



# Applying *PHIPA* and *FIPPA* to Personal Health Information: Guidance for Hospitals



January 1, 2012 heralds a new era of transparency for Ontario hospitals as they become institutions under the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

However, since 2004, hospitals have also been defined as health information custodians under the *Personal Health Information Protection Act (PHIPA)*, which governs the collection, use and disclosure of personal health information by the health sector.

This document provides guidance for hospitals about the application of *PHIPA* and *FIPPA* to personal health information.

### General Rule

Subject to certain exceptions, hospitals are governed by *PHIPA*, not *FIPPA*, with respect to personal health information in their custody or under their control.

Personal health information is defined in *PHIPA* as identifying information about an individual that:

- relates to the physical or mental health of the individual;
- relates to the provision of health care to the individual;
- is a plan of service under the *Home Care and Community Services Act, 1994*;
- relates to payments or eligibility for health care or eligibility for coverage for health care;
- relates to the donation of any body part or bodily substance of the individual or that is derived from the testing or examination of any such body part or bodily substance;
- is the individual's health number; or
- identifies an individual's substitute decision-maker.

Personal health information also includes identifying information about an individual that is not health-related but that is contained in a record that includes personal health information about the individual. Such records are referred to as "mixed records."

**All other recorded information about an individual that is not personal health information and that is in the custody or under the control of a hospital is subject to *FIPPA*.<sup>1</sup>**

### Exceptions to General Rule

Although personal health information in the custody or control of a hospital is generally governed by *PHIPA*, sections 8, 43(1)(f) and 52(1)(f) of *PHIPA* specify that certain provisions in *FIPPA* also apply. The provisions in *FIPPA* that apply to personal health information are described in detail below. In this context, a reference to a record would include a record of personal health information and a reference to personal information would include personal health information.

### Required Disclosures

Section 11 of *FIPPA* requires the head of a hospital<sup>2</sup> to disclose any record if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public, subject to notice being given to any person to whom the information in the record relates if it is practicable to do so.

### *Permitted Disclosures*

Hospitals, as health information custodians under *PHIPA*, are permitted to disclose personal health information without consent in a number of circumstances. In addition to those available to all health information custodians, as institutions under *FIPPA*, hospitals may rely on the disclosures without consent that are permitted in subsections 42(1)(c), (g) and (n) of *FIPPA*.

Subsection 42(1)(c) of *FIPPA* permits the disclosure of personal information, including personal health information, for the purpose for which it was obtained or compiled or for a consistent purpose.

Subsection 42(1)(g) of *FIPPA* permits the disclosure of personal information, including personal health information, where the disclosure is to an institution or law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

Subsection 42(1)(n) of *FIPPA* permits the disclosure of personal information, including personal health information, to the Government of Canada to facilitate the auditing of shared cost programs.

### *Mandatory Exemption from Disclosure*

Section 17 of *FIPPA* requires the head of a hospital to refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information supplied in confidence by a third party where disclosure could reasonably be expected to result in one or more enumerated harms, unless the third party consents to the disclosure. Before the head of a hospital discloses a record that might contain such information, the head must give written notice to the third party and provide the third party with an opportunity to make representations as to why the record or a portion of the record should not be disclosed pursuant to section 28 of *FIPPA*.<sup>3</sup>

### *Discretionary Exemption from Disclosure*

Section 15 of *FIPPA* permits the head of a hospital to refuse to disclose a record where disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations by the government of Ontario or an institution or reveal information received in confidence from other governments, government agencies or international organizations of states or bodies of such international organizations.<sup>4</sup>

### *Access Rights under FIPPA*

Subject to limited exceptions, *PHIPA* does not limit a person's right of access to a record of personal health information under section 10 of *FIPPA* if all personal health information is reasonably severed from the record.

### *Access Rights to One's Own Personal Health Information under PHIPA*

Since a hospital is a health information custodian under *PHIPA*, an individual has a right of access to a record of his or her own personal health information in the custody or under the control of a hospital, subject to limited exceptions. In addition to the exceptions available to all health information custodians, as institutions under *FIPPA*, hospitals may rely on the exemptions in subsections 49(a), (c) and (e) of *FIPPA*.

Section 49(a) of *FIPPA* permits a hospital to refuse to provide access to a record where sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 of *FIPPA* would apply. These exemptions relate to records such as those that:

- would reveal advice or recommendations of employees and consultants of the hospital;
- could reasonably be expected to interfere with a law enforcement matter;
- could reasonably be expected to prejudice the economic interests of the hospital;
- could reasonably be expected to reveal information received in confidence from other governments or government agencies;
- reveal trade secrets or scientific, technical, commercial, financial or labour relations information supplied in confidence by a third party where disclosure could reasonably be expected to result in one or more enumerated harms;
- are subject to solicitor-client privilege; or
- could reasonably be expected to seriously threaten the health and safety of an individual.

Subsection 49(c) of *FIPPA* permits a hospital to refuse to provide access to a record that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for the awarding of contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the hospital in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

Subsection 49(e) of *FIPPA* permits a hospital to refuse to provide access to a record that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence.

## Reporting Requirements to the Information and Privacy Commissioner of Ontario

Section 34 of FIPPA requires a hospital to make an annual report to the Information and Privacy Commissioner of Ontario (IPC). The IPC has an online reporting tool available on its website at [www.ipc.on.ca](http://www.ipc.on.ca).

The annual report must specify:

- the number of requests for access to records under FIPPA as well as PHIPA;
- the number of refusals under FIPPA and PHIPA, the provisions under which the refusal was made and the number of occasions on which each provision was invoked;
- the number of uses or purposes for which personal information, including personal health information, is disclosed where the use or purpose is not included in the personal information bank index required under FIPPA or the written public statement required under PHIPA;
- the amount of fees collected; and
- any other information indicating an effort to put into practice the purposes of these statutes.

Annual statistical reports are due by March 1 of the following year. Hospitals must also make this annual report (along with certain other documents specified by FIPPA) available to the public on the Internet or in a reading room, library or office designated for this purpose.

## Provisions in PHIPA Specific to Health Information Custodians that are Institutions

### Permitted Collection

Hospitals, as health information custodians under PHIPA, are generally only permitted to collect personal health information directly from the individual to whom the personal health information relates. Section 36 of PHIPA provides a number of exceptions to this general rule.

In addition to the exceptions available to all health information custodians, as institutions under FIPPA, hospitals may collect personal health information indirectly for certain additional purposes. Specifically, subsection 36(1)(c) of PHIPA permits the indirect collection of personal health information for a purpose related to investigating a breach of an agreement or a contravention or alleged contravention of the laws of Ontario or Canada, the conduct of a proceeding or possible proceeding or the statutory function of the hospital.

### Permitted Use or Disclosure

Hospitals, as health information custodians under PHIPA, are permitted to use or disclose personal health information without consent for research purposes provided certain requirements are satisfied, including the preparation of a research plan that must be approved by a research ethics board. If a hospital proposes to use or disclose personal health information, together with personal information that is not personal health information, for research purposes, PHIPA rather than FIPPA applies to the use or disclosure of that information pursuant to subsections 37(4) and 44(7) of PHIPA.

### Agent Information

In general, under PHIPA, if a health information custodian receives from another health information custodian identifying information contained in a record that relates primarily to one or more of its employees or agents that will be maintained primarily for a purpose other than the provision of health care, then the receiving health information custodian is subject to certain restrictions on the use and disclosure of that information. However, pursuant to subsection 23(2) of Regulation 329/04 to PHIPA, these restrictions are not applicable to hospitals as institutions under FIPPA.

<sup>1</sup> Subject to any records excluded from the application of FIPPA, including those records identified in section 65 of FIPPA.

<sup>2</sup> Subsection 2(1) of FIPPA defines the head of a public hospital as the chair of the board of the hospital, the head of a private hospital as the superintendent and the head of the University of Ottawa Heart Institute as the Chair of the board.

<sup>3</sup> There is an additional mandatory exemption from disclosure in section 12 of FIPPA relating to cabinet records, however, this is unlikely to apply to hospitals.

<sup>4</sup> There is an additional discretionary exemption from disclosure in section 16 of FIPPA relating to records whose disclosure could reasonably be expected to prejudice the defence of Canada or an allied foreign state or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism. This is unlikely to apply to hospitals.



## About the Commissioner

The Information and Privacy Commissioner, Dr. Ann Cavoukian, is appointed by the Ontario Legislature and is independent of the government of the day.



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