

**Information  
and Privacy  
Commissioner  
of Ontario**

**Comments of the  
Information and Privacy  
Commissioner of Ontario  
on Bill 41**



**Brian Beamish  
Commissioner  
November 18, 2016**



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*Bill 41, An Act to amend various Acts in the interests of patient-centred care* (Bill 41) proposes to eliminate Ontario's 14 Community Care Access Centres (CCACs), and transfer the functions of the CCACs to Ontario's Local Health Integration Networks (LHINs). LHINs would also be given an expanded role to oversee, and plan for, the delivery of health care at the regional level. The Ministry of Health and Long-Term Care (the Ministry) would be given a similarly expanded role to oversee the operations of LHINs.

The Office of the Information and Privacy Commissioner of Ontario (the IPC) has reviewed Bill 41, and has provided three comments to the Ministry to address the privacy implications of this Bill. These comments are summarized in this submission. The goal of these amendments is to ensure that changes to the function of LHINs do not impact the privacy of personal health information. The three amendments suggested by the IPC are:

## **1. LIMIT COLLECTIONS, USES, AND DISCLOSURES OF PERSONAL HEALTH INFORMATION BY INVESTIGATORS/SUPERVISORS**

Bill 41 would give the Ministry the power to appoint investigators and supervisors with respect to LHINs where it is in the public interest.<sup>1</sup> Similarly, Bill 41 would give LHINs the power to appoint investigators and supervisors with respect to certain health service providers where it is in the public interest.<sup>2</sup> Where an investigator or supervisor is appointed, Bill 41, as drafted, would authorize that investigator or supervisor to collect individuals' personal health information.

The IPC understands that investigators and supervisors appointed by the Ministry or a LHIN may, in certain circumstances, have a legitimate need to review records of personal health information. For example, when a LHIN is investigating the quality of care provided by a health service provider, that investigator may need information about the health care provided.

However, while some situations may warrant having access to personal health information, others will not. Personal health information should only be collected, used, and disclosed where necessary. Furthermore, even where personal health information is necessary for an investigation or supervision, investigators and supervisors should be prohibited from collecting, using, and disclosing more personal health information than is needed for the purposes of their investigation or supervision.

This is consistent with the law already applicable to health information custodians under the *Personal Health Information Protection Act, 2004 (PHIPA)*. Section 30 of *PHIPA* provides:

30. (1) A health information custodian shall not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure.

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1 See section 11 of Bill 41 which, if enacted, would add sections 12.1 and 12.2 to the *Local Health System Integration Act, 2006*.

2 See section 21 of Bill 41 which, if enacted, would add sections 21.1 and 21.2 to the *Local Health System Integration Act, 2006*.

(2) A health information custodian shall not collect, use or disclose more personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure, as the case may be.

...

This is also consistent with the limitations imposed on Ontario's Patient Ombudsman pursuant to the *Excellent Care for All Act, 2010*. Subsections 13.6(4) and (5) of that Act provide:

13.6 (4) In exercising their powers under this Act, the patient ombudsman and the Council shall not collect, use or disclose personal health information if other information will serve the purpose.

(5) In exercising their powers under this Act, the patient ombudsman and the Council shall not collect, use or disclose more personal health information than is reasonably necessary for the purpose.

The IPC recommends that a provision be added to *the Local Health System Integration Act, 2006* (*LHSIA*) that prohibits investigators and supervisors appointed by the Ministry or a LHIN from:

- collecting, using or disclosing personal health information where other information will serve the purpose of the investigation or supervision; and,
- collecting, using, or disclosing more personal health information than is reasonably necessary for the purpose of the investigation or supervision.

## **2. CLARIFY THAT REGULATIONS CANNOT COMPEL DISCLOSURE OF PERSONAL HEALTH INFORMATION**

If passed, Bill 41 would permit the Lieutenant Governor in Council to make regulations requiring information to be provided to LHINs. Specifically, section 29 of Bill 41 would add the following provision to *LHSIA*:

### **29. The Act is amended by adding the following section:**

#### **Information and reports**

**37.1** The Lieutenant Governor in Council may make regulations respecting the provision of information from prescribed persons and entities to a local health integration network in order to support collaboration between health service providers, local health integration networks, physicians and others in the health care system, and to support planning of

primary care services, including physician services, that ensure timely access and improve patient outcomes, including information to facilitate understanding by the network of,

- (a) transitions in practice, including opening, closing, retirements and extended leaves; and
- (b) practice and service capacity to address population needs of the local health system in the geographic area of the network.

The above provision could authorize a regulation requiring that prescribed persons and entities disclose personal health information to LHINs. The IPC has been informed that this was never the intention of the above provision. Given this intention, there is no need to create a power that could be used to require the disclosure of personal health information.

The IPC recommends that section 29 of Bill 41 be amended to clearly state that regulations made pursuant to that section cannot authorize the disclosure of personal health information to LHINs.

### 3. REMOVE THE EXCLUSION OF THE “MIXED RECORD” RULE

Bill 41 would adopt the definition of personal health information from *PHIPA* into Part IV of *LHSIA*, with one exception: the “mixed record” rule from *PHIPA* would not apply.<sup>3</sup> It is unclear why Bill 41 excludes the operation of the “mixed record” rule.

The “mixed record” rule ensures that all identifying information about a patient in a health record receives the same privacy protections. It achieves this by deeming all identifying information to be “personal health information,” where this identifying information is contained in a record that contains personal health information.<sup>4</sup> For example, where a patient’s health record includes identifying financial information about the patient, that information may not otherwise be personal health information. However, the “mixed record” rule ensures that this financial information receives the same protections as the personal health information contained in the same health record.

The “mixed record” rule also simplifies the application of *PHIPA*. Without the “mixed record” rule some identifying information in a patient’s health record would be subject to *PHIPA*, while other identifying information may be subject to other federal or provincial privacy statutes, or potentially no statutes at all.

The definition of personal health information in *PHIPA* should apply consistently across Ontario’s health sector legislation. Furthermore, the “mixed record” rule serves an important purpose

<sup>3</sup> See section 15 of Bill 41 which, if enacted, would add section 16.1 to the *Local Health System Integration Act, 2006*.

<sup>4</sup> See section 4(3) of *PHIPA*.



by ensuring that all identifying information about a patient in their health record is subject to the same set of protections. For these reasons, the IPC recommends that the exclusion of the “mixed record” rule be removed from Bill 41.

## CONCLUSION

The IPC recommends that Bill 41 be amended as follows:

1. Limit collections, uses, and disclosures of personal health information by investigators and supervisors;
2. Clarify that regulations under the proposed section 37.1 of *LHSIA* cannot compel disclosures of personal health information; and,
3. Remove the exclusion of the “mixed record” rule from the proposed definition of personal health information to be added to *LHSIA*.

The IPC believes these amendments are straightforward, yet necessary; to ensure that the personal health information of Ontarians is properly protected from improper collection, use and disclosure.





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