

PHIPA Potpourri

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Information and Privacy Commissioner/Ontario*

*IPC Adjudicators
March 9, 2015*

Powers of the Commissioner

- The Powers the Commissioner has to conduct a review are set out in s.61.
- All of clauses (a) to (g) include the wording “make an order directing”.
- Clause (i) permits the Commissioner to make comments and recommendations on the privacy implications of any matter that is the subject of the review.

Requirements for Valid Consent



Information and Privacy
Commissioner of Ontario

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

Requirements for Valid Consent

For consent to be valid, the consent must:

- Be the consent of the individual or his or her substitute decision-maker (where applicable)
- Be knowledgeable, meaning it must be reasonable to believe that the individual knows:
 - The purpose of the collection, use or disclosure, and
 - That the individual may give or withhold consent
- Relate to the information, and
- Not be obtained by deception or coercion

Knowledgeable Consent

- Does not mean “informed” consent which is a higher standard used in the treatment context
- Discharging an informed consent would involve the patient reviewing his/her PHI and being informed of:
 - the material risks and benefits, and,
 - the reasonably foreseeable consequences
- How could health information custodians identify reasonably foreseeable consequences of a collection, use or disclosure? In the case of a collection, they don’t even know what the information is yet.

Obtaining (or assuming) Consent



Express Consent

- Consent may be express or implied, except when the *Act* specifies that consent must be express
- Express consent is not a defined term in the *Act*
- Commonly understood as a consent that has clearly and unmistakably been given orally or in writing
- Express consent is required to:
 - Disclose personal health information to a person that is not a health information custodian (subject to certain exceptions)
 - Disclose personal health information to a health information custodian for a purpose other than the provision of health care
 - Collect, use or disclose personal health information for marketing
 - Collect, use or disclose personal health information for fundraising (if using more than the name and address of the individual)



Implied Consent

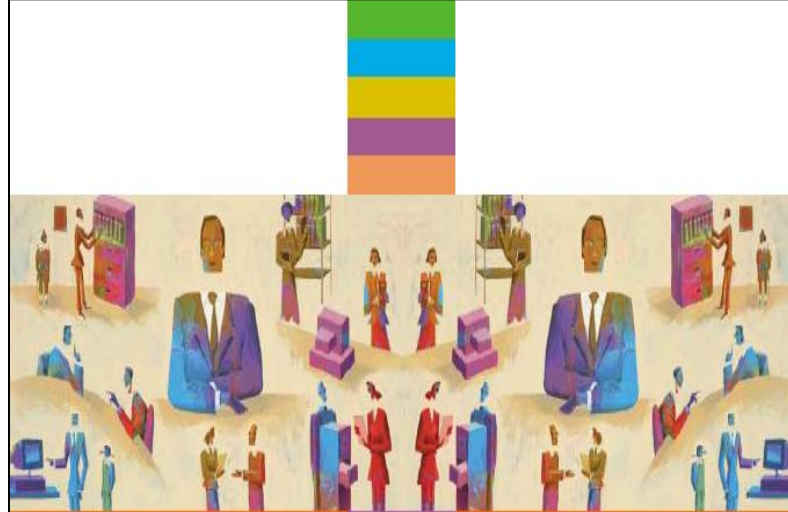
- In all other circumstances, consent may be implied
- Implied consent is not a defined term in the *Act*
- Commonly understood as a consent that a health information custodian concludes has been given based on an individual's action or inaction in particular factual circumstances
- For example, consent may be implied:
 - To *collect* or *use* personal health information for any purpose, subject to certain exceptions
 - To *disclose* personal health information to another health information custodian for health care purposes

Notice of Purposes

Health Information Privacy in our Hospital




PERSONAL HEALTH INFORMATION	<p>Personal health information is information about you that is collected, used or disclosed for personal health care purposes. It includes information about your physical, mental, emotional, psychological, social, financial, or other characteristics.</p> <p>Personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p>
HEALTH CARE AND HEALTH SERVICES	<p>Personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p> <p>Personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p>
YOUR RIGHTS AND CHOICES	<p>You have the right to know what personal health information is collected, used or disclosed about you. You also have the right to know how this information is being used and to whom it is being disclosed.</p> <p>You have the right to access your personal health information. You also have the right to correct or amend your personal health information if it is not accurate, complete or up-to-date.</p> <p>You have the right to withdraw your consent to the collection, use or disclosure of your personal health information at any time.</p>
HOW YOU CAN HELP TO IMPROVE YOUR SERVICES	<p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p> <p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p>
FAMILY, FRIENDS AND OTHERS	<p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p> <p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p>
RESEARCH, EDUCATION AND PUBLIC HEALTH	<p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p> <p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p>
FOR THE GOOD OF	<p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p> <p>Your personal health information is collected, used or disclosed for personal health care purposes only. It is not to be used for any other purpose.</p>




**Your Health Information
and Your Privacy in Our Hospital**

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 1 416 325 5195 www.ipc.on.ca



Information and Privacy
Commissioner of Ontario



Ontario for Association
Association of Ontario Hospitals

Assumed Implied Consent – Circle of Care

- Certain health information custodians *may* assume implied consent to collect, use or disclose personal health information in defined 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 the *Act*
- A health information custodian may only assume implied consent if **six** conditions are satisfied

Conditions to be Satisfied to Assume Implied Consent

A health information custodian may only assume implied consent if **all** six conditions are satisfied:

1. The custodian must fall within a category of health information custodians that are entitled to rely on assumed implied consent

- Some health information custodians are not entitled to rely on assumed implied consent, such as:
 - An evaluator defined in the *Health Care Consent Act, 1996*
 - An assessor as defined in the *Substitute Decisions Act, 1992*
 - The Minister or Ministry of Health and Long-Term Care
 - The Minister or Ministry of Health Promotion
 - Canadian Blood Services

Conditions to be Satisfied to Assume Implied Consent (cont'd)

2. The personal health information must have been received from the individual, his/her substitute decision-maker or another health information custodian
 - It must not have been received from any other person such as an employer, insurer or educational institution

3. The personal health information must have been received for the purposes of providing or assisting in providing health care to the individual
 - It must not have been received for other purposes, such as providing health care to another individual

Conditions to be Satisfied to Assume Implied Consent (cont'd)

4. The purpose of the collection, use or disclosure must be for providing or assisting in providing health care to the individual to whom the information relates
 - It must not be collected, used or disclosed for any other purpose, such as research, fundraising or marketing

5. In the context of a disclosure, the disclosure must be to another health information custodian
 - Personal health information must not be disclosed to any other person regardless of the purpose of the disclosure

Conditions to be Satisfied to Assume Implied Consent (cont'd)

6. The health information custodian that receives the personal health information from the individual, his or her substitute decision-maker or another health information custodian must not be aware that the individual has expressly withheld or withdrawn consent

Withholding and Withdrawing Consent and Express Instructions

- Individuals have the right to withhold or withdraw consent to the collection, use or disclosure of their personal health information 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
- These provisions are referred to as the “lock-box” provisions although the term “lock-box” is not used in the *Act*

Withholding and Withdrawing Consent and Express Instructions (cont'd)

- A health information custodian is not required to comply with a lock-box request where the:
 - Use or disclosure is permitted or required to be made without consent, except as set out in section 37(1)(a), 38(1)(a) and 50(1)(e) of the *Act*
 - Effect is to prohibit or restrict the recording of personal health information by a health information custodian that is required by law or by established standards of professional or institutional practice

Other Factors to be Considered in Relying on Assumed Implied Consent

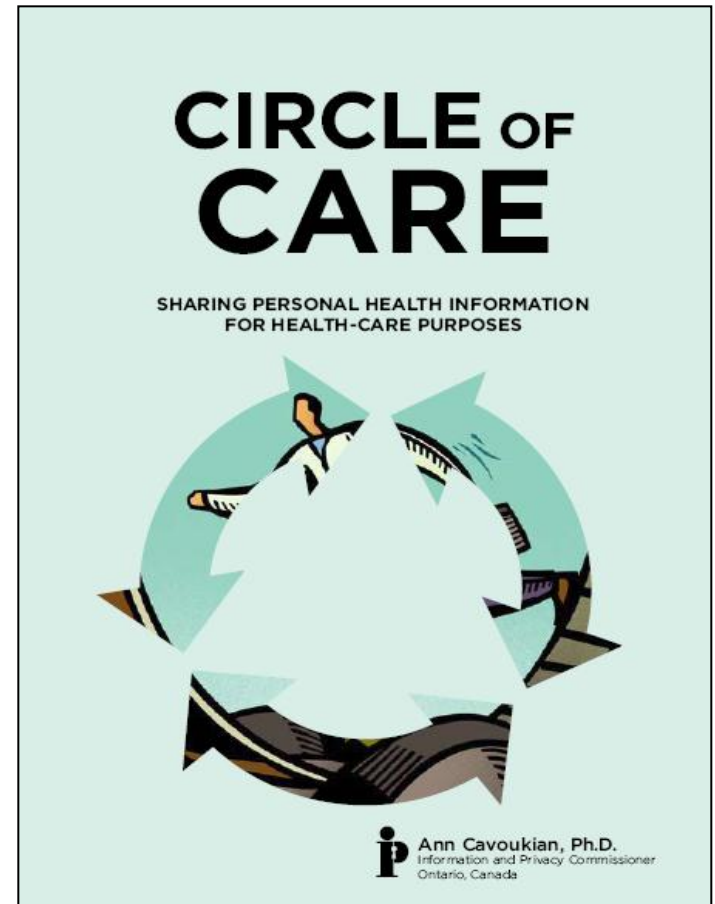
- In general, health information custodians may not:
 - Collect, use or disclose personal health information if other information will serve the purpose; or
 - Collect, use or disclose more personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure
- These provisions continue to apply when health information custodians rely on assumed implied consent

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

The guide was published to clarify the circumstances in which consent may be *assumed* to be implied by custodians

Members of the working group who participated in publishing the guide, included:

- Information and Privacy Commissioner/ Ontario
- College of Physicians and Surgeons of Ontario
- Ontario Association of Community Care Access Centres
- Ontario Association of Non-Profit Homes and Services for Seniors
- Ontario Long Term Care Association
- Ontario Hospital Association
- Ontario Medical Association
- Ontario Ministry of Health and Long Term Care



Available at www.ipc.on.ca

Permissive Disclosures



Permissive Disclosures

- In specific circumstances, *PHIPA* gives health information custodians authority to decide whether or not to disclose personal health information without consent.
- Health information custodians are not required by *PHIPA* to disclose information, but may.
- Some of these permissive disclosures are worded very broadly.

Permissive Disclosures (Cont'd)

- Disclosures for proceedings. S. 41 of PHIPA provides:
- (1) A health information custodian may disclose personal health information about an individual,
 - (a) subject to the requirements and restrictions, if any, that are prescribed*, for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding; [Emphasis added]

*No requirements or restrictions are prescribed

Permissive Disclosures (Cont'd)

- Proceeding is also defined very broadly in *PHIPA*:
 - “proceeding” includes a proceeding held in, before or under the rules of a court, a tribunal, a commission, a justice of the peace, a coroner, a committee of a College within the meaning of the *Regulated Health Professions Act, 1991*, a committee of the Board of Regents continued under the *Drugless Practitioners Act*, a committee of the Ontario College of Social Workers and Social Service Workers under the *Social Work and Social Service Work Act, 1998*, an arbitrator or a mediator; (“instance”)
- Does that mean you can disclose personal health information about any criminal offence without consent?

Permissive Disclosures (Cont'd)

- “Contemplated proceeding” – suggests that disclosure can be made even before the proceeding starts? Can health information custodians report crimes they observe their patients committing?
- Does that mean you can disclose personal health information about any criminal offence without consent?



Permissive Disclosures (Cont'd)

- There are also other provisions of *PHIPA* that would apply to disclosure to police:
 - 43. (1) A health information custodian may disclose personal health information about an individual,
 - (g) subject to the requirements and restrictions, if any, that are prescribed,* to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by or under this Act or any other Act of Ontario or an Act of Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection, investigation or similar procedure;

*none are prescribed.





Permissive Disclosures (Cont'd)

- Maybe permissive disclosure is supposed to work in tandem with other professional guidelines.
- College of Physicians and Surgeons of Ontario policy on Confidentiality of Personal Health Information provides as follows:

It is not mandatory for physicians to provide confidential material to the police in the absence of a legal obligation. At these times, the general rules regarding consent and disclosure apply, meaning that express consent, either from the patient directly, or the substitute decision-maker, will be required before the police are provided with personal health information.

Conflicts between PHIPA and other (lesser) Acts



Conflicts with PHIPA

- PHIPA conflict provisions (s.7 of the Act and s. 1(5) and s.5 of O.Reg.329/04)
- In the event of a conflict PHIPA prevails. (s.7(2))
- There is no conflict unless it is not possible to comply with both PHIPA and its regulations and any other Act or its regulations. (7(3))

Conflicts with PHIPA (Cont'd)

- *Health Protection and Promotion Act* - provided:
 - No person shall disclose identifying information about a person in respect of whom an application, order etc. is made in respect of a communicable disease, reportable disease etc. (s.39(1) HPPA)
 - S.39(1) does not apply to a limited list of exceptions e.g. you can disclose on consent or for the purpose of public health administration.

Conflicts with PHIPA (Cont'd)

- “For the purposes of s.7(3) of the Act, if the Act or its regulations provides that an action, including a collection, use or disclosure may be taken and another Act or regulation provides that it may not be taken, then “it is not possible to comply with both”. O. Reg. 329/04, s.1(5)

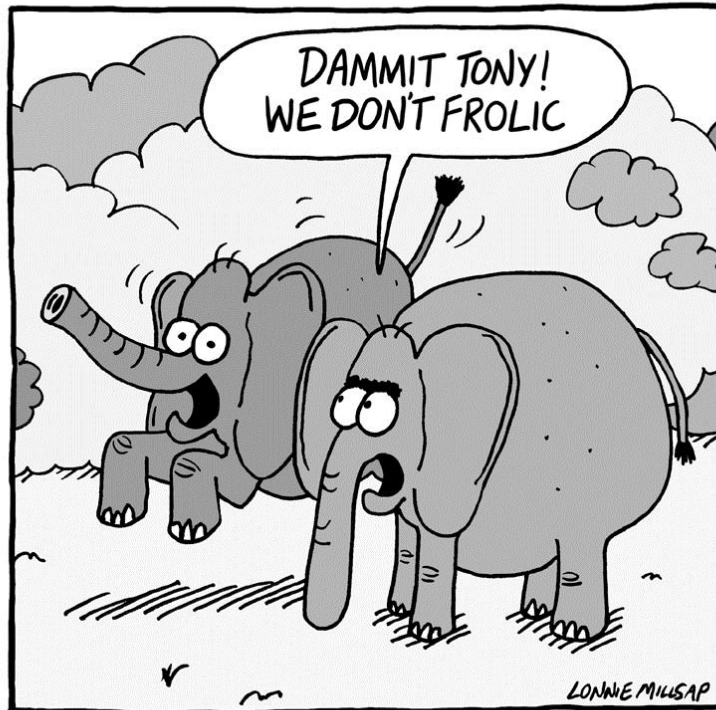
(Although we are not discussing them, here, note that section 5 of the regulation sets out the confidentiality requirements and statutory provisions in other acts that prevail over PHIPA.)

Conflicts with PHIPA (Cont'd)

- *Reg. 965 under the Public Hospitals Act*
- Except as required by law or as provided in s.22 of this Regulation, no hospital shall permit any person to remove, inspect or receive information from records of personal health information
- The exceptions set out in that regulation are fairly limited and do not include many of the permissive disclosures set out in *PHIPA*.

A Further Frolic Through PHIPA's Regs

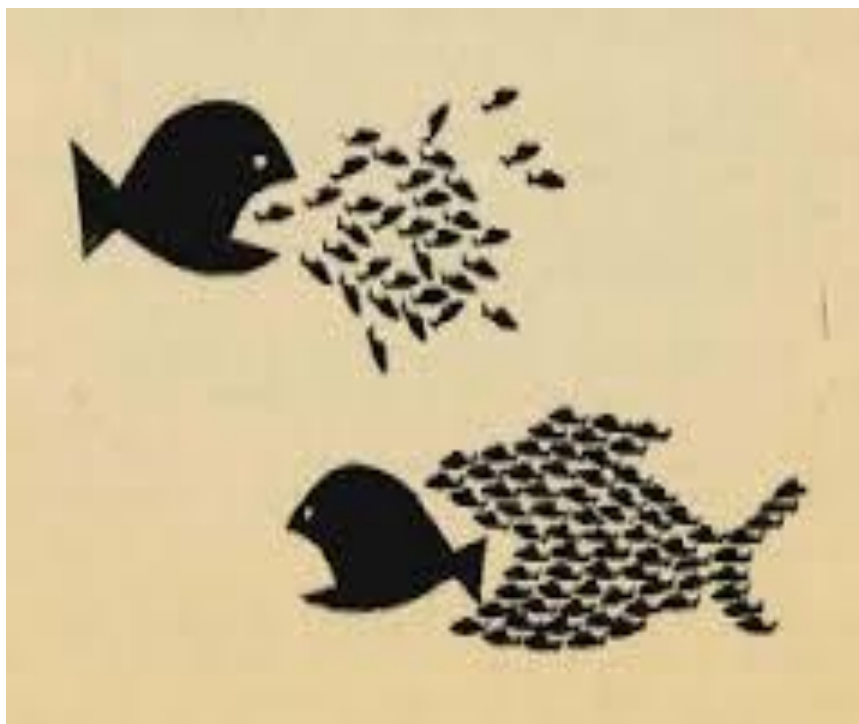
I STEPPED ON A DUCK! BY LONNIE MILLSAP



PHIPA's Regulations

- *PHIPA's* regs can significantly change the meaning and applicability of sections of the statute. For example:
 - S. 2 - “Persons providing fitness or weight-management services” are not “health care practitioners” – meaning they will normally not be health information custodians.
 - S. 24(1) – laboratories performing tests at the request of health care practitioner don't have to provide access provided individual has a right of access via health care practitioner and health care practitioner has not directed laboratory to provide information directly.
- Refer to my table of concordance.

Class Actions



Jones v. Tsige, 2012 ONCA 32

- In 2012, the Ontario Court of Appeal recognized a new cause of action for “instruction upon seclusion”.
- This case was not a class action.
- Facts: Tsige was the common law spouse of Jones’ ex-husband. Tsige worked for Jones’ bank, and snooped on her personal bank account. Jones sued Tsige.
- To win under this new cause of action, must prove:
 - defendant's conduct was intentional;
 - Defendant invaded, without lawful justification, the plaintiff's private affairs or concerns;
 - that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.
- Damages capped at \$20,000. Jones got \$10,000

Hopkins v. Kay, 2014 ONSC 321

- *Hopkins v. Kay* is the first court decision to apply the tort of intrusion upon seclusion to health care privacy class actions.
- In that case, it is alleged that approximately 280 patient records of the Peterborough Regional Health Centre (the “Hospital”) were intentionally and wrongfully accessed by the Hospital, Sir Sanford Fleming College and seven employees of the Hospital
- The trial judge said this lawsuit could proceed. The Court of Appeal recently agreed.

Hopkins v. Kay (cont'd)

- At the Court of Appeal, the 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.”
- The Hospital relied on provisions in *PHIPA* allowing people to commence proceedings in Superior Court based on IPC orders.
- The Court of Appeal rejected this argument, stating that:
 - The 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 personal health information.

Order Trends



Electronic Information Systems/ Rouge Valley Health System

- Expanded use of Electronic Information Systems, creates perils and promises.
 - Promises accurate records that can be rapidly accessed for health care.
 - But creates an opportunity for snoopers and disreputable marketers.
- In Order HO-013 (Rouge Valley Health System), two hospital employees were accessing the personal health information of new mothers through an electronic information system to market RESPs.
- The Problem: the Hospital couldn't track this privacy breach, even after it was notified that this could occur!

Electronic Information Systems/ Rouge Valley Health System (cont'd)

- After conducting a Review, we ordered the Hospital to:
 - Archive its agents user log history for more than 14 days;
 - log for auditing purposes all instances where agents access personal health information;
 - Amend its agreements with service providers to clarify responsibility for audit logs;
 - Implement search controls, so agents can't easily obtain lists of patients;
 - Conduct annual privacy training and require agents to take an annual pledge of confidentiality; and,
 - Update its privacy training, policies, and advisories

I KEEP HITTING THE ESCAPE KEY...

BUT I'M STILL HERE

quickmeme.com

Encryption!

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www.glasbergen.com



“I’m sure there are better ways to disguise sensitive information, but we don’t have a big budget.”

TTFN

- All of this is respectfully submitted: and
- You know where to find me, if you have questions.*

* For anything difficult, please contact our Communications Department.