

**Information
and Privacy
Commissioner
of Ontario**

**Comments of the
Information and Privacy
Commissioner of Ontario
on Bill 160**



**Brian Beamish
Commissioner
November 20, 2017**



Information and Privacy
Commissioner of Ontario
Commissaire à l'information et à la
protection de la vie privée de l'Ontario

2 Bloor Street East
Suite 1400
Toronto, Ontario
M4W 1A8
CANADA

416-326-3333
1-800-387-0073
Fax: 416-325-9195
TTY (Teletypewriter): 416-325-7539
Website: www.ipc.on.ca

Bill 160, *The Strengthening Quality and Accountability for Patients Act, 2017* introduces three pieces of legislation and amends seven others for the stated purpose of ensuring that patients in Ontario continue to receive quality and accountable health care services.

However, while Bill 160 proposes significant changes to the law governing health care services in Ontario, it does not include provisions that the Office of the Information and Privacy Commissioner of Ontario (IPC) considers necessary to protect the privacy of Ontarians. The IPC has specific recommendations related to Schedules 1, 2, 4, 5, 7, 9 and 10 of Bill 160. These recommendations generally relate to the need to amend the Bill to:

- Limit the collection, use and disclosure of personal information and personal health information to that which is reasonably necessary for the purposes articulated
- Include requirements that information be kept confidential
- Include provisions that allow a court to protect personal health information in documents or materials filed with the court in relation to the prosecution of offences
- Remove the proposed exclusion in Schedule 2 for records containing information obtained or prepared by the Patient Ombudsman from the *Freedom of Information and Protection of Privacy Act (FIPPA)*

A summary of the IPC's recommendations, and the Schedules to which they relate, can be found at Appendix A.

SCHEDULE 1: *AMBULANCE ACT*

Schedule 1 of Bill 160 would amend the *Ambulance Act* to expand the authority of inspectors and investigators of the Ministry of Health and Long-Term Care (the Ministry) to collect, use, and disclose personal information and personal health information. Schedule 1 would also amend the *Ambulance Act* to permit the disclosure of personal health information between the Minister of Health and Long-Term Care (the Minister) and a prescribed person, and between such prescribed persons, and would permit personal health information to be disclosed for additional prescribed purposes.

The IPC recommends three amendments to address the privacy implications of Schedule 1.

1. LIMIT COLLECTION, USE AND DISCLOSURE BY THE MINISTRY

Under the *Ambulance Act*, the Director of the Emergency Health Services Branch of the Ministry may appoint inspectors and investigators for the purposes of that *Act*. Sections 4 and 5 of

Schedule 1 would, among other things, amend the *Ambulance Act* with respect to the powers of such inspectors and investigators to collect, use, and disclose personal information and personal health information under that *Act*.

The IPC recognizes that regulatory agencies such as the Ministry may have a legitimate need to review records of personal information or personal health information in certain circumstances. However, personal information and personal health information should only be collected, used, and disclosed where it is necessary and no more should be collected, used, and disclosed than is necessary.

The IPC therefore recommends that the *Ambulance Act* be amended to include the following provisions:

XXX In performing a duty or exercising a power under this Act, the Minister, the Director, an inspector, an investigator, and their employees or agents shall not:

(a) collect, use or disclose personal information or personal health information if other information will serve the purpose of the collection, use or disclosure; and

(b) collect, use, or disclose more personal information or personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

XXX In this section,

“personal health information” means personal health information as defined in the *Personal Health Information Protection Act, 2004*;

“personal information” means personal information as defined in the *Freedom of Information and Protection of Privacy Act*.

2. REQUIRE INSPECTORS AND INVESTIGATORS TO KEEP INFORMATION CONFIDENTIAL

Pursuant to the proposed amendments, an inspector or investigator may, among other things, enter any ambulance service workplace and examine, inspect, extract information from and make copies of any records or other documents relating to the ambulance service. However, there is no statutory confidentiality provision under the *Ambulance Act* requiring these inspectors and investigators to keep all information that comes to their knowledge confidential.

Such a confidentiality requirement is consistent with both the law already applicable to investigators under the *Local Health System Integration Act, 2006 (LHSIA)* and with the provisions applicable to inspectors appointed under Schedule 9 of this very Bill, the *Oversight*

of *Health Facilities and Devices Act, 2017*. Subsections 12.1(8) of *LHSIA* and 39(12) of Schedule 9 provide:

12.1(8) An investigator and his or her agents shall keep confidential all information that comes to the investigator's knowledge in the course of an investigation under this Act and shall not communicate any information to any other person except as required by law or except where the communication is to the Minister or a person employed in or performing services for the Ministry.

[...]

39(12) Except as otherwise provided for in the regulations, an inspector appointed by the executive officer shall keep confidential all information that comes to the inspector's knowledge in the course of an inspection and shall not communicate any information to any other person except as required by law or except where the communication is to the executive officer or the Minister or a person employed in or performing services for the Ministry.

The IPC recommends that a similar provision be added to the *Ambulance Act* stating:

XXX An inspector or investigator appointed under section 18 of this Act shall keep confidential all information that comes to the inspector's or investigator's knowledge in the course of an inspection or investigation under this Act and shall not communicate any information to any other person except as required by law or except where the communication is to the Director, to the Minister or a person employed in or performing services for the Ministry.

3. REMOVE ADDITIONAL PRESCRIBED DISCLOSURES

Section 5 of Schedule 1 would amend the *Ambulance Act* to permit the disclosure of personal health information between the Minister and a prescribed person, and between such prescribed persons, without consent for purposes relating to the discharge or exercise of their duties or powers under that Act. It would further amend the *Ambulance Act* to permit personal health information to be disclosed for additional prescribed purposes.

The IPC understands that these amendments are intended to allow for regulations to permit expanded disclosures of personal health information as the model for delivering health care by ambulance services in Ontario evolves. The IPC understands that these amendments also arise out of a concern that ambulance services are not viewed as being within the 'circle of care' by other health information custodians, and so are not being provided with the personal health information they believe is necessary to provide health care. We further understand that

the government may wish to prescribe additional disclosures that may be made, including to the Ministry, for the purpose of analyzing the quality of ambulance services provided.

The IPC is concerned that a “prescribed person” under these amendments will have the authority to collect, use and disclose personal health information, but may not be a health information custodian subject to the obligations imposed by the *Personal Health Information Protection Act, 2004 (PHIPA)*, and may not be an institution regulated by *FIPPA*. Further, to the extent these amendments arise out of a concern that ambulance services are not receiving personal health information from other health information custodians (or may not disclose personal health information to other custodians), there are already provisions in *PHIPA* that provide a framework permitting disclosures of personal health information where the ambulance service is providing health care (section 20(2)) or where the ambulance service is engaged in activities to improve or maintain the quality of care provided (section 39(1) (d)). Lastly, inasmuch as the amendments appear to contemplate regulations permitting the disclosure of personal health information to the Ministry for the purpose of analysis, the IPC is concerned that these regulations could permit the disclosure of personal health information to the Ministry for broadly defined purposes without an appropriate privacy framework.

Accordingly, the IPC recommends that section 5 of Schedule 1 be deleted.

If the above recommendation is not followed, the IPC recommends, in the alternative, that any prescribed person who receives personal health information under this proposed amendment be subject to restrictions on the use or disclosure of that personal health information. This restriction on recipients is consistent with the law already applicable to recipients of personal health information under section 49 of *PHIPA*. The IPC recommends that the following provision be added to Schedule 1:

XXX Except as permitted or required by law, a prescribed person who receives personal health information under section 19 shall not use or disclose the information for any purpose other than,

- (a) the purpose for which the information was authorized to be disclosed under this Act; or
- (b) the purpose of carrying out a statutory or legal duty.

SCHEDULE 2: EXCELLENT CARE FOR ALL ACT, 2010

Schedule 2 of Bill 160 amends the *Excellent Care for All Act, 2010* to create an exclusion from *FIPPA* for records containing information obtained or prepared by the Patient Ombudsman in the course of conducting an investigation.

The IPC recommends that the proposed exclusion be deleted.

FIPPA SHOULD APPLY TO PATIENT OMBUDSMAN INVESTIGATIONS

When the office of the Patient Ombudsman was established, the government of Ontario had a choice. The Patient Ombudsman could have been established as an officer of the Legislature, with the independence that entails, or it could have been established under the oversight of a government ministry. The government of Ontario chose the latter, and placed the Patient Ombudsman within Health Quality Ontario. As a result of this choice, Ontarians should expect, and should receive, the same level of transparency and privacy protections from the Patient Ombudsman as other government agencies.

Practically, the exclusion of the Patient Ombudsman's investigative records from *FIPPA* has significant consequences for patients making complaints to that office, for health sector organizations dealing with that office, and for the broader public, including:

- Patients whose personal information is in a record that has been obtained or prepared by the Patient Ombudsman in an investigation will no longer be entitled to get access to their own information in the hands of the Patient Ombudsman
- The privacy protections governing collections, uses, and disclosures of personal information would no longer apply to Patient Ombudsman investigations
- Where the Patient Ombudsman is investigating matters of public interest relating to Ontario's health system, Ontarians will not be entitled to access the information used by the Patient Ombudsman to form important recommendations

Moreover, to the extent that this proposed exclusion is motivated by a concern to protect individuals' privacy and to encourage individuals to provide advice or recommendations to the Patient Ombudsman on how the Ontario health system could be improved, the personal privacy exemption in section 21 of *FIPPA* and the advice and recommendations exemption in section 13 of *FIPPA* would provide an established framework for addressing these concerns. To date, the IPC has not been provided with a cogent explanation for why the protections in *FIPPA* are not sufficient to address these concerns.

The IPC recommends that the proposed section 13.6.1 be deleted from section 3 of Schedule 2 of Bill 160.

SCHEDULE 4: HEALTH SECTOR PAYMENT TRANSPARENCY ACT, 2017

Schedule 4 of Bill 160, the *Health Sector Payment Transparency Act, 2017*, requires the reporting of information, including personal information and personal health information, to the Minister about transfers of value between certain parties in Ontario's health care system.

The IPC recommends four amendments to address the privacy implications of Schedule 4.

1. LIMIT THE DEFINITION OF "PERSONAL INFORMATION" TO PERSONAL INFORMATION ABOUT A RECIPIENT, PAYOR, INTERMEDIARY OR AFFILIATE

Section 2 of Schedule 4 defines "personal information" as having the same meaning as in section 2 of *FIPPA*. Personal information is defined under section 2 of *FIPPA* to include, among other things, the medical, psychiatric and psychological history of the individual. This information is personal health information as defined under section 4 of *PHIPA*.

Section 4 of Schedule 4 requires a payor to report personal information to the Minister with respect to a transfer of value provided directly by a payor to a recipient or indirectly by a payor to a recipient through an intermediary. Section 8 further permits the Minister to request personal information from a recipient, payor, intermediary, or an affiliate of a payor or an intermediary to determine compliance with the proposed legislation.

Since the definition of personal information does not exclude personal health information, these reporting requirements may lead to the reporting of personal health information to the Minister about patients who are not parties to the transfer of value. This is particularly concerning as subsection 6(1) requires the Minister to disclose information, including personal information, reported under the proposed legislation on a website and in any other manner that the Minister considers appropriate. The IPC understands that the Minister does not intend to collect, use or disclose personal information, including personal health information, about patients or any person not party to a transfer of value. Given this intention, the definition of "personal information" should be amended to ensure that the Minister may only collect, use and disclose personal information about recipients, payors, intermediaries, or affiliates of payors or intermediaries. The IPC recommends that the definition of "personal information" under section 2 be amended as follows:

"personal information" means personal information as defined in section 2 of the *Freedom of Information and Protection of Privacy Act* about a recipient, a payor, an intermediary, or an affiliate of a payor or an intermediary;

2. LIMIT USE OF INFORMATION BY THE MINISTER TO THE PURPOSES OF HEALTH SYSTEM EVALUATION AND PLANNING

Section 5 of Schedule 4 requires the Minister to analyze information, including personal information, reported under the proposed legislation, for the purposes of “health system research and evaluation, planning and policy analysis.” The term “policy analysis” is vague and likely redundant in relation to the terms “evaluation” and “planning.” The IPC recommends that the language of section 5 be consistent with other statutes governing the analysis of personal information and personal health information, including sections 45 and 47 of *PHIPA*, which refer to evaluation and planning of the health system and do not include the term “policy analysis.”

The IPC further understands that the Minister does not intend to use the information reported, including personal information, for the purpose of research. Given this intention, the IPC recommends that the term “research” be removed from section 5.

The IPC recommends that section 5 be amended as follows:

Use of information for analysis

5 The Minister shall analyse the information reported under this Act, including any personal information, for the purposes of **health system evaluation and planning**.

3. LIMIT COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION BY INSPECTORS

Section 9 of Schedule 4 gives the Minister the power to appoint inspectors who are authorized to, among other things, examine, demand and remove any record that is relevant to the inspection. Section 9 defines the term “record” to include a record that contains personal information.

As noted above, personal information should only be collected, used and disclosed where necessary. Furthermore, even where personal information is necessary for an inspection, inspectors should be prohibited from collecting, using and disclosing more personal information than is needed for the purposes of the inspection.

The IPC recommends that the following provision be added to section 9:

- 9 (13)** In performing a duty or exercising a power under this Act, an inspector shall not:
- (a) collect, use or disclose personal information if other information will serve the purpose of the collection, use or disclosure; and

(b) collect, use, or disclose more personal information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

4. REQUIRE INSPECTORS TO KEEP INFORMATION CONFIDENTIAL

Inspectors are authorized by subsection 9(5) of Schedule 4 to examine, demand and remove any record, including records containing personal information, that is relevant to the inspection. This section does not require inspectors to keep confidential all information that comes to the inspector's knowledge in the course of an inspection.

As noted above, including a confidentiality requirement is consistent with both the law already applicable to investigators under *LHSIA* and with the provisions applicable to inspectors appointed under Schedule 9 of this Bill.

The IPC recommends that the following provision be added to section 9:

9(14) An inspector shall keep confidential all information that comes to the inspector's knowledge in the course of an inspection under this Act and shall not communicate any information to any other person except as required by law or except where the communication is to the Minister or a person employed in or performing services for the Ministry.

SCHEDULE 5: *LONG-TERM CARE HOMES ACT, 2007*

Schedule 5 of Bill 160 would, among other things, amend both the *Long-Term Care Homes Act, 2007* and the *Health Care Consent Act, 1996*. These amendments primarily relate to restraining and confining residents. However, amendments are also made to the provisions of the *Long-Term Care Homes Act, 2007* in relation to the powers of Ministry inspectors, and to the offence provisions of both the *Long-Term Care Homes Act, 2007* and the *Health Care Consent Act, 1996*. Lastly, Schedule 5 would amend the *Long-Term Care Homes Act, 2007* to allow the Ministry to order a long-term care home to prepare, submit, and implement a "written plan" for compliance.

The IPC recommends four amendments to address the privacy implications of Schedule 5.

1. LIMIT COLLECTION, USE AND DISCLOSURE BY THE MINISTRY

Sections 4 and 27 of Schedule 5 would amend the provisions of the *Long-Term Care Homes Act, 2007* applicable to inspections under that Act. These inspections often entail the collection of personal information and personal health information.

For the reasons already stated above, personal information and personal health information should only be collected, used, and disclosed where necessary. Furthermore, even where personal information or personal health information is necessary, the Ministry should be prohibited from collecting, using, and disclosing more of such information than is needed for the purpose.

Accordingly, the IPC recommends that the *Long-Term Care Homes Act, 2007* be amended to include the provisions below:

XXX In performing a duty or exercising a power under this Act, the Minister, the Director, an inspector, and their employees or agents shall not:

- (a) collect, use or disclose personal information or personal health information if other information will serve the purpose of the collection, use or disclosure; and
- (b) collect, use, or disclose more personal information or personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

XXX In this section,

“personal health information” means personal health information as defined in the *Personal Health Information Protection Act, 2004*;

“personal information” means personal information as defined in the *Freedom of Information and Protection of Privacy Act*.

2. REQUIRE INSPECTORS AND INVESTIGATORS TO KEEP INFORMATION CONFIDENTIAL

As a result of the proposed amendments, inspectors may, among other things, demand the production of records or other things that the inspector believes are relevant to the inspection from any person. This would include personal information and personal health information.

However, such inspectors are not required to keep all information that comes to their knowledge confidential. For the reasons already stated above, the IPC recommends that a provision be added to the *Long-Term Care Homes Act, 2007* stating:

XXX An inspector appointed under section 141 of this Act shall keep confidential all information that comes to the inspector’s knowledge in the course of an inspection or making inquiries under this Act and shall not communicate any information to any other person except as required by law or except where the communication is

to the Director or the Minister or a person employed in or performing services for the Ministry.

3. PROTECT PERSONAL HEALTH INFORMATION IN DOCUMENTS FILED IN A PROSECUTION

Sections 48, 60, 61, and 62 of Schedule 5 would amend the provisions of the *Long-Term Care Homes Act, 2007* and the *Health Care Consent Act, 1996* relating to the prosecution of offences under those Acts.

Given the volume of personal health information in the custody or control of long-term care homes, and the very nature of offences under the *Health Care Consent Act, 1996*, prosecutions under those Acts will almost inevitably involve the filing of residents' and patients' personal health information in court. However, Schedule 5, and the legislation it proposes to amend, do not contain specific legislative authority allowing the court to take steps to protect this personal health information.

This is in contrast to recent amendments to *PHIPA*, which provide:

72(7) In a prosecution for an offence under subsection (1) or where documents or materials are filed with a court under sections 158 to 160 of the *Provincial Offences Act* in relation to an investigation into an offence under this Act, the court may, at any time, take precautions to avoid the disclosure by the court or any person of any personal health information about an individual, including, where appropriate,

- (a) removing the identifying information of any person whose personal health information is referred to in any documents or materials;
- (b) receiving representations without notice;
- (c) conducting hearings or parts of hearings in private; or
- (d) sealing all or part of the court files.

This is also in contrast to Schedule 9 of this very Bill, the *Oversight of Health Facilities and Devices Act, 2017*. Section 43 of Schedule 9 provides:

43 In a prosecution for an offence under this Act or where documents or materials are filed with a court under section 41 of this Act or sections 158 to 160 of the *Provincial Offences Act* in relation to an inspection or an investigation into an offence under this Act, the court may, at any time, take precautions to avoid the disclosure by the

court or any person of any personal information about an individual, including, where appropriate,

- (a) removing the identifying information of any person whose personal information is referred to in any documents or materials;
- (b) receiving representations without notice;
- (c) conducting hearings or parts of hearings in private; or
- (d) sealing all or part of the court files.

The IPC recommends that Schedule 5 be amended to include the provisions below in both the *Long-Term Care Homes Act, 2007* and the *Health Care Consent Act, 1996*:

XXX Where documents or materials are filed with a court in relation to an investigation into an offence under this Act or in a prosecution for an offence under this Act, including under sections 158 to 160 of the *Provincial Offences Act*, the court may, at any time, take precautions to avoid the disclosure by the court or any person of any personal health information about an individual, including, where appropriate,

- (a) removing the identifying information of any person whose personal health information is referred to in any documents or materials;
- (b) receiving representations without notice;
- (c) conducting hearings or parts of hearings in private; or
- (d) sealing all or part of the court files.

XXX In this section,

“personal health information” means personal health information as defined in the *Personal Health Information Protection Act, 2004*;

4. PROTECT PERSONAL INFORMATION AND PERSONAL HEALTH INFORMATION IN WRITTEN PLANS FOR COMPLIANCE

Section 31 of Schedule 5 would amend the *Long-Term Care Homes Act, 2007* to allow the Ministry to order a long-term care home to prepare, submit, and implement a “written plan” for compliance. In turn, sections 15, 16, 21, and 44 of Schedule 5 would amend the provisions of the Act to require such ordered written plans for compliance to be published and posted in long-term care homes, and to permit these written plans to be reviewed by the Residents’ and Family Councils of such homes.

Currently, section 301 of O. Reg. 79/10 limits the personal information and personal health information that may be included in inspection reports and orders to be posted, published, and reviewed by Residents' and Family Councils. The IPC understands that the government is considering whether section 301 of O. Reg. 79/10 should be amended to ensure these privacy protections also apply to written plans for compliance.

The IPC recommends that, if these proposed amendments become law, section 301 of O. Reg 79/10 be amended to ensure that any personal information and personal health information in ordered written plans for compliance are subject to the same protections as currently apply to orders and inspection reports.

SCHEDULE 7: *ONTARIO DRUG BENEFIT ACT, 1990*

The IPC recommends amending Schedule 7 to address the privacy implications of the Minister's and the executive officer's powers to collect, use and disclose personal information under the *Ontario Drug Benefit Act, 1990 (ODBA)*.

LIMIT COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION

Section 13 of the *ODBA* permits the Minister and executive officer to directly and indirectly collect personal information and to use and disclose this information, subject to such conditions as may be prescribed, for purposes related to the administration of the *ODBA* or for such other purposes as may be prescribed. Personal information is not defined under the *ODBA*, and may include personal information as defined under section 2 of *FIPPA* and personal health information as defined under section 4 of *PHIPA*.

As noted above, personal information should only be collected, used and disclosed where necessary and more personal information should not be collected, used and disclosed than is necessary for the purposes of fulfilling the Minister's and the executive officer's functions.

The IPC recommends that the following provision be added to section 13 of the *ODBA*:

- 13(8)** The Minister and the executive officer shall not,
- (a) collect, use or disclose personal information if other information will serve the purpose of the collection, use or disclosure; and,
 - (b) collect, use or disclose more personal information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

SCHEDULE 9: OVERSIGHT OF HEALTH FACILITIES AND DEVICES ACT, 2017

Schedule 9 of Bill 160, the *Oversight of Health Facilities and Devices Act, 2017* establishes a regulatory system for community health facilities and energy applying and detecting medical devices that includes, among other things, licensing, funding, enforcement and compliance. The proposed legislation also repeals the *Independent Health Facilities Act, 1990*, the *Healing Arts Radiation Protection Act, 1990* and the *Private Hospitals Act, 1990*.

The IPC recommends six amendments to address the privacy implications of Schedule 9.

1. LIMIT COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION

Schedule 9 authorizes certain persons and entities to collect, use and disclose personal information. Section 1 defines personal information to mean personal information as defined under section 2 of *FIPPA* and includes personal health information as defined under section 4 of *PHIPA*. The IPC recommends that limitations be placed on the authority of any person or entity to collect, use and disclose personal information.

- a) Inspecting bodies, committees, inspectors, supervisors and prescribed persons and entities

The IPC understands that inspecting bodies, inspectors, committees established under subsection 36(3)8, supervisors appointed under subsection 53(1), persons and entities prescribed under subsection 59(5), and prescribed persons and entities to which the executive officer delegates his or her powers under section 71, may have a legitimate need to collect, use and disclose personal information to fulfill their functions under the proposed legislation. As noted above, personal information should only be collected, used and disclosed where necessary. Even where personal information is necessary, these persons and entities should be prohibited from collecting, using and disclosing more personal information than is needed for the purpose.

The IPC recommends that the following provision be added to Schedule 9:

XXX In performing a duty or exercising a power under this Act, inspecting bodies, inspectors, committees established under subsection 36(3)8, supervisors appointed under subsection 53(1), persons and entities prescribed under subsection 59(5) and prescribed persons and entities to which the executive officer delegates his or her powers under section 71 shall not:

- (a) collect, use or disclose personal information if other information will serve the purpose of the collection, use or disclosure; and

(b) collect, use or disclose more personal information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

b) Executive officer

Section 66 authorizes the executive officer to directly and indirectly collect personal information and to use and disclose this information for the purposes set out under this provision. While section 66 provides that the executive officer cannot disclose the information if the disclosure is not necessary for those purposes, this limitation does not apply to collection and use. In addition, the executive officer should be prohibited from collecting, using or disclosing more personal information than is necessary for the purposes set out under this provision.

The IPC recommends that subsection 66(3) be amended and subsection 66(4) be added as follows:

66(3) Despite anything else in this Act, the Minister or the executive officer shall disclose personal information, subject to such conditions as may be prescribed, where the disclosure is necessary for purposes related to the administration of this Act, the *Health Insurance Act* or the *Commitment to the Future of Medicare Act, 2004* or for any other prescribed purposes.

66(4) The Minister and the executive officer shall not,

(a) collect, use or disclose personal information if other information will serve the purpose of the collection, use or disclosure; and,

(b) collect, use or disclose more personal information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

2. REQUIRE PERSONS AND ENTITIES TO KEEP INFORMATION CONFIDENTIAL

Schedule 9 contains inconsistent confidentiality obligations. Schedule 9 requires that inspecting bodies and inspectors keep confidential all information that comes to their knowledge, subject to certain exceptions. However, Schedule 9 does not include a confidentiality requirement for the executive officer, committees established under subsection 36(3)8, supervisors appointed under subsection 53(1), persons and entities prescribed under subsection 59(5) for the purpose of providing funding, and prescribed persons and entities to which the executive officer delegates his or her powers under section 71.

The IPC recommends that the following provision be added to Schedule 9:

XXX The executive officer and any committee established under subsection 36(3)8, supervisor appointed under subsection 53(1), person or entity prescribed under

subsection 59(5) and prescribed person or entity to which the executive officer delegates his or her powers under section 71, shall keep confidential all information that comes to their knowledge in the course of carrying out their functions under this Act and shall not communicate any information to any other person except as required by law or except where the communication is to the Minister or a person employed in or performing services for the Ministry.

3. RESTRICT PERSONS OR ENTITIES RECEIVING PERSONAL INFORMATION

Schedule 9 permits persons and entities to disclose information, including personal information, to other persons and entities without any limitations on the subsequent use or disclosure of that information. The IPC recommends that any recipient of personal information under the proposed legislation be subject to restrictions on the use or disclosure of that personal information. This restriction on recipients is consistent with the law already applicable to recipients of personal health information under section 49 of *PHIPA*.

The IPC recommends that the following provision be added to Schedule 9:

XXX Except as permitted or required by law and subject to the exceptions and additional requirements, if any, that are prescribed, a person or entity that receives personal information under subsections 35(1), 36(3)5 and 59(5)4, shall not use or disclose the information for any purpose other than,

- (a) the purpose for which the information was authorized to be disclosed under this Act; or
- (b) the purpose of carrying out a statutory or legal duty.

4. PRESCRIBE PERSONS RECEIVING PERSONAL INFORMATION

Section 33 requires that information, including personal information, be disclosed to an unspecified person. Subsection 59(5)4 requires that information, including personal information, be disclosed to a specified person that is not prescribed. To limit the disclosure of personal information and enhance transparency, all persons receiving personal information under Schedule 9 should be prescribed in the regulations.

The IPC recommends that section 33 and subsection 59(5)4 of Schedule 9 be amended as follows:

33 Every licensee and prospective licensee shall, in accordance with the requirements provided for in the regulations, if any, establish and maintain a process for the review of prescribed incidents and the disclosure of information, which may include

personal information, if necessary, related to such incidents **to a prescribed person or entity**.

[...]

59(5) 4. The designated person or entity shall provide the reports, notices and other information, which may include personal information, if necessary, to the Minister or other **prescribed person**,

5. USE CONSISTENT LANGUAGE

Subsections 36(3)5, 36(3)6 and 39(8)(c) refer to “personally identifiable information.” This term is not defined in the proposed legislation and it appears that the intent was to refer to “personal information”, a term defined under section 1.

The IPC recommends that the proposed legislation use consistent language and that these subsections be amended as follows:

36(3)5. Submitting reports of inspections and other information, which may include **personal information**, to the executive officer and to other prescribed persons or entities.

36(3)6. Making reports of inspections, which shall not include **personal information**, available to the public.

39(8)(c) inform the patient that information obtained from the direct observation, including **personal information**, may be used in proceedings under the laws of Ontario;

6. REQUIRE PUBLIC CONSULTATION BEFORE MAKING REGULATIONS

Provisions of Schedule 9 require the disclosure of information, including personal information, by prescribed persons and entities and to prescribed persons and entities. Schedule 9 also requires licensees and prospective licensees to disclose information, which may include personal information, related to prescribed incidents. Subsection 36(1) further provides that one or more inspecting bodies may be prescribed in the regulations.

Without knowing who these prescribed persons, entities and inspecting bodies are, it is not possible to determine whether or not they will be subject to privacy requirements such as those set out in *PHIPA* or *FIPPA*. To help ensure transparency and that personal information is adequately protected, the IPC recommends adding provisions that require public consultation and adequate notice before making any regulations under Schedule 9.

The IPC recommends that the following provisions be added to Schedule 9:

XXX (1) The Lieutenant Governor in Council and Minister shall not make any regulation under section 72 unless,

(a) the Minister has published a notice of the proposed regulation in *The Ontario Gazette* and given notice of the proposed regulation by all other means that the Minister considers appropriate for the purpose of providing notice to the persons who may be affected by the proposed regulation;

(b) the notice complies with the requirements of this section;

(c) the time periods specified in the notice, during which members of the public may exercise a right described in clause (2) (b) or (c), have expired; and

(d) the Minister has considered whatever comments and submissions that members of the public have made on the proposed regulation in accordance with clause (2) (b) or (c) and has reported to the Lieutenant Governor in Council on what, if any, changes to the proposed regulation the Minister considers appropriate.

(2) The notice mentioned in clause (1) (a) shall contain,

(a) a description of the proposed regulation and the text of it;

(b) a statement of the time period during which members of the public may submit written comments on the proposed regulation to the Minister and the manner in which and the address to which the comments must be submitted;

(c) a description of whatever other rights, in addition to the right described in clause (b), that members of the public have to make submissions on the proposed regulation and the manner in which and the time period during which those rights must be exercised;

(d) a statement of where and when members of the public may review written information about the proposed regulation;

(e) all prescribed information; and

(f) all other information that the Minister considers appropriate.

(3) The time period mentioned in clauses (2) (b) and (c) shall be at least 60 days after the Minister gives the notice mentioned in clause (1) (a).

SCHEDULE 10: *RETIREMENT HOMES ACT, 2010*

Schedule 10 of Bill 160 amends the *Retirement Homes Act, 2010* in relation to, among other things, the powers of inspectors or investigators appointed by the Retirement Homes Regulatory Authority, and would also amend the offence provisions of that *Act*.

The IPC recommends two amendments to address the privacy implications of Schedule 10.

1. LIMIT COLLECTION, USE AND DISCLOSURE BY THE RETIREMENT HOMES REGULATORY AUTHORITY

Sections 8 and 18 to 22 of Schedule 10 amend the provisions of the *Retirement Homes Act, 2010* applicable to inquiries, investigations, and inspections under that *Act*. As part of conducting inquiries, investigations and inspections, the Retirement Homes Regulatory Authority may obtain personal information and personal health information.

As noted above, personal information and personal health information should only be collected, used, and disclosed where it is necessary and no more should be collected, used, and disclosed than is necessary for the purpose.

Moreover, the Retirement Homes Regulatory Authority is not a health information custodian under *PHIPA*, nor is it currently regulated by *FIPPA* or its municipal equivalent. As such, the broader privacy protections applicable to personal information, and personal health information, in the hands of health information custodians and Ontario government institutions, would not apply to it.

The IPC recommends that a provision be added to the *Retirement Homes Act, 2010* specifying that:

XXX In performing a duty or exercising a power under this Act, the Authority and its officers, directors, Registrar, investigators, inspectors, employees and agents shall not:

- (a) collect, use or disclose personal information or personal health information if other information will serve the purpose of the collection, use or disclosure; and
- (b) collect, use, or disclose more personal information or personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

2. PROTECT PERSONAL HEALTH INFORMATION IN DOCUMENTS FILED IN A PROSECUTION

Section 25 of Schedule 10 would amend the *Retirement Homes Act, 2010* in relation to offences that may be prosecuted under that Act.

As noted above in relation to Schedule 5, given the volume of personal health information in the custody or control of retirement homes, some prosecutions under the *Retirement Homes Act* will inevitably involve the filing of residents' personal health information in court.

The IPC recommends that section 98 of the *Retirement Homes Act, 2010* be amended to include the provision below:

XXX Where documents or materials are filed with a court in relation to an investigation into an offence under this Act or in a prosecution for an offence under this Act, including under sections 158 to 160 of the *Provincial Offences Act*, the court may, at any time, take precautions to avoid the disclosure by the court or any person of any personal health information about an individual, including, where appropriate,

- (a) removing the identifying information of any person whose personal health information is referred to in any documents or materials;
- (b) receiving representations without notice;
- (c) conducting hearings or parts of hearings in private; or
- (d) sealing all or part of the court files.



APPENDIX A

The IPC's recommendations are summarized below for ease of reference.

Recommendations	Affected Schedule(s)
Limit collection, use and disclosure of personal information and personal health information – Personal information and personal health information should only be collected, used, and disclosed where it is necessary and no more should be collected, used, and disclosed than is necessary	1, 4, 5, 7, 9, 10
Require information be kept confidential – Include requirements that information be kept confidential	1, 4, 5, 9
Protect personal health information in documents filed in a prosecution – Include provisions that allow a court to protect personal health information in documents or materials filed with the court in relation to the prosecution of offences	5, 10
Remove additional prescribed disclosures – Delete the provision permitting the disclosure of personal health information between the Minister and a prescribed person, and between such prescribed persons. Also, delete the provision permitting personal health information to be disclosed for additional prescribed purposes	1
Remove the proposed exclusion from FIPPA for records containing information obtained or prepared by the Patient Ombudsman in the course of conducting an investigation – FIPPA should apply to patient ombudsman investigations	2
Limit the definition of “personal information” – Limit the definition of “personal information” to personal information about recipients, payors, intermediaries, or affiliates of payors or intermediaries	4
Limit the use of information – Limit use of information to the purposes of health system evaluation and planning	4

Protect personal information and personal health information in written plans for compliance – Ensure that any personal information and personal health information in ordered written plans for compliance are subject to the same privacy protections as apply to orders and inspection reports	5
Restrict persons or entities receiving personal information – Any recipient of personal information should be subject to restrictions on the use or disclosure of that personal information	9
Prescribe persons receiving personal information – All persons receiving personal information should be prescribed to limit disclosure of personal information and enhance transparency	9
Use consistent language – Refer to “personal information” in a consistent manner	9
Require public consultation before making regulations – Require public consultation and adequate notice before making any regulations to help ensure transparency and that personal information is adequately protected	9



Information and Privacy
Commissioner of Ontario
Commissaire à l'information et à la
protection de la vie privée de l'Ontario

2 Bloor Street East
Suite 1400
Toronto, Ontario
M4W 1A8
CANADA

416-326-3333
1-800-387-0073
Fax: 416-325-9195
TTY (Teletypewriter): 416-325-7539
Website: www.ipc.on.ca