

Health Law Privacy In Schools

Dara Lambie

Legal Counsel



Information and Privacy
Commissioner of Ontario

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

Osgoode
Professional
Development

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Information and Privacy Commissioner of Ontario

- **Patricia Kosseim**—appointed by Ontario Legislature (July 1, 2020)
- 5 year term
- The Commissioner is an officer of the Legislature who is appointed by and reports to the Legislative Assembly of Ontario, and is independent of the government of the day



Information and Privacy Commissioner of Ontario

- The IPC's mandate:
 - investigate privacy complaints related to personal information
 - resolve appeals when there is a refusal to grant access to information
 - ensure compliance with the acts
 - review privacy policies and information practices
 - conduct research on access and privacy issues and provide comment on proposed government legislation and programs
 - reach out and educate the public, media and other stakeholders about Ontario's access and privacy laws and current issues affecting access and privacy

<https://www.ipc.on.ca/about-us/role-and-mandate/>



*Personal Health Information
Protection Act*

The *Personal Health Information Protection Act (PHIPA)*

- Applies to the collection, use and disclosure of **personal health information** by **health information custodians** and to the use or disclosure of **personal health information** by a person to whom a health information custodian disclosed the information
- Some parts apply to others (agents, electronic service providers, health information network providers, prescribed registries and entities, the operator of the provincial Electronic Health Record)

What is Personal Health Information?

- **Identifying information** about an individual in oral or recorded form that relates to:
 - the **physical or mental health** of the individual, including their family health history
 - **providing health care** to the individual, including **identifying a health care provider**
 - payments or eligibility for health care or health care coverage
 - the individual's **health number**
 - the donation or testing of body parts or bodily substances
 - the identification of the individual's substitute decision-maker

Who is a Health Information Custodian?

- Most individuals and organizations involved in the delivery of **health care** in Ontario are health information custodians, including:
 - **health care practitioners**
 - such as physicians, nurses, psychologists, speech-language pathologists, dental hygienists, optometrists, and social workers providing health care
 - a person who operates a group practice of health care practitioners
 - a community health or mental health centre, program or service whose primary purpose is the provision of health care

What is Health Care?

- Health care includes any health-related observation, examination, assessment, care, service or procedure provided to individuals to:
 - diagnose, treat, or maintain their physical or mental wellbeing
 - prevent disease or injury
 - promote health
- Examples in schools include:
 - providing care to a student who is not feeling well
 - providing psychological counselling
 - conducting an assessment—e.g. dental, vision, speech etc.

Health Information Custodians in Schools

Q: Who is the health information custodian when a health care practitioner provides health care to a student in school?

A: *It depends* on the way the relationship between the school and the health care practitioner is structured.

Health Information Custodians in Schools

1. A **school/school board** may be the custodian if the school is:
 - operating a group practice of practitioners, or
 - operating a centre, program or service for community or mental health whose primary purpose is providing health care
 2. A **health care practitioner** may be the custodian
 - a) The custodian may be an individual health care practitioner who provides the service to the school; or
 - b) The custodian may be a person who operates a group practice of practitioners who provide the services to the school
- If the custodian is the school or a person who operates a group practice, then individual health care practitioners would likely be **agents** to the custodian

Health Information Custodians in Schools

- Different arrangements are possible
- Employment contracts, service agreements, or other agreements should set out who is the custodian responsible for carrying out the duties and responsibilities required by *PHIPA*
- It should be clear to students and parents who the custodian is and a contact person must be identified

Health Information Custodians in Schools

- When determining who is the health information custodian, practitioners and schools should consider:
 - Who is in the best position to communicate with students and parents?
 - Who decides what information is to be collected and how it will be used and disclosed?
 - Where will records be maintained and who will ultimately be responsible for them?
 - What will happen when health care practitioners change positions?

Health Information Custodians And Institutions

- Institutions under the *Freedom of Information and Protection of Privacy Act (FIPPA)* (e.g. a University) or the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* (e.g. a school board) may have custody and control of personal health information
- Section 8 of the *PHIPA* sets out rules regarding how *PHIPA* and *FIPPA/MFIPPA* apply to records of personal health information that are in the custody and control of a *FIPPA/MFIPPA* institution
- Apply primarily to how a custodian/institution must respond to access requests

Obligations on Health Information Custodians— Collection, Use and Disclosure

- Custodians may only collect, use or disclose a student's health information if:
 - they have consent from the student or parent* and it is necessary for a lawful purpose, or
 - it is permitted or required by *PHIPA*
- *Consider who is authorized to provide consent

Obligations on Health Information Custodians— Collection, Use and Disclosure

- Custodians can only transfer student health records to a successor if the custodian makes reasonable efforts to give notice to the student or parent before transferring the records, or if this is not possible, as soon as is possible after the transfer

Who Can Consent?

AGE	CAPACITY	DECISION MAKER
Any age	If capable	Can consent to collection, use and disclosure of their personal health information
Over age of 16	If capable	Can authorize in writing a capable person 16 years of age or older to act on their behalf
Any age	If incapable	A substitute decision-maker must make decisions about collection, use and disclosure of personal health information
Under age of 16	If capable	<p>Can consent to collection, use and disclosure of their personal health information <u>AND</u> A parent can also consent to collection, use and disclosure of individual's personal health information <u>EXCEPT</u> with respect counselling under the <i>Child, Youth and Family Services Act</i> or to treatment that the child has made a decision about on their own **The decision of a capable child prevails over a conflicting decision of a parent</p>

Who is Capable?

- A person who is able:
 - to **understand the information that is relevant** to deciding whether to consent to the collection, use or disclosure of personal health information; and
 - to understand the **reasonably foreseeable consequences** of giving or withholding consent

Obligations on Health Information Custodians— Security

- Custodians must take **reasonable steps** to keep health information secure

Administrative	Technical	Physical
<ul style="list-style-type: none"> • privacy and security policies • auditing compliance with rules • privacy and security training • data minimization • confidentiality agreements • Privacy Impact Assessments 	<ul style="list-style-type: none"> • strong authentication and access controls • detailed logging, auditing, monitoring • strong passwords, encryption • patch and change management • firewalls, anti-virus, anti-spam, anti-spyware • protection against malicious code • Threat Risk Assessments, ethical hacks 	<ul style="list-style-type: none"> • controlled access to premises • controlled access to locations within premises where PI is stored • access cards and keys • ID, screening, supervision of visitors <p>NOTE – when determining appropriate safeguards consider</p> <ul style="list-style-type: none"> • sensitivity and amount of information • number and nature of people with access to the information • threats and risks associated with the information

Obligations on Health Information Custodians— Access and Correction

- Individuals have a **right to access** their health records that are held by a custodian
- Individuals also have the **right to request correction** of their health records if the record is inaccurate or incomplete

Obligations on Health Information Custodians— Transparency

- Custodians must designate a **contact person** responsible for:
 - Compliance with PHIPA
 - Responding to inquiries and complaints about the custodian’s information practices
 - Responding to requests for access or correction of records
- A health information custodian must have a **written public statement** that describes:
 - The custodian’s information practices
 - How to reach the contact person
 - How an individual may obtain access to or request correction of a record
 - How to make a complaint to the custodian and the IPC

Health Numbers

- If the school/school board is not the custodian it cannot collect, use or disclose a student's health number
 - Except—for certain purposes, such as providing publicly funded health care services
- Cannot require students to present a health card for other purposes such as to identify a student for registration

Immunization of School Pupils Act

- Public health units are required by the *Immunization of School Pupils Act* to keep up-to-date immunization records for every student in respect to nine designated diseases
- Doctors and nurses are required to provide parents with proof that a vaccine was administered
- Parents are required to provide evidence of immunization to public health unit
- Schools are required to provide a list of students to public health units
- If a student's immunization record is incomplete, a health unit can send the school a written order to suspend the student until evidence of the immunization is provided to the public health unit

COVID-19

- Immunization information; test results; infection information
 - Does PHIPA apply to the information?
 - What other laws may apply
 - *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* and regulations
 - Eg. Vaccine certificate program
 - Employment and labour law (with respect to employers collecting, using or disclosing COVID-19 related information about employees or vaccine mandates)
 - Human rights legislation (with respect to medical exemptions)
- Some existing and new rules in *PHIPA* provide for the ability to share information related to COVID-19 for public health and research purposes
- IPC has published a number of resources relating to COVID-19 (see resources section below)



Resources from the Office of the Information and Privacy Commissioner

A Guide to the *Personal Health Information Protection Act*

- Provides guidance to health information custodians regarding their obligations under the *Personal Health Information Protection Act*



A Guide to the *Personal Health Information Protection Act*

December 2004



A Guide to Privacy and Access to Information in Ontario Schools

- Provides guidance to school boards with respect to collection, use, disclosure of personal information under the *Municipal Freedom of Information and Protection of Privacy* legislation
- Section on *Collection, Use and Disclosure of Health Information* applies to collection, use and disclosure of personal health information



A Guide to Privacy and Access to Information in Ontario Schools



Health Information Custodians Working for Non-Health Information Custodians

- Examples of Custodians Working for Non-Custodians—including for school boards
- Responsibilities of Custodians
- Disclosure of Personal Health Information by Custodians
- Health Information Records Kept In Other Places



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Fact Sheet

Health Information Custodians Working for Non-Health Information Custodians

The *Personal Health Information Protection Act, 2004 (PHIPA)* sets out rules for the collection, use and disclosure of personal health information by health information custodians (custodians).

While these rules are generally the same for all custodians, special considerations may apply in the case of custodians working for non-custodians.

What is a Health Information Custodian?

As defined in *PHIPA*, health information custodians include health care practitioners (see below), hospitals, psychiatric facilities, pharmacies, laboratories, nursing homes and long-term care facilities, homes for the aged and homes for special care, community care access corporations, ambulance services, boards of health, the Minister of Health and Long-Term Care and the Canadian Blood Services.

PHIPA defines a health care practitioner as: a person who is a member within the meaning of the *Regulated Health Professions Act, 1991* who provides health care; a person registered as a drugless practitioner under the *Drugless Practitioners Act* who provides health care; a person who is a member of the Ontario College of Social Workers and Social Service Workers who

provides health care; and any other person whose primary function is to provide health care for payment. Examples of health care practitioners include: doctors, nurses, audiologists and speech-language pathologists, chiropractors, chiropodists, dental professionals, dietitians, medical radiation technologists, medical laboratory technologists, massage therapists, midwives, optometrists, occupational therapists, opticians, pharmacists, physiotherapists, psychologists and respiratory therapists.

PHIPA defines health care as 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;
- to prevent disease or injury or to promote health; or
- as part of palliative care.

Persons who do not provide health care are not health care practitioners.

Examples of Custodians Working for Non-Custodians

There are many examples of custodians working for non-custodians, including:



COVID-19 Resources from the IPC

- General: [COVID-19 Information and Resources](#)
- [Ontario's Vaccine Certificate Program](#)
- [Remote learning and student privacy](#)
- [Privacy and vaccination status](#)
- [Data protection while working from home](#)
 - [Privacy Fact Sheet: Working from home during the COVID-19 pandemic](#)



Scenarios

Scenario #1

- A student trips and falls on the playground and scrapes his knee. A teacher helps him wash it off and gives him a bandage. The teacher sends a short email to the student's parent telling them what happened.
 - Is this personal health information? Does PHIPA apply?
 - What factors do you need to consider?
- Is the teacher a health information custodian?
- Is the teacher providing health care?

Scenario #2

- A school board hires a dental hygienist to perform dental assessments of all kindergarten aged students.
 - Who is responsible for ensuring that the records of the assessments are securely stored?
 - What factors do you need to consider?
- What agreements are in place between the school board and the dental hygienist?
- What do they say about who is the custodian?
- What obligations do the agreements impose on both parties with respect to retention and safeguarding of the records?

Scenario #2 Continued

- Assume that the employment agreement with the dental hygienist specifies that the school board is the health information custodian. A parent contacts the school principal and asks to obtain a copy of the record of their child's assessment?
 - What is the responsibility of the school principal? The school board? The dental hygienist?
 - Is the parent entitled to receive a copy of the assessment?
 - What things do you need to consider?
- Does the principal know who the contact person is for the custodian? Can they direct individuals to that person?
- Can the parents request access to the child's record on behalf of the child?

Scenario #3

- A 17 year old student receives a vaccination at a clinic held at her school. Her parent calls the school wanting to receive a copy of the vaccination record.
 - Can the school give a copy to the parents?
 - What factors do you need to consider?
- Can a parent make decisions about collection, use and disclosure of personal health information of individuals who are over 16?
- Did the 17 year old student authorize the parents to receive this information?

Scenario #3 Continued

- What if the student was 14 years old?
 - What factors do you need to consider?
- Is the student capable?
- Did the student make a decision about treatment on their own?
- Did the student say they didn't want a copy provided to their parent?
- Can the student authorize someone else to act on their behalf?

HOW TO CONTACT US

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