

Sharing Personal Health Information Within and Among Ontario Health Teams

Nicole Minutti

Team Lead and Senior Health Policy Advisor
Information and Privacy Commissioner of Ontario



Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

CANADIAN MENTAL
HEALTH ASSOC.
(CMHA) ONTARIO

Aug 10, 2022

Overview

- About the Office of the Information and Privacy Commissioner of Ontario
- Application of PHIPA
- Consent under PHIPA
- PHIPA's Limiting Principles
- *The Connecting Care Act, 2019*
- Sharing Personal Health Information Within an Ontario Health Team
- Sharing Personal Health Information Among Ontario Health Teams



The Office of the Information and Privacy Commissioner of Ontario

Information and Privacy Commissioner of Ontario

- Ontario's Information and Privacy Commissioner is an officer of the legislature
 - Appointed by and reports to the Legislative Assembly of Ontario
 - Independent of the government of the day
- The IPC has authority under the following laws:
 - *Freedom of Information and Protection of Privacy Act* (FIPPA)
 - *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA)
 - *Personal Health Information Protection Act, 2004* (PHIPA)
 - *Child, Youth and Family Services Act, 2017* (CYFSA)
 - *Anti-Racism Act, 2017* (ARA)
 - *Coroners Act*

IPC Role and Mandate

- In addition to overseeing provincial access and privacy laws, the office of the IPC also serves the government, public institutions and the public through its mandate to:
 - Resolve appeals when access to information is refused
 - Investigate privacy complaints related to personal information
 - Ensure compliance with the province's access and privacy laws
 - Review privacy policies and information management practices
 - Conduct research on access and privacy issues and provide comment on proposed legislation and government programs
 - Educate the public, media and other stakeholders about Ontario's access and privacy laws and current issues affecting access and privacy

Application of PHIPA

Application of PHIPA

- Ontario's *Personal Health Information Protection Act, 2004* (PHIPA) sets out rules for the collection, use and disclosure of personal health information (PHI) by health information custodians.
- PHIPA applies to:
 - PHI in the custody or control of health information custodians; and
 - Agents of custodians

Personal Health Information

- PHI is identifying information about an individual in oral or recorded form that:
 - Relates to an individual's physical or mental health
 - Relates to the provision of health care to the individual
 - Is a plan that sets out the home and community care services for the individual to be provided by a health service provider or Ontario Health Team pursuant to funding under section 21 of the *Connecting Care Act, 2019*
 - Relates to payments or eligibility for health care
 - Relates to the donation of body parts or bodily substances
 - Is the individual's health number
 - Identifies an individual's substitute decision-maker

Health Information Custodians

- Health information custodians (custodians) include:
 - Health care practitioners who provides health care
 - Group practices of health care practitioners who provide health care
 - Health service providers that are part of an Ontario Health Team and that provide a home and community care service pursuant to funding under the *Connecting Care Act, 2019*, including a person or entity from whom the provider or Team has purchased the home and community care service
 - Hospitals, psychiatric facilities and independent health facilities
 - Long-term care homes, retirement homes and homes for special care
 - Pharmacies, ambulance services, labs and specimen collection centres
 - Centres, programs, or services for community health or mental health whose primary purpose is the provision of health care
 - Medical Officers of Health of a board of health (*public health units*)
 - Minister/Ministry of Health

Agents

- A person that, with the authorization of a custodian, acts for or on behalf of the custodian in respect of PHI.
- Agents do not have to be paid by the custodian in order to be considered an agent under PHIPA.
- Custodians remain responsible for any PHI that is collected, used, disclosed, retained or disposed of by their agents.



Consent under PHIPA

Consent under PHIPA

- Custodians shall not collect, use or disclose PHI unless:
 - Consent of the individual has been obtained; or
 - Collection, use or disclosure is permitted or required to be made without consent.
- PHIPA sets out the requirements of valid consent.
- There are three types of consent under the PHIPA:
 - Express;
 - Implied; and
 - Assumed implied

Valid Consent

- For consent to be valid, the consent must:
 - Be the consent of the individual or his or her substitute decision-maker
 - Be knowledgeable
 - It must be reasonable to believe that the individual knows the purpose of the collection, use or disclosure and that he or she may give or withhold consent
 - This is not the same as “informed” consent
 - Relate to the information, and
 - Not be obtained by deception or coercion.

Express Consent

- Express consent is not a defined term in PHIPA
- Consent may be express or implied, except when it must be express
- Express consent is required in the following situations:
 - When a custodian discloses PHI to a non-custodian (some exceptions)
 - When a custodian discloses PHI to another custodian for a purpose other than for the provision of health care
 - When collecting, using or disclosing PHI for marketing or fundraising*
 - *for fundraising purposes, express consent is required if collecting, using or disclosing more than the name and address of the individual

Implied Consent

- Implied consent is not a defined term in PHIPA
- Generally, when express consent is not required prior to the collection, use or disclosure of PHI, custodians may rely on implied consent
- Consent may be implied to:
 - Collect or use PHI for most purposes, with some exceptions
 - Disclose PHI to another custodian for the purpose of providing or assisting in providing health care
- Although PHIPA permits custodians to rely on implied consent, they are not required to rely on implied consent

Assumed Implied Consent: The Circle of Care

- Certain custodians may assume implied consent to collect, use or disclose PHI in certain circumstances.
- The assumed implied consent provisions have come to be referred to as the “circle of care” provisions although “circle of care” does not appear in PHIPA.
- In order to rely on assumed implied consent all of six conditions of assumed implied consent must be met.

Six Conditions for Assumed Implied Consent

1. The custodian must fall within the category of custodians entitled to rely upon assumed implied consent,
2. The PHI in question must have been received from the individual to whom the information pertains, his/her substitute decision-maker, or another custodian,
3. The PHI must have been received for the provision of health care to the individual,
4. The purpose of the collection, use, or disclosure must be for the purpose of providing health care to the individual to whom the information relates,
5. In the context of a disclosure, the disclosure must be to another custodian, and
6. The custodian that receives PHI must not be aware that the individual has expressly withheld or withdrawn consent.

Custodians who May Rely on Assumed Implied Consent

The custodian must fall within the category of custodians entitled to rely upon assumed implied consent:

- Health care practitioners
- Home and community care services part of an Ontario Health Team
- Long-term care homes
- Hospitals
- Pharmacies
- Labs, specimen collection centres and independent health facilities
- Centre, program or service for community health or mental health
- Ambulance services
- Medical Officers of Health (public health units)

Implied vs Assumed Implied Consent

- In the case of implied consent, custodians must ensure that the consent is valid (for example, that it is knowledgeable) before collecting, using and disclosing PHI.
- In the case of assumed implied consent, custodians may assume that all the elements of consent are fulfilled.
- Unless consent has been withheld or withdrawn, custodians may assume they have the individual's implied consent for providing health care within the "circle of care."



PHIPA's Limiting Principles

PHIPA's "Limiting Principles"

- In general, custodians may not:
 - Collect, use or disclose PHI if other information will serve the purpose
 - Collect, use or disclose more PHI than is reasonably necessary to meet the purpose



The *Connecting Care Act*, 2019

Connecting Care Act, 2019

- The *Connecting Care Act, 2019* (CCA) was proclaimed into force on June 6, 2019.
- It proposes to transform the health system through, among other things, the:
 - Establishment of Ontario Health
 - Creation of Ontario Health Teams

Ontario Health

In 2019, the CCA created a single agency, Ontario Health, to assume centralized responsibilities for several pre-existing agencies. The below agencies and their operations have been transferred to Ontario Health through transfer orders issued by the Minister of Health:

- Cardiac Care Network of Ontario (CorHealth)
- Trillium Gift of Life Network
- Ontario Telemedicine Network
- Cancer Care Ontario
- eHealth Ontario
- HealthForceOntario Marketing and Recruitment Agency
- Health Quality Ontario
- Health Shared Services Ontario
- And parts of the following Local Health Integration Networks (LHINs) / Ontario Health Regions
 - Central LHIN
 - Central East LHIN
 - Central West LHIN
 - Champlain LHIN
 - Erie St. Clair LHIN
 - Hamilton Niagara Haldimand Brant LHIN
 - Mississauga Halton LHIN
 - North East LHIN
 - North Simcoe Muskoka LHIN
 - North West LHIN
 - South East LHIN
 - South West LHIN
 - Toronto Central LHIN
 - Waterloo Wellington LHIN

Responsibilities of Ontario Health

Ontario Health is expected to integrate the following key responsibilities:

System Management and Performance

- overseeing the delivery of health care
- improving the quality of care
- measuring and managing how the system performs
- enabling innovation
- ensuring financial accountability
- providing clinical leadership

Population-Based Programs and Clinical and Quality Standards

- overseeing highly specialized care (for example: cancer, organ donation)
- managing provincial population health programs (for example: cancer screening)
- investigating and supporting new and emerging health services
- developing evidence-based advice for delivering health services and clinical care

<https://www.ontario.ca/page/ontario-health-agency>

Responsibilities of Ontario Health

Back Office Support

- accountability for an integrated supply chain for health care products and services
- shared information technology resources

System Oversight

- assessing and planning for local needs
- holding accountability for Ontario Health Teams in the future

Ontario Health Teams

- Under the CCA, the Minister of Health may designate a person, entity or group as an Ontario Health Team (OHT).
- OHTs must be able to deliver integrated and coordinated services in at least three areas identified in the CCA (e.g. hospital, primary care services, **mental health or addictions services**, community support services, etc.).
- Guidance provided by the ministry defines OHTs as *“groups of providers and organizations that, at maturity, will be clinically and fiscally accountable for delivering a full and coordinated continuum of care to a defined population.”*
- 51 OHTs have been announced and will cover 95% of Ontarians at maturity.

Ontario Health Teams and their Constituents

- The CCA sets out that Ontario Health and each health service provider and OHT shall separately and in conjunction with each other identify opportunities to integrate the services of the health system to provide appropriate, coordinated, effective and efficient services.
- Under the CCA, any obligation, power or decision that applies to an OHT also applies to each constituent of the OHT.
- Ministry guidance sets out that OHTs are to determine for themselves how to self-organize and what governance structure(s) work best for them, their patients/clients and their communities.
- At maturity, OHTs will work under a single accountability framework and an integrated funding envelope.

Recent Legislative Amendments Related to OHTs

- Earlier this year, Bill 106 amended PHIPA's regulation-making authority concerning OHTs.
- These amendments allow regulations to be made governing matters such as the collection, use and disclosure of PHI by OHTs, including undesignated OHTs.
- However, the regulation-making authority has not been exercised yet.



Sharing Personal Health Information Within an Ontario Health Team

Ontario Health Teams: Obligations under PHIPA

- OHTs must comply with the provisions of PHIPA.
- Each constituent of an OHT continues to have its own obligations under PHIPA.
- A designation by the Minister as an OHT does not mean the OHT is a single custodian for the purposes of complying with PHIPA.
- Although PHIPA (s.3(8)) provides authority for the Minister to make an order permitting applicants to act as a single custodian:
 - In making the order, the Minister must have regard to:
 - Public interest
 - Ability of applicants to provide individuals with reasonable access to their PHI
 - Ability of the applicants to comply with PHIPA
 - Whether permitting the applicants to act as a single custodian is necessary to enable them to effectively provide integrated care
 - All applicants to become a single custodian must be custodians

Sharing PHI in an OHT: When All Constituents are Custodians

- Sharing of PHI between two constituents within an OHT requires a disclosure by one custodian and a collection by the other.
- Constituents of OHTs who are custodians may rely on implied or assumed implied consent to share PHI, if all conditions for consent are met.
- If not all conditions are met, express consent may be required.
- For example, when a custodian constituent within an OHT discloses PHI to another custodian constituent within the same OHT for a purpose other than for the provision of health care that is not otherwise permitted by law.
- Reminder: PHIPA's limiting principles continue to apply.

An Example of an OHT

About the North Toronto OHT

Our team

Current members of the team include:

- Baycrest
- LOFT Community Services
- Patients, families and caregivers
- Primary care providers
- SE Health
- SPRINT Senior Care
- Sunnybrook
- Toronto Central LHIN (Home and Community Care)
- Unison Health & Community Services
- VHA Home HealthCare
- Vibrant Healthcare Alliance

We are committed to expanding our mandate and membership to include other interested organizations.



Sharing PHI in an OHT: When Some Constituents are Not Custodians

- Sharing of PHI between two constituents within an OHT requires a disclosure and a collection.
- In most circumstances, express consent is required when a custodian discloses PHI to a non-custodian.
- Custodians are permitted to collect PHI indirectly when, for example:
 - The individual consents
 - The information is reasonably necessary for providing health care to the individual and it is not reasonably possible to collect the PHI directly from the individual
- Sharing of PHI in OHTs between custodians and non-custodians will usually require the individual's express consent.

Ontario Health Teams: Compliance with PHIPA

- To assist in ensuring compliance with PHIPA, OHTs should:
 - Identify all of the constituents (and any other participants) in the OHT
 - Determine whether each constituent is a custodian
 - Identify the purpose(s) of each collection, use and disclosure of PHI
 - Determine whether there is authority for each collection, use and disclosure
 - If the authority is based on consent, determine the type of consent required (express/implied/assumed implied)
 - Develop a governance framework and harmonized policies and procedures
 - The government requires OHTs to develop a Harmonized Information Management Plan
 - Be transparent with patients/clients about the information practices

Transparency Regarding Information Practices

OHTs are expected to have public facing documents that:

- Identify the OHT (including all constituents and other participating organizations)
- Describe its governance structure
- Describe the PHI that will be collected
- Identify the purpose(s) for which the information will be collected and used
- Identify to whom and the purposes for which the information will be disclosed
- Describe how individuals may withhold or withdraw consent
- Describe how individuals may make requests for access or correction
- Identify the person to contact if they have questions or concerns

Harmonized Information Management Plans

- The government has produced guidance for OHTs regarding Harmonized Information Management Plans (HIMPs).
- The guidance states that OHTs require timely and shared access to quality data and information to enable effective and efficient care delivery.
- HIMPs have been identified as a way to meet the OHT's goals of integrated care while protecting the privacy of patient/clients' PHI (and PI, where relevant).
- HIMPs will also help ensure legal requirements are met and high standards of information protection and ethical practices are consistently observed across all OHT constituents.

https://www.health.gov.on.ca/en/pro/programs/connectedcare/oht/docs/HIMP_guidance.pdf



Harmonized Information Management Plans: Components

- Information governance and accountability structures and processes, including for data management and privacy.
- Data management plans (identifying core data sets, data sources, and data flows between OHT constituents and other health system partners).
- Proposed and actual digital health solutions to support the implementation of plans and tactics for information management (where appropriate).
- Privacy considerations and implications (including key privacy impact assessment findings, authorities under PHIPA, harmonizing privacy policies, practices and procedures, and controls and safeguards to ensure the protection of PHI).
- Any technical and security considerations, highlighting any additional measures that may need to be put in place.

Harmonized Policies and Procedures

- The IPC expects that harmonized privacy policies, procedures, and practices will address areas such as:
 - Privacy training
 - Privacy assurance
 - Logging, auditing and monitoring
 - Consent management
 - Privacy breach management
 - Privacy complaints and inquiries management
 - Access and correction
 - Governance

The background is a solid teal color. On the left side, there is a large, semi-transparent green speech bubble graphic that points towards the right. The text is centered horizontally and vertically within the frame.

Sharing Personal Health Information Among Ontario Health Teams

Sharing PHI Among OHTs

- Remember:
 - Each constituent of an OHT continues to have its own obligations under PHIPA.
 - A designation by the Minister as an OHT does not mean the OHT is a single custodian for the purposes of complying with PHIPA.
- Custodian constituents may continue to collect, use and disclose PHI to other custodians (within or outside OHTs) as authorized under PHIPA.
- OHTs are expected to have varying governance frameworks and data sharing agreements that set out the authorities of each constituent with regard to the sharing of PHI among OHTs.

Information and Privacy Commissioner of Ontario

2 Bloor Street East, Suite 1400

Toronto, Ontario, Canada M4W 1A8

Phone: (416) 326-3333 / 1-800-387-0073

TDD/TTY: 416-325-7539

Web: www.ipc.on.ca

E-mail: info@ipc.on.ca

Media: media@ipc.on.ca / 416-326-3965