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Ann Cavoukian, Ph.D.
Information and Privacy Commissioner/Ontario

Fact Sheet

Long-term Care Homes Consent and Access under the *Personal Health Information Protection Act, 2004*

The *Personal Health Information Protection Act, 2004 (PHIPA)* requires health information custodians to obtain the consent of the individual or his or her substitute decision-maker prior to the collection, use or disclosure of personal health information unless *PHIPA* provides otherwise. *PHIPA* further requires health information custodians to provide an individual or his or her substitute decision-maker with a right to request access to records of personal health information about the individual.

1. Long-Term Care Homes as Health Information Custodians

Approved charitable homes for the aged within the meaning of the *Charitable Institutions Act*, homes or joint homes within the meaning of the *Homes for the Aged and Rest Homes Act* and nursing homes within the meaning of the *Nursing Homes Act* are defined as health information custodians and therefore must comply with *PHIPA*, including the provisions related to consent and access to records of personal health information. For purposes of this Fact Sheet, these charitable homes, homes or joint homes and nursing homes will be

collectively referred to as “long-term care homes.”

2. Consent for Collection, Use and Disclosure of Personal Health Information

a. Obtaining Consent Where the Resident is Capable

Where the resident is capable and *PHIPA* requires consent prior to the collection, use or disclosure of personal health information, the consent must be obtained from the resident or from any capable person sixteen years of age or older authorized in writing by the resident to provide the consent on his or her behalf. A resident is capable of consenting to the collection, use or disclosure of personal health information if the resident is able to:

- Understand information relevant to the decision of whether to consent to the collection, use or disclosure of personal health information, and
- Appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing consent.



Long-term care homes may presume that a resident is capable of consenting to the collection, use or disclosure of his or her personal health information unless it is unreasonable to do so.

b. Obtaining Consent Where the Resident is Incapable

Where a resident is incapable of consenting to the collection, use or disclosure of his or her personal health information, the following persons (in the following order of priority) may provide consent on behalf of the resident:

- A substitute decision-maker under section 9, section 39 and section 56 of the *Health Care Consent Act, 1996* if the purpose of the collection, use or disclosure is necessary for or ancillary to a decision about treatment under Part II, a decision about admission to a care facility under Part III or a decision about a personal assistance service under Part IV of the *Health Care Consent Act, 1996* respectively;
- The resident's guardian of the person or guardian of property, if the consent relates to the guardian's authority to make a decision on behalf of the resident;
- The resident's attorney for personal care or attorney for property, if the consent relates to the attorney's authority to make a decision on behalf of the resident;

- The resident's representative appointed by the Consent and Capacity Board;
- The resident's spouse or partner;
- A child or parent of the resident;
- A parent of the resident with only a right of access;
- A sibling of the resident; or
- Any other relative of the resident.

A person listed may consent on behalf of the resident only where there is no person ranked higher on the above list or where the person ranked higher in the list is incapable, unavailable or unwilling to make a decision of whether or not to consent.

c. Obtaining Consent Where the Resident is Deceased

Where a resident has died, the estate trustee or the person who assumed responsibility for the administration of the estate if the estate does not have an estate trustee, may consent to the collection, use or disclosure of personal health information on behalf of the resident.

3. Rights of Access to Records of Personal Health Information

A resident or his or her substitute decision-maker has a right of access to records of personal health information about the resident in the custody or control of a long-term care home, subject to certain exceptions set out in sections 51(1) and 52(1) of *PHIPA* such as:



- Where the record of personal health information is subject to a legal privilege;
- Where another *Act* or a court order prohibits the disclosure of the record of personal health information to the resident; or
- Where granting access could result in a risk of serious harm to the treatment or recovery of the resident or a risk of serious bodily harm to the resident or another person.

The provisions in the *Nursing Homes Act*, the *Homes for the Aged and Rest Homes Act* and the *Charitable Institutions Act* which enable a resident or his or her substitute decision-maker to request access to a resident's plan of care, do not limit the right of the resident or his or her substitute decision-maker to request access to any other record of personal health information in the custody or control of a long-term care home subject to the exceptions in *PHIPA*.

a. Persons Who May Make a Request for Access

Where the resident is capable, a request for access may be made by the resident or any capable person sixteen years of age or older authorized in writing by the resident to make the request for access on his or her behalf.

Where a resident is incapable, please refer to the list of persons under the heading "Obtaining Consent Where the Resident is Incapable" to determine who may make a request for access on behalf of the incapable resident.

Where a resident has died, the estate trustee or the person who assumed responsibility for

the administration of the estate if the estate does not have an estate trustee, may make a request for access to records of personal health information of the resident.

b. Responding to a Request for Access

When granting a request for access, a long-term care home must make the record available for examination or, upon request, provide the resident or his or her substitute decision-maker with a copy of the record as soon as possible but no later than thirty days after receipt of the request. The thirty day time limit may be extended in limited circumstances for a further thirty days upon written notice to the resident or his or her substitute decision-maker.

Where a long-term care home denies access, the long-term care home must provide the requester with a written notice in accordance with section 54(1) (c) or 54(1) (d) of *PHIPA*, depending on the nature of the exception relied on by the long-term care home in refusing the request for access.

Nothing in *PHIPA* prevents long-term care homes from granting the resident or his or her substitute decision-maker access to a record of personal health information, where no exceptions to the right of access are applicable, in circumstances where the resident or his or her substitute decision-maker makes an oral as opposed to a written request for access.

However, in order to trigger the formal process, the request for access must be in writing.



c. Fee for Access

Where a request for access is granted and a long-term care home makes a record of personal health information available or provides a copy to the resident or his or her substitute decision-maker, the long-term care home is entitled to charge the resident or his or her substitute decision-maker a fee that does not exceed the amount that is reasonable to enable the long-term care home to recover its costs, provided the long-term care home first gives the resident or his or her substitute decision-maker an estimate of the fee.

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Communications Department

Information and Privacy Commissioner/Ontario
2 Bloor Street East, Suite 1400
Toronto, Ontario M4W 1A8
Telephone: 416-326-3333 • 1-800-387-0073
Facsimile: 416-325-9195
TTY (Teletypewriter): 416-325-7539
Website: www.ipc.on.ca
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