

Information
and Privacy
Commissioner
of Ontario

Submission of the Information and
Privacy Commissioner of Ontario
to the Standing Committee
on Justice Policy on Bill 119:
*The Health Information
Protection Act, 2015*



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COMMENTS OF THE INFORMATION AND PRIVACY

COMMISSIONER OF ONTARIO ON BILL 119

Bill 119 is designed to improve accountability and transparency in the health care system and to better protect patient privacy. The bill consists of two distinct schedules. Schedule 1 contains proposed amendments to the *Personal Health Information Protection Act, 2004*. Schedule 2 contains the proposed *Quality of Care Information Protection Act, 2015*, which will repeal and replace the existing *Quality of Care Information Protection Act, 2004*.

The *Personal Health Information Protection Act, 2004* and the *Quality of Care Information Protection Act, 2004* were originally introduced together as one bill. Proposed amendments to the *Personal Health Information Protection Act, 2004* and the proposed *Quality of Care Information Protection Act, 2015* have again been introduced together in Bill 119. It is important to note that while my office provides oversight for the *Personal Health Information Protection Act, 2004*, we do not oversee the existing *Quality of Care Information Protection Act, 2004* or the proposed statute that will replace it.

This submission is divided into two distinct sections. The first part relates to Schedule 1, the proposed amendments to the *Personal Health Information Protection Act, 2004*. The second part relates to Schedule 2, the proposed *Quality of Care Information Protection Act, 2015*.



Schedule 1: Proposed Amendments to the *Personal Health Information Protection Act, 2004* and to certain related Statutes

Schedule 1 of Bill 119 proposes to amend the *Personal Health Information Protection Act, 2004* (*PHIPA*) to improve accountability and transparency in the health sector and better protect patient privacy. If passed, the amendments would, among other things:

- establish a privacy governance framework for shared electronic health records created and maintained by prescribed organizations,
- require reporting of privacy breaches that meet certain requirements to my office,
- remove the requirement that prosecutions be commenced within six months of when the alleged offence occurred, and
- double the maximum fines for offences.

Health care is an information intensive industry. Without accurate, complete and up-to-date personal health information, it is not possible to provide efficient and effective health care. However, in order for patients to be willing to share such information with their health care providers, they must have trust and confidence that the health sector will protect their privacy and the confidentiality of their personal health information.

As the health sector transitions from paper-based records and stand-alone electronic medical records to a shared provincial electronic health record system (a shared provincial EHR), amendments to Ontario's health privacy legislation are necessary to ensure the privacy of patients and the confidentiality of their personal health information in a shared provincial EHR. For a number of years, my office has been advocating for a governance framework to protect personal health information collected, used and disclosed in the context of a shared provincial EHR. We commend the government for moving forward with the proposed amendments to *PHIPA*.

In the context of a shared provincial EHR, there is no single health information custodian with custody or control of all of the records of personal health information. Custody and control is shared among the custodians who create and contribute the information and those who collect and use the information from the shared provincial EHR. This presents challenges for compliance with *PHIPA* since the duties and obligations set out in *PHIPA* lie with the health information custodian who has custody or control of the records of personal health information. Similarly, the rights of individuals are exercised by contacting the health information custodian with custody or control of their records of personal health information. However, in a shared provincial EHR, where multiple custodians may have custody or control of the records of personal health information, it is not clear how the duties and obligations of health information custodians will be fulfilled or how individuals will be able to exercise their rights with respect to their records of personal health information. The proposed amendments will help to clarify these issues.

The proposed amendments will establish a governance framework for a shared provincial EHR. The Minister of Health and Long-Term Care will be required to establish an advisory committee to make recommendations to the Minister concerning the shared provincial EHR, including recommendations regarding the information practices that a prescribed organization must have in place and the disclosure of personal health information in the shared provincial EHR for secondary purposes such as research. A prescribed organization will be required to maintain, audit and monitor certain logs relating to the shared provincial EHR, including logs of all access to personal health information, as well as respond to or facilitate a response to requests for access by individuals. In addition to having the authority to direct the disclosure of personal health information in the shared provincial EHR for secondary purposes, the Minister will have access to the information for the purpose of de-identifying the information and using it for planning and managing the provincial health system.

Individuals will be able to exercise control over the collection, use and disclosure of their personal health information in the shared provincial EHR through the application of “consent directives.”



Although health information custodians will be permitted to override consent directives in limited circumstances, they will be required to notify individuals. In addition, health information custodians will be required to notify my office when a consent directive is overridden for the purpose of preventing harm to someone other than the individual to whom the information relates. Individuals will have a right of access to their records of personal health information in the shared provincial EHR, as well as logs of all accesses to their records.

The proposed amendments will enhance oversight for the shared provincial EHR. For example, health information custodians will be required to report privacy breaches that meet certain prescribed requirements to my office. Prescribed organizations, as well as two units of the Ministry of Health and Long-Term Care, will be required to have their information practices reviewed and approved by my office every three years.

The proposed amendments include a number of provisions to help address unauthorized access to personal health information and other offences under *PHIPA*. For example, the six month limitation period for commencing a prosecution will be removed and maximum fines for offences will be doubled from \$50,000 to \$100,000 for individuals and from \$250,000 to \$500,000 for organizations.

As the proposed amendments to *PHIPA* were developed in close consultation with my office, I support all of the proposed amendments, with one minor exception. Specifically, I recommend changing the proposed amendment to clarify the restrictions on agents of health information custodians in respect of the collection, use and disclosure of personal health information. While I am not opposed to an amendment to clarify the restrictions on agents, I am concerned that, as currently drafted, the proposed amendment may be relied upon to argue that agents of health information custodians are not required to know and comply with the law.

RESTRICTIONS AND RESPONSIBILITIES OF AGENTS

PHIPA contemplates that the activities of health information custodians will often be carried out by agents. The identity of agents varies broadly, from hospital employees to companies that are retained to shred documents. In our view, as currently worded, *PHIPA* makes it clear that agents may only collect, use, disclose, retain or dispose of personal health information if it is not contrary to *PHIPA* or any other law.

In an attempt to bring clarity to the obligations imposed on agents, Bill 119 proposes to amend section 17(2) of *PHIPA*. The proposed amendment does this by mirroring the obligations imposed on health information custodians under the proposed section 17(1), with one exception: it does not explicitly require that agents only collect, use and disclose personal health information where not contrary to the limits imposed by *PHIPA* or another law.

Agents of health information custodians are defined in *PHIPA* to encompass a wide variety of individuals and organizations who act on behalf of health information custodians in respect of personal health information. For example, agents may include regulated health professionals, health researchers, electronic service providers, health information network providers and other third party service providers (e.g., health record storage companies, paper shredding companies). Agents of health information custodians include independent businesses and professionals. Such agents of health information custodians are currently required to comply with a range of legislation and are generally expected to understand their legal obligations, independent of their relationships with health information custodians on whose behalf they may act in respect of personal health information. Given the diverse nature of agents of health information custodians, it is recommended that the duty to comply with *PHIPA* as well as other laws be explicitly imposed on all agents of health information custodians as well as on the health information custodians on whose behalf they may act.

Further, removing the direct obligation for agents of health information custodians to comply with *PHIPA* and other laws may weaken the existing accountability framework. Protecting privacy and maintaining confidentiality requires a collaborative effort on the part of all parties involved in the collection, use and disclosure of personal health information. To ensure an appropriate degree of accountability, it is essential that health information custodians as well as all of their agents are required to comply with *PHIPA* and other laws.

It is also important that agents be explicitly required to comply with *PHIPA* **and other laws** in the event that the health information custodian on whose behalf they act has policies and procedures that are not in compliance with *PHIPA* or another law, and/or the health information custodian asks the agent to perform an activity or take some action that is not in compliance with *PHIPA* or another law.

RECOMMENDATION

This issue can be addressed through a simple amendment. To clarify that all agents are required to only collect, use, disclose, retain and dispose of personal health information in compliance with *PHIPA* and other laws, regardless of what is permitted by the health information custodian, I recommend that the proposed section 17(2) be amended as follows:

An agent of a health information custodian may collect, use, disclose, retain or dispose of personal health information only if,

- (a) the collection, use, disclosure, retention or disposal of the information, as the case may be,
 - (i) is permitted by the custodian in accordance with subsection (1),

(ii) is necessary for the purpose of carrying out his or her duties as agent of the custodian,

(iii) is not contrary to this Act or another law, and

(iv) complies with any conditions or restrictions that the custodian has imposed under subsection (1.1); and

(b) the prescribed requirements, if any, are met **[bold indicates change]**.

The recommended amendment would also ensure consistency with the proposed language in section 17(1) which sets out the obligations of the health information custodian in respect of its agents.

CONCLUSION

My office fully supports the proposed amendments to *PHIPA*. In my view, these amendments are necessary to address privacy issues that are emerging in the provincial ehealth environment. However, one minor amendment should be made to ensure that all agents of health information custodians are explicitly obliged to only collect, use, disclose, retain or dispose of personal health information if it is not contrary to *PHIPA* or another law.

Schedule 2: *Quality of Care Information Protection Act, 2015*

If enacted, Schedule 2 of Bill 119, the *Quality of Care Information Protection Act, 2015* (the proposed legislation), will repeal and replace the existing *Quality of Care Information Protection Act, 2004 (QCIPA)*. By restricting the disclosure of what is defined as “quality of care information,” the goal of the proposed legislation is to enable health care providers and others who work in health care facilities to participate in frank discussions to improve patient care without fear of retaliation. I note again that my office plays no direct oversight role in enforcing *QCIPA*. However, my office may become involved in situations where patients or their families submit a request for information to a health care facility and are denied access based on the provisions of *QCIPA*.

While my office is not opposed to the enactment of the proposed legislation, two amendments are recommended to enhance openness and transparency and to improve accountability and oversight, without detracting from the goals of the proposed legislation. The proposed legislation should be amended to ensure that:

- my office has the power to independently review the decisions of government institutions and health information custodians who refuse to provide access to records they believe contain “quality of care information,” and
- individuals and their authorized representatives continue to have a right of access to facts in respect of all incidents that may be subject to review under the proposed legislation, rather than facts relating to critical incidents only.

POWERS OF COMMISSIONER

As you are aware, the Office of the Information and Privacy Commissioner of Ontario oversees three statutes: the *Personal Health Information Protection Act*, the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy*

Act. Among other things, these statutes provide individuals with a right of access to records of their own personal information and personal health information. If a government institution or health information custodian refuses to provide access, individuals have a right to complain or appeal to my office.

Both *QCIPA* and the proposed legislation provide broad prohibitions on the disclosure of “quality of care information.” For example, section 9(1) of the proposed legislation like section 4(1) of the current *QCIPA*, provides “despite the *Personal Health Information Protection Act, 2004*, no person shall disclose quality of care information except as permitted by this Act.” Section 3 of the proposed legislation, like section 1.1 of the current *QCIPA*, provides that “the *Freedom of Information and Protection of Privacy Act* does not apply to quality of care information.” Section 10 of the proposed legislation, like section 5 of the current *QCIPA*, provides that “quality of care information” is not admissible in evidence in a proceeding and that no court or body holding a proceeding shall permit or shall require a witness to disclose “quality of care information.” Further, as is currently the case with *QCIPA*, the proposed legislation would prevail over other legislation in the event of a conflict, unless specially provided otherwise.

The prohibition on the disclosure of “quality of care information” is not absolute. Section 9 of the proposed legislation, like section 4 of the current *QCIPA*, provides some exceptions. However, none of these exceptions provide my office with the explicit authority to review information that a government institution or a health information custodian believes is “quality of care information” to determine whether it is properly excluded from access under Ontario’s access and privacy laws.

Consider a typical situation. The family of a deceased individual may submit a request for access to records of information about the deceased individual to learn more about his or her death. A hospital may withhold certain records because they are determined to contain “quality of care information” which is protected from disclosure under *QCIPA*. I believe that my office should explicitly have the power to review the records from the hospital to determine whether *QCIPA* was properly invoked in refusing the request. As *QCIPA* is currently worded, hospitals

may argue that they are prohibited from disclosing records that they believe contain “quality of care information” to my office.

RECOMMENDATION

It is therefore recommended that section 9 of the proposed legislation be amended to clarify that both government institutions and health information custodians may disclose information they believe is “quality of care information” to my office for the purpose of enabling my office to carry out its powers and duties under the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act* and the *Personal Health Information Protection Act*. In particular, it is recommended that section 9 of the proposed legislation be amended to add two subsections as follows:

(4.1) Despite subsection (1), a person may disclose quality of care information to the Commissioner for the purpose of enabling the Commissioner to carry out the Commissioner’s powers and duties under the *Freedom of Information and Protection of Privacy Act*, *Municipal Freedom of Information and Protection of Privacy Act* and the *Personal Health Information Protection Act*, 2004.

(4.2) In this section, “Commissioner” means the Information and Privacy Commissioner appointed under the *Freedom of Information and Protection of Privacy Act*.

The recommended changes would ensure that, in response to complaints and appeals from individuals and their authorized representatives, my office has explicit authority to conduct an independent review of decisions to refuse to provide access to records that are believed to contain “quality of care information.” Such reviews may help to assure individuals that they have been provided with access to all of the information to which they are entitled, despite the fact

that an incident has been subject to review under the proposed legislation. It may also help to alleviate public concerns about the lack of transparency and oversight for incidents reviewed under the proposed legislation.

INCREASING OPENNESS AND TRANSPARENCY

The preamble to the proposed legislation states that the people of Ontario and their Government “believe that quality of health care and patient safety is best achieved in a manner that supports openness and transparency to patients and their authorized representatives regarding patient health care.” Despite this statement, the proposed legislation appears, in some respects, to be less open and transparent than the current *QCIPA*, the statute it will replace, especially in relation to incidents that do not fit within the definition of a “critical incident.” By narrowing the types of information that are excluded from the definition of “quality of care information,” it is my view that the enactment of the proposed legislation may result in the disclosure of less information to individuals and their authorized representatives and therefore less openness and transparency than is currently the case under *QCIPA*. This was clearly not the intent of repealing and replacing *QCIPA*.

With limited exceptions, the *Personal Health Information Protection Act* provides individuals with the right to access and request correction of records of their own personal health information. However, these rights do not apply to a record that contains “quality of care information.” Similarly, section 3 of the proposed legislation provides that “the *Freedom of Information and Protection of Privacy Act* does not apply to quality of care information.”

Currently, the definition of “quality of care information” in section 1 of *QCIPA* explicitly provides that “quality of care information” does not include “**facts** contained in a record of an **incident** involving the provision of health care to an individual, except if the facts involving the incident are also fully recorded in a record [that is maintained for the purpose of providing health care to

an individual].” Where this exception applies, the information is currently not considered to be “quality of care information” and therefore is not excluded from access under Ontario’s access and privacy laws. This ensures that *QCIPA* is not used to shield facts about the health care that was provided to an individual, unless those facts are already contained in a record to which the individual has a right of access.

Under the proposed legislation, paragraph 3(i) of section 2(3) contains a similar exclusion for **facts**. However, this exclusion has been narrowed to only exclude **facts** in relation to a **critical incident** as follows:

“Quality of care information” does not include any of the following:

...

3. Information relating to a patient in respect of a **critical incident** that describes,
 - i. facts of what occurred with respect to the incident [emphasis added],

Thus, while facts relating to critical incidents will not be excluded from the right of access, with respect to all other incidents, such information would be “quality of care information” and therefore excluded from the right of access.

A **critical incident** is defined in section 2(1) of the proposed legislation as follows:

In this Act,

“critical incident” means any unintended event that occurs when a patient receives health care from a health facility that,

- (a) results in death, or serious disability, injury or harm to the patient, and
- (b) does not result primarily from the patient's underlying medical condition or from a known risk inherent in providing the health care,

Because the definition of **critical incidents** is limited to unintended events that result in death or serious disability, injury or harm to patients, the proposed legislation may be used to shield facts about errors or omissions that do not cause serious harm. As a result, individuals may have access to less information than is currently the case, since “quality of care information” under *QCIPA* excludes facts about *any incident* rather than just **critical incidents**.

RECOMMENDATION

I therefore recommend that the proposed legislation be amended to ensure that individuals and their authorized representatives continue to have a right of access to facts of what occurred in respect of *all* incidents that are reviewed under the proposed legislation, rather than just facts relating to critical incidents. This is consistent with the current provisions of *QCIPA*.

CONCLUSION

While my office is not opposed to the introduction of the proposed legislation, amendments are needed to enhance accountability and transparency. Specifically, the proposed legislation should be amended to ensure that my office has the ability to receive quality of care documents in order to independently review the decisions of government institutions and health information custodians who refuse to provide access to records they believe contain “quality of care information.” Further, the proposed legislation should be amended to ensure that individuals and their authorized representatives continue to have a right of access to facts in respect of all incidents that may be subject to review under the proposed legislation, rather than just critical incidents.

APPENDIX

SUMMARY OF RECOMMENDATIONS

Schedule 1: Proposed Amendments to the *Personal Health Information Protection Act, 2004* and to certain related Statutes

To clarify that agents are required to only collect, use, disclose, retain and dispose of personal health information in compliance with *PHIPA* and other laws, amend section 17(2) as follows:

a. An agent of a health information custodian may collect, use, disclose, retain or dispose of personal health information only if,

(a) the collection, use, disclosure, retention or disposal of the information, as the case may be,

(i) is permitted by the custodian in accordance with subsection (1),

(ii) is necessary for the purpose of carrying out his or her duties as agent of the custodian,

(iii) is not contrary to this Act or another law, and

(iv) complies with any conditions or restrictions that the custodian has imposed under subsection (1.1); and

(b) the prescribed requirements, if any, are met **[bold indicates change]**.

Schedule 2: Quality of Care Information Protection Act, 2015

Amend section 9 to add two subsections as follows:

(4.1) Despite subsection (1), a person may disclose quality of care information to the Commissioner for the purpose of enabling the Commissioner to carry out the Commissioner’s powers and duties under the *Freedom of Information and Protection of Privacy Act*, *Municipal Freedom of Information and Protection of Privacy Act* and the *Personal Health Information Protection Act, 2004*.

(4.2) In this section, “Commissioner” means the Information and Privacy Commissioner appointed under the *Freedom of Information and Protection of Privacy Act*.

Amend section 2(3) to ensure that facts relating to all incidents are excluded from the definition of “quality of care information” as follows:

“Quality of care information” does not include any of the following:

...

3. Information relating to a patient in respect of an **incident** that describes,
 - i. facts of what occurred with respect to the incident **[bold indicates change]**,



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