

# PHIPA and the Circle of Care

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# Overview

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# **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

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- 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.

# Valid Consent

- PHIPA does not specify a period of time after which consent is no longer valid
- In determining whether consent continues to remain valid over time, custodians must consider the four elements of valid consent and should reflect on:
  - Whether the nature of the information has changed in a significant way
  - Whether there has been a change in the nature of the relationship between the individual and the custodian disclosing the PHI
  - Whether there has been a change in the nature of the relationship between the individual and the custodian collecting the PHI

# Express Consent

- Express consent is not a defined term in PHIPA
- Commonly understood as consent that has been clearly and unmistakably given in writing or orally
  - When consent is provided orally, it is recommended that the custodian document in the record
- Consent may be express or implied, except when it must be express

# Express Consent

- Express consent is required in the following situations:
  - When a custodian discloses PHI to a non-custodian (with 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.”

# Scenario: Ashley

- Ashley, nearly 30, loves spending time outdoors with her bulldog Topher and makes soap that she sells in the summer at a local farmer's market.
- She has been a client of the CMHA for over 5 years where the ACT Team supports her with her diagnosis of schizoaffective disorder.
- She has a history of not always taking her medication as prescribed, which can result in decompensation and, consequently, visits to the ED.
- Marcus, her ACT Team Lead, has learned that she recently presented to the ER at the local hospital and was subsequently admitted to the psychiatric ward.
- He calls the hospital and requests an update on her health and asks for information about discharge plans (especially related to discharge back to CMHA care).
- Marcus is told that the hospital cannot release any personal health information to him because the information is confidential.



# Capacity to Consent

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- In general, unless the individual is not capable of consenting to the collection, use, or disclosure of the personal health information, consent must be given by the individual.
- An individual is capable of consenting to the collection, use or disclosure of their personal health information if they are able to:
  - Understand the information that is relevant to deciding whether to consent to the collection, use, or disclosure, as the case may be; and
  - Appreciate the reasonably foreseeable consequences of giving, not giving, withholding, or withdrawing the consent.
- An individual may be capable of consenting to the collection, use, or disclosure of some parts of their personal health information, but incapable of consenting with respect to other parts.





# Substitute Decision Making

# Substitute Decision Making

- If the individual is determined to be incapable, the following persons may act on his/her behalf (in the following order):
  - The individual's guardian of the person or guardian of property
  - The individual's attorney for personal care or attorney for property
  - The individual's representative appointed by the CCB
  - The individual's spouse or partner
  - A child or parent of the individual
  - A parent of the individual with only a right of access
  - A brother or sister; or
  - Any other relative

# Scenario: Edward

- Edward, who recently turned 50, loves riding his bicycle and playing chess with his cousin. He currently lives in Kenora's supportive housing.
- He has been a long-time client at the CMHA in Kenora and receives support services from the Assertive Community Treatment (ACT) Team who are monitoring his antipsychotic medications.
- He recently appeared unsteady on his feet and complained of chest pain and shortness of breath.
- Given his medical history, CMHA staff are worried that he may not be taking his clozapine as prescribed and may be experiencing hypotension related to stopping/starting his medication.
- Julio, Edwards ACT Team Lead, refers Edward to the Emergency Department (ED) due to concerns for his physical health.

# Scenario: Edward

- The next day, Julio contacted the ED to follow-up on Edward's condition and were told that he would be discharged back to CMHA's care.
- Julio was told that no personal health information would be disclosed to the CMHA about Edward's care in the ED without Edward completing a release of information form.
- It is unclear whether Edward has the capacity to complete the release form.
- The ED report would be very helpful for the CMHA to have in order to support Edward's ongoing care, but Julio is unsure what to do next to obtain the report.



# **Withholding and Withdrawing Consent**

# Withholding & Withdrawing Consent

- In general, individuals have the right to expressly withhold or withdraw consent to the collection, use or disclosure of their personal health information for any purpose, including for health care purposes
- Individuals also have the right to provide express instructions to health information custodians not to use or disclose personal health information for health care purposes without consent in certain circumstances



# 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



# Scenario: Rosalba

- Rosalba is a proud grandmother of four and looks forward to cooking for her family on Sundays.
- She has been a client of the ACT Team for 6 years and was recently seen in the ED for psychotic symptoms and somatic complaints.
- Lisa, her ACT Team Lead, called the hospital to request Rosalba's ED report.
- Lisa was told that the hospital would release mental health related information only and would not disclose any personal health information related to Rosalba's physical health due to the CMHA being a mental health agency.
- Lisa notes that the ACT Team includes nursing staff and also provides physical health care such as through monitoring blood glucose levels, providing diabetes education, and nursing assessments.



# Disclosures Related to Risk

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- A health information custodian may disclose personal health information, without consent, where the custodian believes on reasonable grounds that that the disclosure is necessary to eliminate or reduce a significant risk of bodily harm to one or more persons

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