

What's New at the IPC

Brian Beamish
Information and Privacy
Commissioner

PHIPA Connections Summit
December 3, 2015

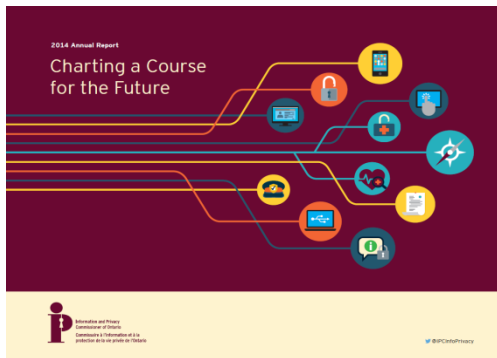
Strategic Direction

- 2015 has seen a re-focusing of IPC priorities:
 - Focus on Ontario
 - Practical advice to Ontario institutions and organizations
 - Co-operative consultations on legislative initiatives
 - Ensure IPC is an efficient, effective tribunal

Updating PHIPA



Recommendation in Support of *ePHIPA* from our 2014 Annual Report



Recommendation

EHRs have the potential to improve treatment, enhance safety, and facilitate the coordination of services, resulting in a more efficient and effective health-care system. Over the coming years, Ontario's health-care system will need to adapt to rapid changes in technology, including EHRs. Consequently, there is a growing need for a legislative framework to address PHI in an increasingly digital and interconnected world.

While *PHIPA* has served Ontario admirably over the last decade, it does not adequately address the rights of individuals and the duties of HICs in an EHR environment. The IPC recommends that the government re-introduce the *Electronic Personal Health Information Protection Act*. This legislation will amend *PHIPA* to clarify how the privacy of patients and the confidentiality of their PHI will continue to be protected as the health-care sector transitions to electronic systems.



Newsroom

News Release

Ontario Taking Action to Protect Patient Privacy and Improve Transparency

Strengthening Privacy, Accountability and Transparency in the Health Care System

September 16, 2015 9:00 A.M. | Ministry of Health and Long-Term Care

Ontario intends to introduce legislation today that, if passed, would improve privacy, accountability and transparency in the health care system with new measures that put patients first.

The Health Information Protection Act would amend existing legislation to protect the personal health information of patients. Some of these changes would include:

- Making it mandatory to report privacy breaches, as defined in regulation, to the Information and Privacy Commissioner and to relevant regulatory colleges.
- Strengthening the process to prosecute offences under the Personal Health Information Protection Act by removing the requirement that prosecutions must be commenced within six months of when the alleged offence occurred.
- Doubling the maximum fines for offences from \$50,000 to \$100,000 for individuals and from \$250,000 to \$500,000 for organizations.

The Health Information Protection Act would also update the Quality of Care Information Protection Act (QCIPA) to help increase transparency and maintain quality in Ontario's health care system. If passed, this new bill would:

- Affirm the rights of patients to access information about their own health care.
- Clarify that certain information and facts about critical incidents cannot be withheld from affected patients and their families.
- Require the Minister of Health and Long-Term Care to review QCIPA every five years.

Ontario is also carrying out other recommendations made by an expert committee that reviewed QCIPA to improve transparency in critical incidents. These include ensuring patients or their representatives are interviewed as part of a critical incident investigation, and are informed of the cause of the incident, if known.

"People in Ontario deserve to know that they are protected by a health care system that is accountable, transparent and keeps their personal health information private. Our government is introducing amendments that, if passed, will keep Ontario at the forefront of protecting the privacy of health records. We are also introducing an improved Quality of Care Information Protection Act so that patients and their families will be kept informed and will have their voices heard during an investigation into a critical incident."

Dr. Eric Hoskins

Minister of Health and Long-Term Care



Bill 119

- Introduced on September 16, 2015 – similar to Bill 78
- In relation to the shared provincial electronic health record (EHR), the Bill:
 - Sets out rules for collection, use and disclosure;
 - Establishes processes by which individuals can implement consent directives; and
 - Establishes processes by which individuals access their records of PHI.

Additional Features

- The Bill proposes to:
 - Require privacy breaches to be reported to the IPC and to relevant regulatory colleges;
 - Remove the six month limitation period for prosecutions; and
 - Double fines for offences to \$100,000 for individuals and \$500,000 for organizations.

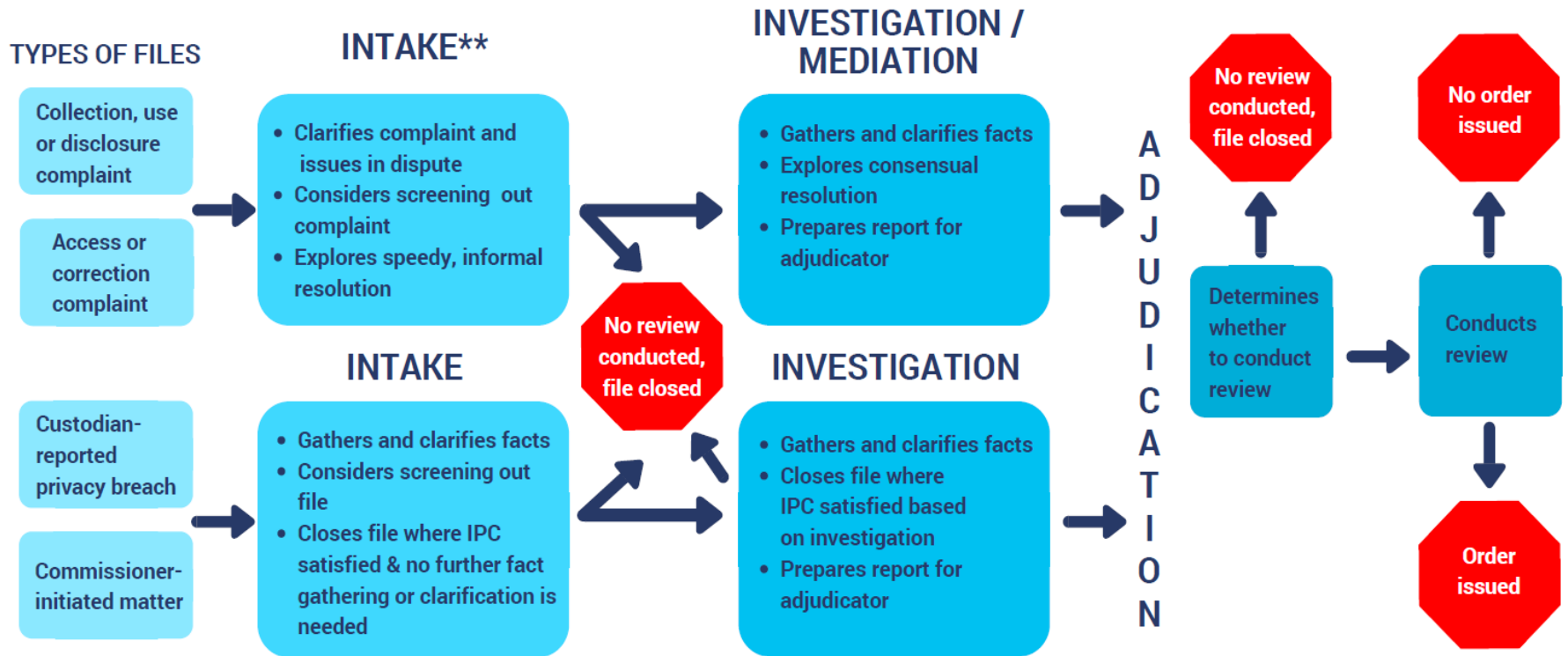
PHIPA Process Review

PHIPA Process Review

- 10+ years of experience handling *PHIPA* complaints.
- Volume of complaints will continue to increase with no expectation of increased resources.
- Are changes to our processes required for efficiency, fairness, consistency?
- Are IPC processes transparent enough to the public/custodians?
- Can we do a better job of providing precedents and guidance through our tribunal function?

Simplifying the *PHIPA* Process

PHIPA Pilot Project Process*



* The above process may be varied at the discretion of the IPC to achieve the fair, just and timely resolution of proceedings before the Commissioner or his delegates. Note specifically that urgent matters may be expedited to the adjudication stage.

** In addition to the general procedures outlined in the above flowchart, Intake also adjudicates time-sensitive complaints related to deemed refusals, failures to provide access and expedited access requests.

NEW *PHIPA* PROCESSES

- As a result of these changes, the IPC will now be:
 - publishing an expanded range of *PHIPA* decisions;
 - clarifying the roles and responsibilities of the three stages of the tribunal processes: Intake; Investigation/Mediation; and Adjudication;
 - following similar processes for all types of complaints.

First Two PHIPA Decisions

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 15

Complaint HA14-76

Dr. Raymond Morris

August 24, 2015

Summary: The complainant made a request under section 55 of the *Personal Health Information Protection Act, 2004 (PHIPA)* to a psychologist to correct a Custody and Access Assessment Report that the psychologist had completed at the request of legal counsel for the parents of a child. The complainant is one of the parents. The psychologist denied the complainant's request. In this review of the complaint, the psychologist takes the position that he was not a "health information custodian" for the purpose of the Custody and Access Assessment Report. In this decision, the adjudicator finds that the psychologist was not a "health information custodian" within the meaning of that term in section 3(1) of *PHIPA* for the purpose of preparing the Custody and Access Assessment Report. The right to request a correction under *PHIPA* therefore does not apply and there is no basis for a complaint about the denial of the complainant's correction request.

Statutes Considered: *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched. A, as amended, sections 2 (definition of health care and health care practitioner), 3(1), 20(2) and 55(1).

Cases Considered: *Hooper v. College of Nurses of Ontario* (2006), 81 O.R. (3d) 296 (Div. Ct.); *Wyndowe v. Rousseau*, 2008 FCA 39.

Decisions Considered: HC-050014-1.

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 16

Complaint HC13-37

September 14, 2015

Summary: In this decision the IPC refuses a request by a doctor to defer a review of a collection, use and disclosure complaint, pending the completion of related proceedings before the College of Physicians and Surgeons of Ontario.

Statutes considered: *Personal Health Information Protection Act, 2004*, sections 57(4) and 60(16); *Regulated Health Professions Act, 1991*, section 36(3).

Cases Considered: *Farris v. Staubach Ontario Inc.*, 2004 CanLII 11325 (ON SC); *Hollinger International Inc. v. Hollinger Inc.*, 2004 CanLII 7352 (ON SC) aff'd 2004 CanLII 48063 (ON CA); *Cork v. Cork*, 2014 ONSC 2488 (CanLII)

INTRODUCTION

[1] In this complaint under the *Personal Health Information Protection Act, 2004 (PHIPA or the Act)*, a former patient of a medical clinic alleges that her ex-spouse obtained her medical records from the clinic and from a hospital without her consent. The complainant's ex-spouse, who is a physician, worked at the clinic for a period of time. The complainant alleges that her ex-spouse was not her health care provider, that he gained access to her medical records through deception, and that he subsequently wrongfully disclosed her personal health information in a court proceeding.

[2] I decided to initiate a review of the complaint under section 57(3) of *PHIPA*, and sent a Notice of Review to the complainant's ex-spouse (who I will refer to here as "the respondent"). Counsel for the respondent requested that I defer my review of the




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PHIPA Decision 17

- Issued Nov. 10, 2015;
- First IPC Decision examining application of *PHIPA* and *FIPPA* to a request made to a hospital;
- Decision discusses:
 - Status of hospital under the acts;
 - Application of *PHIPA/FIPPA* to records;
 - Meaning of “primarily dedicated” to health care;
 - Ability of complainant to make request on behalf of wife/daughter.

Information and Privacy Commissioner,
Ontario, Canada



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

PHIPA DECISION 17

Complaint/Appeal PA12-256

Mackenzie Health

November 10, 2015

Summary: This decision addresses a number of issues arising in a complex complaint and appeal of a decision made by a hospital in response to a request for access to records relating to the birth and death of an infant and the care given to the mother and child at the hospital. As the hospital is subject to both the *Personal Health Information Protection Act (PHIPA)* and the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the adjudicator in this decision addresses matters arising under both statutes through a combined review under *PHIPA* and inquiry under *FIPPA*. Among these are preliminary issues concerning the status of the hospital under the acts, the proper understanding of the request made to the hospital, the application of *PHIPA* and *FIPPA* to the records, and the entitlement of the complainant to make an access request for records of personal health information of his wife and daughter.

In this decision, the adjudicator finds that the complainant's request is a request for records of personal health information of his wife and daughter, which is governed by *PHIPA*, as well as a request for his own personal information, which is governed by *FIPPA*. She also finds that the complainant is the substitute decision-maker for his wife and daughter for the purposes of the *PHIPA* component of the request. As a result, she finds that the complainant exercises rights of access to the records under both *PHIPA* and *FIPPA*.

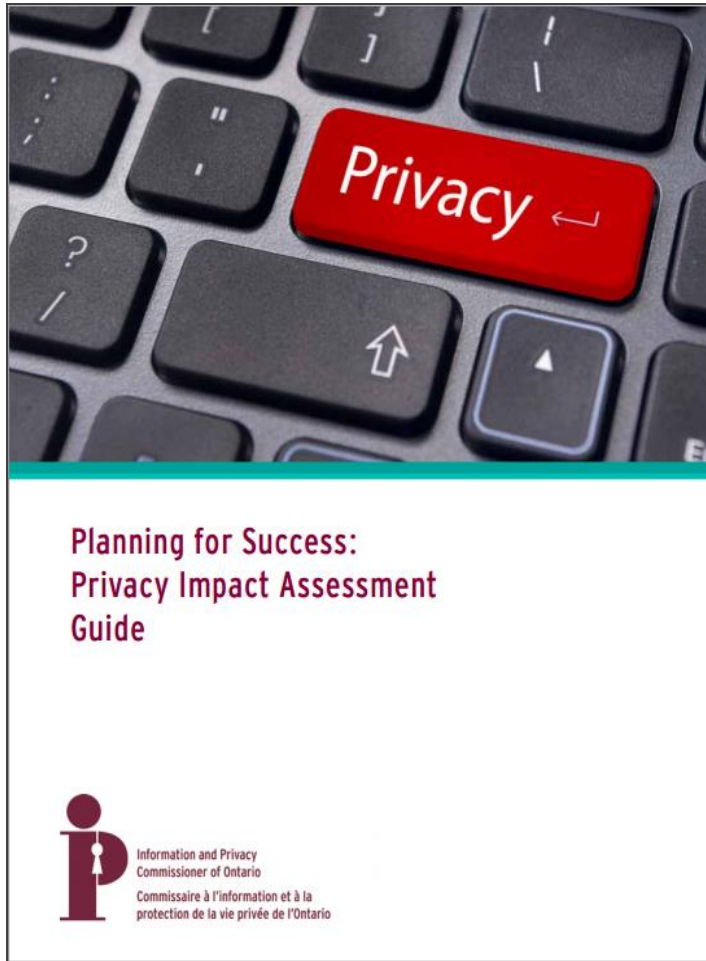
The adjudicator then determines that most of the records at issue in this review are records of personal health information of the complainant's family, subject to *PHIPA*, with a subset of the *PHIPA* records also containing the complainant's personal information, and so subject to both *PHIPA* and *FIPPA*. She also finds that a small number of records contain only the complainant's personal information, and are subject only to *FIPPA*.



Updates and Improvements



Planning for Success: Privacy Impact Assessment Guide



- Privacy impact assessments (PIAs) are tools to **identify privacy impacts** and **risk mitigation strategies**.
- PIAs are widely recognized as a **best practice**.
- This guide provides institutions with **step-by-step** advice on how to conduct a PIA from beginning to end.

PIA Methodology and Tools

| Key Steps | Tools |
|---|----------------------------------|
| 1. Preliminary Analysis Is personal Information involved? | Appendix A: Questionnaire |
| 2. Project Analysis Gather project info, people and resources, and map data flows | Appendix B: Questionnaire |
| 3. Privacy Analysis Identify and mitigate risks | Appendix C: Checklist |
| 4. PIA Report Document findings, get approval, proceed | Appendix D: Template |

Downloadable Worksheet containing all Appendices: <https://goo.gl/aRS8l4>

Updates and Improvements

- We are in the process of **updating our health privacy publications** to respond to frequently asked questions about *PHIPA* and to address changes over time that affect the information management practices of health information custodians (HIC).
- We are also in the process of **launching a new website** – coming early spring. It will:
 - cover a broader range of subjects in both access and privacy;
 - be easier to navigate with a more streamlined search function;
 - be targeted to both public and professional audiences.

Updated *Circle of Care*

- Updated August, 2015.
- Thorough review.
- Introduced gender-neutral language.



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

August 2015



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Updated *PHIPA* FAQ

- Revised October, 2015.
- Updated information includes:
 - Questions on assumed implied consent and consent from children under 16.
 - Questions regarding the relationship between PHIPA and FIPPA/MFIPPA.
 - Notification requirements in the event of a breach.
 - Responsibilities with respect to accountability and openness.
 - Requirements in the event of a change of practice.
 - Emergency disclosure.
 - Obtaining health records of a deceased individual.
 - Storing, accessing and disclosing personal health information outside of Ontario.
 - Fees associated with a request to access health records.



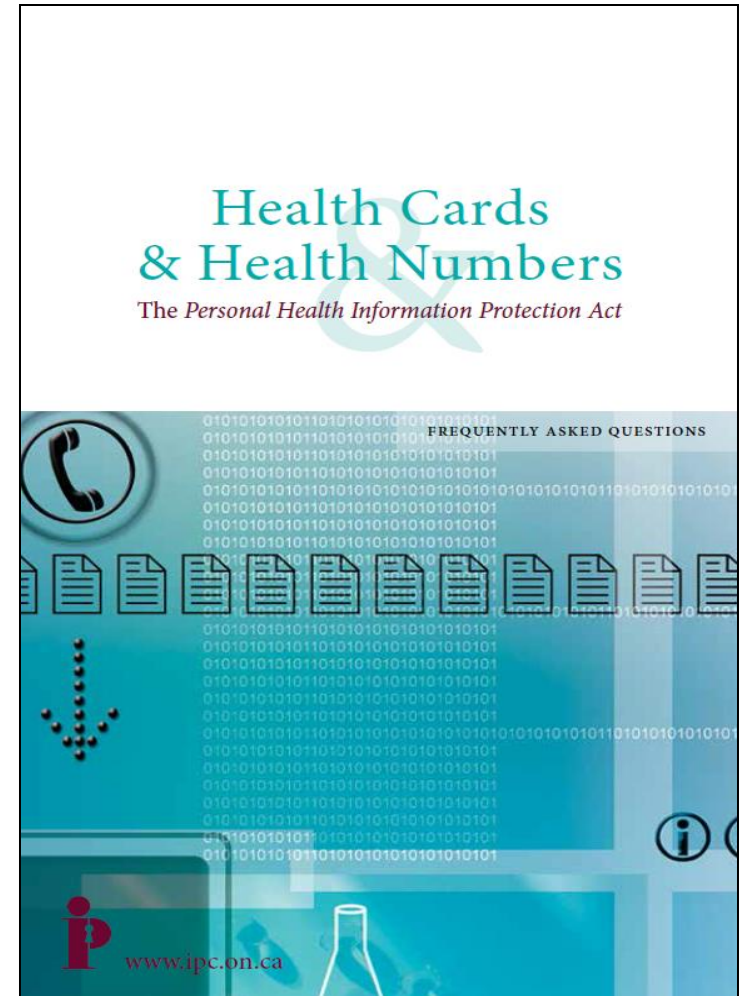
Frequently Asked Questions *Personal Health Information Protection Act*

September 2015



Updated Health Cards/Numbers FAQ

- Revised November, 2015.
- Revision answers these questions:
 - Who may require individuals to provide their health cards?
 - Who may collect, use or disclose health numbers and under what circumstances?
 - Can health cards serve as proof of identification?
 - What should you consider before asking individuals to provide a health card or health number?



Frontline #HealthPrivacy

- New initiative from our office.
- Goal is to establish an online community between the IPC and frontline health care workers.
- This resource will provide a constant stream of information to health care workers on their responsibilities to protect privacy and the confidentiality of personal health information (PHI).
- You can join us on Facebook, Twitter, LinkedIn and YouTube.



Unauthorized Access

Meaning of Unauthorized Access

- When you view, handle or otherwise deal with phi without consent and for purposes not permitted by *PHIPA*, for example:
 - When not providing or assisting in the provision of health care to the individual; or
 - When not necessary for the purposes of exercising employment, contractual or other responsibilities.
- The act of viewing PHI on its own, without any further action, is an unauthorized access.

Consequences of Snooping

- Reviews and Decisions by the IPC
- Prosecution and fines
- Statutory or common law actions
- Investigation by law enforcement
- Reputational Damage
- Disciplinary action by employers
- Disciplinary action by health regulatory bodies
- Costs of containing, investigating and remediating privacy breach

Orders HO-002, HO-010 and HO-013

The IPC has issued three orders involving unauthorized access:

Order HO-002

- Registered nurse accessed records of the estranged spouse of her boyfriend to whom she was not providing care over a period of six weeks during divorce proceedings.

Order HO-010

- Diagnostic imaging technologist accessed records of the current spouse of her former spouse to whom she was not providing care over a period of nine months.

Order HO-013

- Two employees accessed records to market and sell RESPs

Common themes

- Orders underline need for:
 - Well developed privacy program – vip flags, notices, annual oath of confidentiality;
 - Staff training – and not just at orientation
 - Audit program
 - Breach response
 - Consequences



Guidance Document:

Detecting and Deterring Unauthorized Access



Detecting and Deterring
Unauthorized Access to
Personal Health Information



- Impact of unauthorized access
- Reducing the risk through:
 - Policies and procedures
 - Training and awareness
 - Privacy notices and warning flags
 - Confidentiality and end-user agreements
 - Access management
 - Logging, auditing and monitoring
 - Privacy breach management
 - Discipline

How to Reduce the Risk

- Clearly articulate the purposes for which employees, staff and other agents may access phi.
- Provide ongoing training and use multiple means of raising awareness such as:
 - Confidentiality and end-user agreements.
 - Privacy notices and privacy warning flags.
- Immediately terminate access pending an investigation.
- Implement appropriate access controls and data minimization.
- Log, audit and monitor access to phi.
- Impose appropriate discipline for unauthorized access.

Three Referrals for Prosecution

- **2011** – Nurse at North Bay Health Centre. Case was dismissed due to an unreasonable delay.
- **2015** – Healthcare professionals at the University Health Network who accessed Rob Ford’s medical records for unauthorized purposes.
- **2015** – Breaches involving a family health team.



Ex-hospital worker sentenced for maternity-records breach

JANET MCFARLAND

The Globe and Mail

Published Tuesday, Nov. 24, 2015 11:00AM EST

Last updated Tuesday, Nov. 24, 2015 11:36AM EST

0 Comments



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Dentons.

The Global Elite law firm created by Salans, FMC and SNR Denton.*

*Acritas Global Elite Law Firm Brand Index 2013 and 2014.

DENTONS

dentons.com

A former hospital employee who sold confidential maternity-ward records to investment companies **has been sentenced** to two years of probation and ordered to pay \$45,000 in fines after pleading guilty to unregistered trading.

Shaيدا Bandali, a former file clerk at the Rouge Valley Centenary Hospital in Toronto, pleaded guilty to breaching confidentiality rules by gaining access to maternity-patient information and selling it to registered education savings plan (RESP) dealers.

Justice Kathleen Caldwell of the Ontario Superior Court imposed a \$36,000 fine during a sentencing hearing on Monday plus an additional \$9,000 victim surcharge as required under provincial sentencing rules. She also ordered Ms. Bandali to do 300 hours of community-service work.



Information and Privacy Commissioner of Ontario

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

Jones v. Tsige, 2012 ONCA 32

- In 2012, the Ontario Court of Appeal recognized a new cause of action for “intrusion upon seclusion.”
- Under this new cause of action, the plaintiff must prove that:
 - The defendant's conduct was intentional;
 - The defendant invaded, without lawful justification, the plaintiff's private affairs or concerns; and,
 - A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.
- Proof of actual loss is not required for an award of damages under this tort.
- Court of Appeal capped damages at \$20,000.

Hopkins v. Kay, 2015 ONCA 112

- Plaintiffs allege that the Peterborough Regional Health Centre (the “Hospital”) breached the privacy interests of approximately 280 patients when their records were intentionally and wrongfully accessed.
- Hospital argued that *PHIPA* was an “an exhaustive code that ousts the jurisdiction of the Superior Court to entertain any common law claim for invasion of privacy rights in relation to patient records.”
- Hospital relied on the provisions in *PHIPA* allowing proceedings in Superior Court based on IPC orders and convictions for offences.

Hopkins v. Kay

- IPC intervened and submitted that *PHIPA* did not oust common law claims for invasion of privacy.
- **Court of Appeal agreed**, stating that:
 - IPC was not intended to play a comprehensive or expansive role in dealing with individual complaints; and,
 - *PHIPA* expressly contemplates other proceedings in relation to PHI.
- An application for leave to appeal was dismissed by the Supreme Court of Canada.

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

Web: www.ipc.on.ca

E-mail: info@ipc.on.ca

