



Information and Privacy  
Commissioner of Ontario

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

**VIA ELECTRONIC MAIL & ONLINE SUBMISSION**

May 14, 2021

Deepak Anand  
Chair of the Committee  
Standing Committee on Social Policy  
Legislative Assembly of Ontario  
99 Wellesley Street West  
Room 1405, Whitney Block  
Queen's Park  
Toronto, ON M7A 1A2

Dear Chair Anand:

**RE: Written Submission of the Information and Privacy Commissioner of Ontario  
Bill 283, *Advancing Oversight and Planning in Ontario's Health System Act, 2021***

Bill 283, *Advancing Oversight and Planning in Ontario's Health System Act, 2021* introduces three pieces of legislation and amends the *Medicine Act, 1991*. Bill 283 also makes complementary amendments to various other statutes, including the *Personal Health Information Protection Act, 2004 (PHIPA)*.

While Bill 283 proposes significant changes to the law governing health care services in Ontario, the Office of the Information and Privacy Commissioner (IPC) believes that important amendments are necessary to protect the privacy of Ontarians.

The IPC makes the following recommendations regarding Bill 283.

**SCHEDULE 1: *COVID-19 VACCINATION REPORTING ACT, 2021***

Schedule 1 to Bill 283 introduces the *COVID-19 Vaccination Reporting Act, 2021*, which requires persons and entities that administer COVID-19 vaccines to disclose certain information to the Ministry of Health (the Ministry).<sup>1</sup> The IPC makes the following recommendations to amend Schedule 1 in order to protect the privacy of individuals with respect to their personal health information.

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<sup>1</sup> Or to the ministry of such other minister as may be assigned responsibility for the administration of the Act.



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## 1. Require the Ministry to comply with *PHIPA*

The Ministry is a health information custodian (custodian) within the meaning of *PHIPA*. *PHIPA* applies to the collection, use, and disclosure of personal health information by custodians, except if *PHIPA* or its regulations specifically provide otherwise.<sup>2</sup> *PHIPA* provides that in the event of a conflict between a provision of *PHIPA* or its regulations and a provision of any other act or its regulations, *PHIPA* and its regulations prevail unless *PHIPA*, its regulations or the other act specifically provide otherwise.<sup>3</sup> Schedule 1, as proposed, is an instance of an act specifically providing otherwise. Section 5 of Schedule 1 states:

(1) Subject to subsection (2), the Ministry shall use and disclose the information disclosed under sections 2, 3 and 4 in accordance with the *Personal Health Information Protection Act, 2004*.

(2) Despite the *Personal Health Information Protection Act, 2004*, the Ministry shall use and disclose any information that may be prescribed in the regulations in accordance with the requirements provided for in the regulations.

The IPC is concerned that subsection 5(2) of Schedule 1 puts at serious risk the privacy of Ontarians with respect to their personal health information. We are not aware of any rationale that would justify the Ministry being permitted or required to use or disclose personal health information in a manner not in accordance with *PHIPA*. Moreover, leaving to regulations such fundamental decisions about which uses and disclosures of Ontarians' personal health information will not be subject to *PHIPA* risks undermining public confidence in the importance being placed on their privacy at a time when trust is so indispensable to the success of any public health measures. Furthermore, it would go against the Minister of Health's statement during the second reading of Bill 283 that "[t]he data would be collected and retained in the same way as other confidential personal health information. Any data collection, retention, use or disclosure would be in compliance with *PHIPA*."

There are already many existing authorities in *PHIPA* that permit custodians to use and disclose personal health information without consent for a variety of purposes that are seen to be in the public interest. It is not clear why these existing consent exemptions would not be sufficient for the purposes of Schedule 1. By removing these uses and disclosures of personal health information from *PHIPA* altogether by way of subsection 5(2), such uses and disclosures would fall outside the oversight of the IPC and would not be subject to standard privacy and security requirements built into *PHIPA*, including the requirement for reasonable security safeguards and breach notification.

Accordingly, the IPC recommends that subsection 5(2) be struck from the Bill.

Additionally, in subsection 5(1) the phrase "shall use and disclose the information disclosed under sections 2, 3 and 4 in accordance with" should be changed to "may use and disclose the information

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<sup>2</sup> See *PHIPA* s. 7(1).

<sup>3</sup> See *PHIPA* s. 7(2).

disclosed under sections 2, 3 and 4 only in accordance with”. This phrasing more accurately conveys what the IPC understands to be the intended meaning of subsection 5(1).

The IPC recommends that subsection 5(1) be amended and subsection 5(2) be struck as follows:

~~5 (1) Subject to subsection (2), the Ministry shall may use and disclose the information disclosed under sections 2, 3 and 4 in accordance with *the Personal Health Information Protection Act, 2004*.~~

~~(2) Despite the *Personal Health Information Protection Act, 2004*, the Ministry shall use and disclose any information that may be prescribed in the regulations in accordance with the requirements provided for in the regulations.~~

## **2. Allow individuals to direct that their information not be disclosed to the Ministry**

Section 2 of Schedule 1 requires the vaccinator to disclose certain information to the Ministry in respect of the individual “unless the individual has not supplied the information to the vaccinator”. While the quoted phrase may be an attempt to allow individuals to opt out of having their information disclosed to the Ministry, the phrase, as is, will not be effective in achieving this purpose.

If an individual supplies the data elements in section 2 to the vaccinator prior to, or at the beginning of, the vaccination appointment, the individual may not be aware that the information supplied will in turn be disclosed to the Ministry for a different and as of yet undefined purpose. Schedule 1 does not describe the purposes for the collection, use, and disclosure of this information by the Ministry and therefore, the vaccinator would not be in a position to explain to individuals what those purposes are.

Furthermore, the vaccinator may be collecting some of the data elements listed in section 2 for its own purpose (the purpose of providing health care) and the individual may intend to only supply their information for that purpose and no other purpose.

In short, an individual’s decision to supply information to the vaccinator for the purpose of receiving health care (the vaccine), and an individual’s decision to allow that information to be disclosed to the Ministry, are two separate disclosures with different purposes which, in our view, should not be conflated. As written, section 2 does not clearly set out that only where the vaccinator obtains the consent of the individual to disclose the information to the Ministry does the requirement to disclose the information to the Ministry become operative. Instead, the current wording of section 2 requires the vaccinator to disclose to the Ministry personal health information supplied by the individual even if it was for a different purpose and even if the disclosure is against the individual’s wishes.

To avoid this result, the IPC recommends that section 2 of Schedule 1 be amended as follows:

2 Every vaccinator shall ensure that the following information is disclosed to the Ministry in respect of every individual to whom the vaccinator administers a vaccine and every individual to whom the vaccinator declines to administer a vaccine, if the individual has consented to the disclosure of the information to the Ministry ~~unless the individual has not supplied the information to the vaccinator: ...~~

### **3. Ensure that vaccinators comply with *PHIPA*'s requirements with respect to consent**

Section 2 of Schedule 1 requires vaccinators to disclose certain information to the Ministry, including “[a]ny other information provided for in the regulations”. The IPC understands the Ministry intends to prescribe sociodemographic data by way of such regulations.

However, before collecting, using, or disclosing any information set out under section 2 of Schedule 1, including any sociodemographic information provided for in the regulations, vaccinators, as custodians or agents of custodians within the meaning of *PHIPA*, must comply with all of the requirements of *PHIPA*.

Among other things, a custodian must not collect, use, or disclose personal health information about an individual unless, (a) it has the individual’s consent under *PHIPA* and the collection, use, or disclosure, as the case may be, to the best of the custodian’s knowledge, is necessary for a lawful purpose; or (b) the collection, use, or disclosure is permitted or required by *PHIPA*.

While vaccinators must disclose certain information to the Ministry under section 2 of Schedule 1 of the Bill, in order to collect it in the first place, they require consent under *PHIPA*. For consent to be valid it must be knowledgeable, meaning that it is reasonable in the circumstances to believe that the individual knows the purpose of the collection, use, or disclosure and that consent may be given or withheld. Further, express consent is required for disclosures of personal health information for purposes other than providing health care or assisting in providing health care. Schedule 1 does not specify the purposes for which the Ministry may use and disclose the personal health information collected from vaccinators. It only states that the information will be used and disclosed in accordance with *PHIPA* and, despite *PHIPA*, as set out in the regulations. Prior to the vaccinators’ collection of any information from individuals, the Ministry must clarify the purposes for which the information may be used or disclosed by the Ministry so that vaccinators can ensure that they obtain knowledgeable consent from individuals when collecting this information.

If Schedule 1 is passed, the IPC recommends that vaccinators and their agents involved in collecting information from individuals be appropriately trained on how to seek consent, how to respond to individuals’ questions about the initiative, and how to safeguard the personal health information collected in compliance with *PHIPA*. Any consent form used in this initiative should, at a minimum, clearly explain the legal authority – and rationale – for the collection, use, and disclosure of the individual’s personal health information, and that receiving a vaccine is not contingent on the individual consenting to the disclosure of the individual’s personal health

information to the Ministry. The consent form should further explain the purposes of any subsequent use or disclosure of the personal health information by the Ministry.

#### **4. Enhance transparency by including provisions directly in Schedule 1 and require public consultation before making regulations**

Section 7 of Schedule 1 contains broad regulation-making authority and does not require any notice or consultation before making the regulations. Schedule 1 leaves a number of significant matters to regulation, such as prescribing additional information to be disclosed about individuals under section 2 (which may include sociodemographic data), and information that the Ministry must use and disclose despite *PHIPA* under section 5. The IPC believes these matters should be directly addressed in Schedule 1 and not be left to regulation. This will help ensure that these requirements are justified, transparent to the public, and can be the subject of deliberation in the legislature.

Additionally, to help ensure transparency and that personal health information is adequately protected, the IPC recommends adding provisions to Schedule 1 that require public consultation and adequate notice before making any regulations under section 7.

Therefore, the IPC recommends that the following provisions be added to Schedule 1:

**XXX** (1) The Lieutenant Governor in Council shall not make any regulation under section 7 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).

## **5. Make various other amendments to accord with the language of *PHIPA***

For the purposes of consistency with *PHIPA*, the IPC recommends amending the language identified below.

“information”

The IPC recommends that “information” be defined to include personal health information within the meaning of *PHIPA*.

“Ontario health card number”

The IPC recommends that Schedule 1 use language consistent with *PHIPA* wherever it is reasonable to do so. Therefore the IPC recommends that “Ontario health card number” be amended to “health number within the meaning of the *Personal Health Information Protection Act, 2004*”.

## **SCHEDULE 2: HEALTH AND SUPPORTIVE CARE PROVIDERS OVERSIGHT AUTHORITY ACT, 2021**

Schedule 2, the *Health and Supportive Care Providers Oversight Authority Act, 2021*, establishes a regulatory framework for registrants that provide health services and supportive care services that includes, among other things, registration with the Health and Supportive Care Providers Oversight Authority (the “Authority”), enforcement, and compliance mechanisms. Schedule 2 also makes complementary amendments to other legislation, including *PHIPA*.

The IPC recommends the following amendments to address the privacy implications of Schedule 2 and invites consideration of possible further amendments to *PHIPA*.

### **1. Define personal information and personal health information**

Schedule 2 uses the terms “information”, “document”, “record”, “personal information” and “personal health information” but does not define them.<sup>4</sup> The IPC recommends that the terms “information”, “document” and “record” be used in a consistent manner and clarify wherever they are intended to include personal information and personal health information.

The IPC further recommends that the terms “personal information” and “personal health information” be defined in subsection 1(1) of Schedule 2 as follows:

“personal health information” has the same meaning as in section 4 of the *Personal Health Information Protection Act, 2004*

“personal information” means personal information within the meaning of the *Freedom of Information and Protection of Privacy Act*

### **2. Limit collection, use, and disclosure of personal information and personal health information by investigators**

Part V of Schedule 2 authorizes investigators to enter a place in which a registrant provides health services or supportive care services to the public, or in which documents or records relevant to the registrant’s provision of health services or supportive care services are located, and to examine anything found there that is relevant to the investigation.

Part V of Schedule 2 also makes reference to, but does not define, the terms “document”, “information”, or “record” that may be examined by an investigator. As mentioned above, it is not clear whether these terms are intended to include personal information or personal health information. Given the nature of the health services and supportive care services provided by registrants, it is likely that documents, information, and records pertaining to those services contain

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<sup>4</sup> Except for “information” being defined in the context of section 36 only, and “document” being defined in the context of section 42 only.

personal information or personal health information of individuals receiving health services or supportive care services.

The IPC understands that investigators may have a legitimate need to collect, use, and disclose personal information and personal health information to fulfill their functions under the proposed legislation. However, in doing so, we recommend that they carry out their functions in keeping with universally-accepted principles of privacy protection, namely that: 1) personal information and personal health information should only be collected, used, and disclosed to the extent necessary; and 2) even where necessary, investigators should be prohibited from collecting, using, and disclosing more personal information and personal health information than is needed for the purpose.

The IPC recommends, therefore, that the following provision be added to Schedule 2:

**XXX** In performing a duty or exercising a power under this Act, an investigator 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.

### **3. Amend the exceptions to the confidentiality provision**

Schedule 2 contains a confidentiality provision applicable to persons who obtain information in the course of exercising a power or carrying out a duty related to the administration of the *Health and Supportive Care Providers Oversight Authority Act, 2021*, its regulations or the memorandum of understanding described in subsection 14(1).

The confidentiality provision contains a number of exceptions to the prohibition on communicating information obtained in the course of exercising a power or carrying out a duty related to the administration of the *Health and Supportive Care Providers Oversight Authority Act, 2021*. One of the exceptions is set out in clause 51(1)(b), which states “for the purposes of the administration of another prescribed Act of Ontario or Canada”. This exception is very broad and, as written, it is not possible to determine the persons to whom this information may be communicated and whether those persons will be subject to privacy requirements in other legislation, such as those set out in *PHIPA* or the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

In contrast, the exceptions found in the confidentiality provision of the *Regulated Health Professions Act, 1991* name the specific acts that the exception applies to, for instance, the exception applies to disclosures required for the administration of the *Drug Interchangeability and Dispensing Fee Act*.



The IPC recommends that, in the interest of transparency, any statute to which clause 51(1)(b) pertains be named in the legislation rather than prescribed in the regulations, and that the government determine whether the application of an exception to confidentiality is necessary for the statutes being considered.

Another exception to the prohibition on communicating information obtained in the course of exercising a power or carrying out a duty related to the administration of the *Health and Supportive Care Providers Oversight Authority Act, 2021* is clause 51(1)(k), which refers to “a prescribed entity or organization”. Again, without knowing who these entities and organizations are, it is not possible to determine whether this exception is necessary and whether or not the entity or organization is subject to privacy requirements in other legislation, such as those set out in *PHIPA* or *FIPPA*. The IPC recommends that any entity or organization to which clause 51(1)(k) pertains be named in the legislation itself rather than prescribed in the regulations, and that the government determine whether the application of an exception to confidentiality is necessary for the entity or organization being considered.

#### **4. Require public consultation before making regulations**

As discussed above, the confidentiality provision under Schedule 2 contains exceptions permitting the communication of information “for the purposes of the administration of another prescribed Act of Ontario or Canada” and “to a prescribed entity or organization”. The IPC recommends adding provisions that require public consultation and adequate notice before making these or any other regulations under section 62 of Schedule 2. In our view, these added steps would greatly enhance transparency and help ensure that personal information and personal health information are adequately protected.

The IPC recommends that the following provisions be added to Schedule 2:

**XXX** (1) The Lieutenant Governor in Council shall not make any regulation under section 62 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).

## **5. Protect personal health information in documents filed in a prosecution**

Sections 55 and 56 of Schedule 2 set out offences and the penalties for the commission of an offence. Although prosecutions under the *Health and Supportive Care Providers Oversight Authority Act, 2021* will almost inevitably involve filing personal health information of the individual who receives health services or supportive care services, Schedule 2 does not contain provisions allowing the court to take steps to protect this personal health information.

The IPC recommends that Schedule 2 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.

## **6. Consider whether further complementary amendments to *PHIPA* are needed**

Section 67 of Schedule 2 makes complementary amendments to *PHIPA*. These amendments add references to the Authority to several provisions of *PHIPA* that currently refer to a College within the meaning of the *Regulated Health Professions Act, 1991* and to the Ontario College of Social Workers and Social Service Workers.

The IPC recommends that the government determine whether similar amendments are needed to section 2 of *PHIPA* (in the definition of “health care practitioner”) and subsections (3), (4), and (5) of section 17.1 of *PHIPA*. Similarly, the IPC recommends that if Schedule 2 is passed, that the government determine whether amendments are needed to add references to the “Authority” in sections 6.3 and 22 of O. Reg. 329/04.

### **SCHEDULE 3: *MEDICINE ACT, 1991***

Section 1 of Schedule 3 amends the *Medicine Act, 1991* to provide that physician assistants are a class of members of the College of Physicians and Surgeons of Ontario. However, the section also contains the following restriction and exception:

#### Restriction

(2) Subject to subsection (3), a reference in any other Act or regulation to a physician, a legally qualified medical practitioner, a member of the College or any similar expression does not include a physician assistant unless the other Act or regulation specifically provides that it does.

#### Exception

(3) Despite subsection (2), a provision of the *Regulated Health Professions Act, 1991*, that applies with respect to a member of the College applies with respect to a physician assistant unless it provides otherwise, except in,

- (a) clause 33 (2) (c) of that Act; and
- (b) paragraph 3 of subsection 33.1 (1) of that Act.

The IPC recommends that *PHIPA* be amended to include physician assistants in the definition of a member of a College. This would ensure that breaches are reported to the College under section 17.1 and to the IPC under subsection 12(3).

**SCHEDULE 4: *PSYCHOLOGY AND APPLIED BEHAVIOUR ANALYSIS ACT, 2021***

Schedule 4 repeals the *Psychology Act, 1991* and enacts the *Psychology and Applied Behaviour Analysis Act, 2021*. Section 5 of Schedule 4 provides that the College of Psychologists of Ontario is continued under the name College of Psychologists and Behaviour Analysts of Ontario. The IPC recommends that a complementary amendment be made to *PHIPA* to reflect this college's new name.

Accordingly, the IPC recommends that the following provision be added to Schedule 4:

***Personal Health Information Protection Act, 2004***

**XXX** Subsection 52 (5) of the *Personal Health Information Protection Act, 2004* is amended by striking out "College of Psychologists of Ontario" and substituting "College of Psychologists and Behaviour Analysts of Ontario".

Sincerely,

A handwritten signature in black ink, appearing to read "Kosseim", with a horizontal line underneath the name.

Patricia Kosseim  
Commissioner