outside Ontario would not have to undergo research ethics board approval. While there is an opportunity to set out requirements in the regulations that accompany the legislation, it is not clear why different standards should apply to research using personal health information originating from within and outside Ontario. Unless a clear rationale can be provided for differing standards of protection, we would suggest that subsections 43(10) and 43(11) be deleted from the legislation.

Enhancing transparency in the research ethics review process

Once a research ethics review body has approved the use or disclosure of personal health information without consent, the legislation should require researchers to inform the IPC of their research, prior to its undertaking. This would be compatible with the requirements under the federal *Personal Information Protection and Electronic Documents Act*.[3] In addition, to enhance transparency, research ethics boards should be required to provide a summary of all research proposals involving personal health information they review, as well as their decisions, in an annual report that is made available to the public.

---

[3] http://laws.justice.gc.ca/en/P-8.6/index.html

Part V: Access to Records of Personal Health Information and Correction

Limits to the Right of Access

Subsection 50(1) sets out the conditions under which a health information custodian may refuse to provide individuals with a right of access to their own personal health information. Paragraph (a) allows the health information custodian to refuse to provide access to information if the record is subject to a legal privilege that prohibits the disclosure. Since fair information practices require that exceptions to the right of access be as limited as possible, it is our view that this provision is too broad. We recommend that this exception to access be limited to information that is subject to solicitor-client privilege rather than any legal privilege. This would be consistent with Ontario's public sector legislation and the federal *Personal Information Protection and Electronic Documents Act*.

Response of Health Information Custodian to Request for Access

Paragraph (c) of subsection 52(1) states that if the custodian is entitled to refuse a request for access, the custodian must give a written notice to the individual stating that the custodian is refusing the request and stating that the individual is entitled to make a complaint to the Commissioner. In addition, we recommend that the custodian be required to include in the written notice the reason why the custodian is refusing the request and the specific provision of the legislation that is being relied upon in refusing the request. This would be consistent with Ontario's public sector legislation and the federal *Personal Information Protection and Electronic Documents Act*.

Part VI: Administration and Enforcement

To promote compliance with the legislation, it is essential that the oversight body have the necessary powers to conduct, both complaint-driven and self-initiated, investigations of contraventions of the *Act*. The legislation only provides the powers that are necessary for conducting efficient and effective reviews, if the Commissioner obtains a warrant. The necessity of obtaining a warrant will fundamentally alter the manner in which we carry out our oversight functions and will be detrimental to our effectiveness as a privacy advocate and advisor.

The privacy protection scheme envisioned in the proposed legislation sets up a system of trusted keepers of personal health information – the health information custodians. Since it would not be possible for an oversight body to oversee all of the activities of every health information custodian, the effectiveness of the legislation will rest on their voluntary compliance. Privacy oversight bodies operate primarily as privacy advocates, advisors and educators – ensuring compliance with legislation through establishing co-operative relationships with the trusted keepers. When an issue of non-compliance arises, the vast majority of cases can be resolved through mediation, education and persuasion as opposed to penalties and sanctions. For example, under the existing public sector legislation in Ontario, over 80 per cent of privacy-related complaints and appeals are resolved informally through mediation and alternative dispute resolution methods – rarely does the IPC have to resort to issuing a formal investigation report or ordering an institution to take some remedial action to ensure compliance.

Since, under the proposed legislation, the powers of the Commissioner to compel testimony and to demand the production or inquire into a record of personal health information only exist within the context of an inspection with a warrant, this would force the Commissioner to resort to obtaining a warrant on a frequent basis. Since a search warrant is almost always associated with criminal or quasi-criminal activity and issued to force individuals to take some action that they would not otherwise take, the entire concept is fraught with many negative connotations. It is our view that conducting inspections with a search warrant would be embarrassing and humiliating to health information custodians who are generally viewed as the trusted keepers of personal health information by both the public and the oversight body and who are often more than willing to co-operate in resolving any issues of non-compliance. Routine use of warranted powers would be counterproductive, as it will change the nature of the relationship between the oversight body and the health information custodian – from co-operative to adversarial. Ultimately, it would diminish an oversight body's capacity to establish co-operative relationships with health information custodians and to fulfill its primary functions as privacy advocate, advisor and educator.

In our view, the use of warranted powers would make the process of resolving complaints more costly, formal and adversarial, and perhaps less understandable and accessible to members of the public. This type of process seems unnecessary and inappropriate in light of the fact that most issues of non-compliance arise inadvertently through a lack of awareness on the part of the custodian or an employee of the custodian and can be, in many cases, readily resolved through minor changes to existing policies and practices.

In addition, a requirement to obtain a search warrant would place an undue burden on an oversight body, such as the IPC, which is a relatively small agency, with limited resources.

To make the administration and enforcement scheme consistent with the approach taken in Ontario's public sector legislation and the federal *Personal Information Protection and Electronic Documents Act*, we recommend the deletion of sections 57, 58 and 59 and a complete redrafting of the provisions relating to the powers of the Commissioner in conducting reviews. Please refer to Appendix A for proposed language for the powers of the Commissioner in conducting reviews.

Power to Compel Testimony

The investigation the IPC conducted into the disclosure of personal information by the Province of Ontario Savings Office (POSO) (report tabled with the Legislative Assembly in April 2000[4]) clearly demonstrated that a major shortcoming of the current public sector legislation is the Commissioner's inability to compel testimony in the context of privacy investigations. In the POSO investigation, the IPC was unable to conduct a thorough investigation into the disclosure of sensitive financial data, primarily because a number of key individuals refused to be interviewed. The result was a report that could not satisfy the public's right to know the full details of a public institution's non-compliant use of personal information.

As this case demonstrates, without clear authority to compel testimony as part of the evidence-gathering process, an oversight body cannot adequately assess the extent to which organizations are complying with their responsibilities. In turn, the public cannot be confident that organizations are being held accountable for their information management practices.

In virtually every other jurisdiction with similar legislation, including Canada (federal), Alberta, Saskatchewan, Manitoba, Quebec, Australia and New Zealand, the privacy oversight bodies have the power to require testimony without a warrant. There is no reason why Ontario should fall short in this critical area. Without this power, the proposed legislation may run a serious risk of not being considered substantially similar to the federal *Personal Information Protection and Electronic Documents Act*.

Under the proposed legislation, the IPC can only compel testimony with a warrant. We strongly recommend that the IPC be able to compel testimony during the course of conducting reviews, without a warrant. Please refer to Appendix A for proposed language for the powers of the Commissioner in conducting reviews. Our proposed language is based on provisions found in provincial and federal public sector and private sector privacy legislation in Canada and abroad.

---

[4] www.ipc.on.ca/docs/poso-e.pdf

Access to Personal Health Information

Subsections 58(3) and 59(2) limit an IPC's ability to demand the production or inquire into a record of personal health information without the consent of the individual, unless the Commissioner obtains a warrant and the justice of the peace issuing the warrant approves. This limitation on the Commissioner's powers is completely unnecessary and unworkable from our perspective. It would be virtually impossible for the Commissioner to conduct effective reviews without access to the very information that is the subject of a review.

In the event that an individual who has filed a complaint refused to provide consent, it would be impossible to conduct the review. Also, even if the individual did provide consent, in most cases an effective review would not be limited to that individual's records. Most complaints about the collection, use, disclosure or retention of personal information involve systemic issues and often require an examination of records relating to a representative sample of individuals, not just those of the individual who complained. In some cases, the sheer volume of records would make obtaining the consent of individuals impractical. Also, in the context of self-initiated reviews, pursuant to section 56, where there is no complainant, the IPC would not have direct contact with the individuals whose records may become part of the review, making it virtually impossible to obtain consent in advance. It is also possible that, while searching for personal information relevant to a review, the IPC may inadvertently access the personal information of other individuals whose personal information is not involved in the review. Consequently, a requirement to obtain consent would severely restrict the IPC's capacity to conduct reviews and to ensure the public that health information custodians are complying with the requirements of the legislation.

In virtually all jurisdictions with privacy legislation, including jurisdictions with health sector specific privacy legislation, the Commissioner is permitted to access any necessary information, including personal health information. We also note that the proposed legislation provides for numerous exceptions to the requirement of consent for the use and disclosure of personal health information for a broad range of other purposes, none of which require a warrant. For example, the *Act* authorizes the disclosure of personal health information without consent and without a warrant to an individual conducting an audit, the Chief Medical Officer of Health, a health professional regulatory College, the Board of Regents under the *Drugless Practitioners Act*, the Ontario College of Social Workers, the Public Guardian and Trustee, the Children's Lawyer and a children's aid society, among others. We cannot understand why there would be greater restrictions on access to personal health information for the oversight body administering and enforcing the *Health Information Protection Act* than there are for other individuals and organizations administering and enforcing other legislation. In addition, the proposed *Act* permits a health information custodian to disclose personal health information for the purpose of a proceeding, without consent or a warrant. What justification is there for requiring consent or a warrant before personal health information is disclosed for a proceeding before the Commissioner? It is also important to note that, unlike other potential recipients of personal health information, the IPC would be bound by strict confidentiality provisions set out in section 66 of the *Health Information Protection Act*.

Under the proposed legislation, in the absence of consent the IPC can only access personal health information with a warrant and the approval of the justice of the peace issuing the warrant. We strongly recommend that the IPC be permitted to access any information that is necessary to conduct the review, without a warrant. Please refer to Appendix A for proposed language on the powers of the Commissioner in conducting reviews.

Burden of Proof Where Access Denied

Whenever access to personal health information is denied, the burden of proving that there are reasonable grounds for refusing access rests with the person who denied access. It would not make sense to require the person requesting access to refute the case for denying access, since they generally will not have knowledge about what information is in the record. We recommend adding a provision to clarify that the burden of proof where access is denied rests with the health information custodian, similar to section 53 of the provincial public sector legislation.

Part VII: General

Delegation of Powers

The Commissioner's ability to delegate powers is set out in section 65. The provisions provide for the delegation of powers to the Assistant Commissioner or another officer or employee if there is no Assistant Commissioner and subdelegation by the Assistant Commissioner. We believe that these provisions may be needlessly cumbersome and would prefer that the Commissioner simply be given the authority to delegate to any officer or employee. This would be consistent with the existing public sector legislation and the federal *Personal Information Protection and Electronic Documents Act*.

Offences

Offences under the legislation are set out in section 70. Subsection 70(1)(d) states that a person is guilty of an offence if the person disposes of a record of personal health information with an intent to evade a request for access to the record. This provision should be expanded to clarify that it is offence to dispose of a record of personal health information in anticipation of a request or during the processing of a request or a complaint in relation to the request, until all proceedings relating to the request for access or correction have been completed.

Part VIII: Complimentary Amendments

Mental Health Act

We have some concerns about the proposed amendments to the *Mental Health Act*.[5] Specifically, we are concerned about the broad wording of subsections 35(1) and 35(2)(a). Subsection 35(1) defines a patient as: a former patient, out-patient, former out-patient and anyone who is or has been detained in a psychiatric facility. Paragraph (a) of subsection 35(2) allows the officer in charge of a psychiatric facility to collect, use or disclose personal health information about a patient, with or without the patient's consent, for the purposes of examining, assessing, observing or detaining the patient. Without this provision in the *Mental Health Act*, the proposed *Health Information Protection Act* would require consent for the collection, use and disclosure of personal health information for these purposes, with a limited number of exceptions.

We question the appropriateness of applying this lower standard of privacy protection to anyone who is receiving or has received health care in a psychiatric facility. For example, an individual who has been admitted to a psychiatric facility as an informal or voluntary patient, under section 12 of the *Mental Health Act*, should remain subject to the collection, use and disclosure provisions of the proposed legislation. On the other hand, it may be appropriate to eliminate the requirement for consent for individuals who are required to undergo a psychiatric assessment under section 15 or a psychiatric examination under section 16. Accordingly, we recommend that the *Mental Health Act* be reviewed to narrow the instances where consent will not be required.

Additional Issues

Computer Matching

Computer matching is an error-prone procedure that is generally used to generate new information or more detailed information about individuals through the linking of two or more databases. This new information is used to make administrative decisions that may directly affect individuals. Since computer matching involves the collection, use and disclosure of personal information for a purpose other than that for which it was originally intended, the procedure is considered to be very privacy-invasive. Due to the invasive nature of computer matching, government bodies, including the Ministry of Health and Long-Term Care, are already required to comply with a computer matching directive of the Ontario Government that provides a number of privacy safeguards. These safeguards include the completion of a computer matching assessment that must be submitted to the IPC for review and comment.

---

[5] www.e-laws.gov.on.ca/DBLaws/Statutes/English/90m07_e.htm

Consistent with existing privacy practices, we recommend that the proposed legislation require custodians, subject to the *Freedom of Information and Protection of Privacy Act*, to prepare and submit a computer matching assessment to the oversight body, prior to conducting a computer match. As is currently required under the existing directive, this computer matching assessment should include, for example, a description of the types of records involved, how the computer match is consistent with the requirements of the legislation, data security procedures, procedures for the retention and destruction of records, and procedures for verifying the accuracy of information prior to taking an adverse action against the individual as a result of the computer match. In addition, for the purposes of transparency and accountability, we also recommend that all computer matching assessments and any comments offered by the IPC be made available to the public.

It would be desirable from a privacy perspective if these privacy safeguards for the use and disclosure of personal health information for computer matching purposes applied to all personal health information, not just that which is in the custody of government institutions. This would be consistent with Alberta's *Health Information Act* which contains provisions requiring all health information custodians to prepare a privacy impact assessment and submit the assessment to Alberta's IPC before performing data matching.

If such protections are not built into the legislation, we would like a written commitment on the part of all health information custodians who are currently subject to the *Freedom of Information and Protection of Privacy Act* to continue to abide by the existing government directive on computer matching.

Conclusion

In conclusion, we would like to commend the government of Ontario for moving forward promptly with the introduction of privacy protection legislation for the health sector. We would also like to recognize the efforts of the Ministry of Health and Long-Term Care in developing this important piece of legislation. We support the overall objectives of the legislation and are pleased with the overall approach that has been taken in addressing privacy issues.

The only area that is of major concern is the powers of the Commissioner in conducting reviews. We are particularly concerned about the Commissioner's inability to demand production of or inquire into records of personal health information, without consent or a warrant and the approval of the justice of the peace issuing the warrant. Without access to the very information that is the subject of a review, it will be virtually impossible for us to carry out our oversight functions. We are also concerned about the Commissioner's lack of power to compel testimony, in the absence of a warrant. Without this power, we will be unable to conduct effective reviews of the information practices of health information custodians, in cases where they do not want to co-operate. To address these concerns, we recommend a complete redrafting of those sections of the *Act* relating to the powers of the Commissioner in conducting reviews.

Appendix A – Powers of the Commissioner in Conducting Reviews

Power to enter

57. (1) In conducting a review under section 55 of a complaint or a review under section 56, the Commissioner may, without warrant or court order, enter and inspect any premises in accordance with this section if,

(a) the Commissioner has reasonable grounds to believe that,

  (i) the person about whom the complaint was made or the person whose activities are being reviewed, as the case may be, is using the premises for a purpose related to the subject-matter of the complaint or the review, as the case may be, and

  (ii) the premises contains books, records or other documents relevant to the subject-matter of the complaint or the review, as the case may be;

(b) the Commissioner is conducting the inspection for the purpose of determining whether the person has contravened or is about to contravene a provision of this Act or its regulations; and

(c) the Commissioner does not have reasonable grounds to believe that a person has committed an offence.

Investigation powers

(2) In conducting a review under section 55 of a complaint or a review under section 56, the Commissioner may,

(a) demand the production of any books, records or other documents relevant to the subject-matter of the review or copies of extracts from the books, records or other documents;

(b) inquire into all information, records, information practices of a health information custodian and other matters that are relevant to the subject-matter of the review;

(c) demand the production for inspection of anything described in clause (b);

(d) use any data storage, processing or retrieval device or system belonging to the persons being investigated in order to produce a record in readable form of any books, records or other documents relevant to the subject-matter of the inspection; or

(e) on the premises that the Commissioner has entered, review or copy any books, record or documents that a person produces to the Commissioner, if the Commissioner pays the reasonable cost recovery fee that the health information custodian or person being inspected may charge.

Entry to dwellings

(3) The Commissioner shall not, without the consent of the occupier, exercise a power to enter a place that is being used as a dwelling, except under the authority of a search warrant issued under subsection (4).

Search warrants

(4) Where a justice of the peace is satisfied by evidence upon oath or affirmation that there is reasonable grounds to believe it is necessary that a place being used as a dwelling or to which entry has been denied be entered to investigate a complaint, he or she may issue a warrant authorizing such entry by a person named in the warrant.

Time and manner for entry

(5) The Commissioner shall exercise the power to enter a premise under this section only during reasonable hours for the premises and only in such a manner so as not to interfere with health care that is being provided to any person on the premises at the time of entry.

No obstruction

(6) No person shall obstruct the Commissioner who is exercising powers under this section or provide the Commissioner with false or misleading information.

Written demand

(7) A demand for books, records or documents or copies of extracts from them must be in writing and must include a statement of the nature of the things that are required to be produced.

Obligation to assist

(8) If the Commissioner makes a demand for any thing under subsection (2), the person having custody of the thing shall produce it to the Commissioner and, at the request of the Commissioner, shall provide whatever assistance is reasonably necessary, including using any data storage, processing or retrieval device or system to produce a record in readable form, if the demand is for a document.

Removal of documents

(9) If a person produces books, records and other documents to the Commissioner, other than those needed for the current health care of any person, the Commissioner may, on issuing a written receipt, remove them and may review or copy any of them, if the Commissioner is not able to review and copy them on the premises that the Commissioner has entered.

Return of documents

(10) The Commissioner shall carry out any reviewing or copying of documents with reasonable dispatch, and shall forthwith after the reviewing or copying return the documents to the person who produced them.

Admissibility of copies

(11) A copy certified by the Commissioner as a copy is admissible in evidence to the same extent, and has the same evidentiary value, as the thing copied.

Answers under oath

(12) In conducting a review of a complaint under section 55 or a review under section 56, the Commissioner may, by summons, require the appearance of any person before the Commissioner and compel them to give oral or written evidence on oath or affirmation.

Evidence privileged

(13) Anything said or any information supplied or any document or thing produced by a person in the course of a review by the Commissioner under this Act is privileged in the same manner as if the review were a proceeding in a court.

Protection

(14) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of a review by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

Protection under Federal Act

(15) A person giving a statement or answer in the course of a review by the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the Canada Evidence Act.

Confidentiality of personal health information

(16) The Commissioner shall only collect, use or retain personal information that the Commissioner deems reasonably necessary for the administration of the Act or for a proceeding under it.

(17) The Commissioner shall only collect, use or retain personal health information if the Commissioner deems that other information will not serve the purpose of the collection, use or retention.

Appendix B – Recommended Technical Amendments

Freedom of Information Legislation

Section 8 clarifies how the proposed legislation will operate in conjunction with the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) and the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*), in those cases where an institution is subject to more than one piece of legislation. Subsection 8(2) sets out the sections of the public sector legislation that will continue to apply after the *Health Information Protection Act* comes into effect. Most of these sections relate to the duties of government institutions to promote transparency. We agree that these obligations should continue. However, sections 12, 15 and 16 of the provincial *Act* and section 9 of the municipal *Act* are exemptions to the individual's right of access to information. Since, under subsection 50(1)(f)(ii), these exemptions to the right of access will continue to apply in the context of accessing one's own personal health information, they do not need to be included under section 8. We recommend removing these sections from the list in subsection 8(2) to clarify that these exemptions would only apply in the context of section 50.

Disclosures Related to This or Other Acts

Paragraph (h) of subsection 42 allows for the disclosure of personal health information where it is permitted or required by another Act. Subsection 42(2) states that a provision of an Act shall be deemed to permit the disclosure of information if a clause specifically provides that information is exempt, under stated circumstances, from a confidentiality or secrecy requirement. This provision would appear to limit the circumstances in which another piece of legislation would be deemed to permit the disclosure of personal health information. Such a limitation would be desirable from a privacy perspective. However, if this is not the intended purpose of subsection 42(2), to avoid any confusion, we recommend removing it from the proposed legislation.

Disclosures Outside Ontario

Section 48 sets out the rules for disclosing personal health information outside of Ontario. The exceptions to these rules are set out in subsection 48(3) which states that nothing in this section affects a disclosure that another law requires or authorizes be made or a disclosure that is necessary for a purpose set out in subsection 37(4). Subsection 37(4) permits the disclosure of personal health information about a deceased individual for specified purposes. Since paragraph (b) of subsection 48(1) already permits disclosures outside Ontario that the proposed *Act* would permit inside of Ontario, it is not clear why there is a specific reference only to subsection 37(4) in the exceptions. We recommend omitting this reference to 37(4) in the proposed legislation, as it could create confusion about the applicability of other sections of the proposed *Act* to disclosures outside Ontario.

Frivolous and Vexatious Requests

Under subsections 52(5) and 53(6) a health information custodian may refuse a request for access or correction if the custodian believes that the request is frivolous or vexatious. Although we believe the intention of these provisions are the same, the wording is not consistent. We recommend that both sections require the custodian provide the individual with a notice that sets out the reason for the refusal and states that the individual is entitled to make a complaint, as is currently the case in subsection 53(6).

Reply to Request for Correction

Paragraph (b) of subsection 53(3) allows the heath information custodian to extend the deadline for replying to a request for correction for 30 days if the time required to undertake consultations would make it not reasonably practical to respond within that time frame. While the intention of this provision is similar to that found in 52(3)(b), the wording is inconsistent. To make these two provisions consistent, we recommend that 53(3)(b) allow an extension if "consultations with a person who is not employed by or acting for or on behalf of the custodian are necessary to comply with the request and cannot reasonably be completed within the time limit."

Duty to Correct

Subsection 53(8) states that a health information custodian shall grant a request for correction if the individual demonstrates that the record is incomplete or inaccurate and provides the information necessary to enable the custodian to correct the record. However, in some cases, the health information custodian may already have the information necessary to correct the record. We recommend adding that the individual should only be required to provide the information necessary to enable the custodian to correct the record, "where appropriate."

Notice with Order

Subsection 60(3) requires the Commissioner to include, with a copy of an order, a notice setting out the Commissioner's reasons for the order. Consistent with our existing practices, our preference would be to require that the IPC include the reasons for an order within the order, rather than requiring an additional notice.