

The Latest in Health Privacy from the IPC

A Presentation to the 2016 *PHIPA* Connections
Summit

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Themes

- *PHIPA* processes
- *PHIPA* decisions of note
- Unauthorized access
- Update on HO-013
- Email Fact Sheet
- Bill 119



PHIPA Processes

- Internal review of *PHIPA* processes led to some changes
 - Most significant: an increase in the number of public decisions, in order to give public guidance and increase transparency
 - 13 Orders issued between 2004 and 2014
 - IPC now issues “Decisions” which can include:
 - Orders
 - Decisions not to conduct a review
 - Decisions following a review, with no orders
 - Interim decisions
 - Number of decisions more than doubled since 2015



PHIPA Processes

- Other changes as result of review:
 - More staff involved in *PHIPA* Decisions
 - Code of Procedure for all *PHIPA* files being finalized
- Have not changed:
 - Efforts to reach early resolution of complaints
 - 70% of access/correction complaints and 60% of collection/use/disclosure complaints are settled
 - Additional number are screened out at an early stage without a review



PHIPA Decisions to be discussed

- Applying access provisions: *PHIPA* Decision 17
- What is a reasonable search in response to an access request: *PHIPA* Decision 18
- Can a complaint be made about a refusal to disclose: *PHIPA* Decisions 19, 20, 21, 22
- Approach to issuing an interim order: *PHIPA* Decision 23
- Decision not to conduct a review: *PHIPA* Decision 32



Access Issues

- **PHIPA Decision 17**
- **Background**
 - An infant died shortly after delivery in the hospital.
 - The father filed complaints about doctors and nurses involved in the care of his wife and baby to the College of Physicians and Surgeons of Ontario (CPSO) and the College of Nurses of Ontario (CNO).
 - Findings of the CPSO and CNO appealed by the father to the Health Professions Appeal and Review Board
 - Father also filed a lawsuit against the hospital and hospital staff, which was in progress at the time of the complaint to the IPC



Access Issues– *cont'd.*

- Father made an access-to-information request to the hospital for all records relating to the birth and death of the infant, and the care given to his wife.
- He had already received the medical charts
- The request was clarified to include records generated by specified hospital teams, an internal review report, records of the hospital's board, and email communications of named individuals.



Access Issues– *cont'd.*

- As the hospital is subject to both *PHIPA* and *FIPPA*, I conducted a combined review and examined:
 - the application of *PHIPA* v. *FIPPA* to the records
 - which are “records of personal health information” (PHI)
 - differences in access rights under *PHIPA* depending on whether a record is “dedicated primarily” to the PHI of the individual
 - meaning of “dedicated primarily”
 - the ability of the complainant to make an access request on behalf of his wife/daughter



Access Issues– *cont'd.*

- Conclusion:
 - The complainant’s request for the PHI of his wife and daughter is governed by *PHIPA* and his request for his own personal information is governed by *FIPPA*.
 - Most of the records are records of PHI.
 - Most of the records were not dedicated primarily to the PHI of the wife and daughter.
 - I upheld the hospital’s decision to refuse access to most of the information at issue on the basis of exclusions and exemptions in *PHIPA* and *FIPPA*.
 - The public interest override in *FIPPA* did not apply.
 - Hospital’s exercise of discretion under both acts upheld.



Reasonable Search

- **PHIPA Decision 18** – addresses the issue of whether the hospital conducted a reasonable search in response to a request for records relating to the complainant's son, who was the victim of a fatal car accident.
- The hospital granted complete access to the records it located.
- After reviewing the records, the requestor believed additional records should exist.
- The hospital provided an affidavit from the Manager of Health Records and Privacy describing the steps it took to locate the records the requestor believed should exist and described the hospital's retention period for records under the *Public Hospitals Act*.



Reasonable Search – *cont'd.*

- The adjudicator invoked the principles regarding reasonable search established in orders issued under *FIPPA* and *MFIPPA* *i.e.* that a reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the requests, expends a reasonable effort to locate records reasonably related to the request.
- *PHIPA* does not require the custodian to prove with absolute certainty that further records do not exist.
- As the complainant did not provide a reasonable basis to conclude additional records existed, the complaint was dismissed and no order was issued.



Disclosure under Section 38(4) of *PHIPA*

Discretionary disclosure of PHI of deceased individuals

Section 38(4) permits disclosure of PHI of deceased individuals, including

- for the purpose of informing any person whom it is reasonable to inform in the circumstances of the circumstances of death, where appropriate: 38(4)(b)(ii) and
- to the spouse, partner, sibling or child of the individual if the recipients of the information reasonably require the information to make decisions about their own health care or their children's health care: 38(4)(c)



Disclosure – *cont'd.*

- ***PHIPA* Decisions 19, 20, 21 and 22**
 - address the issue of “disclosure” under section 38(4), as distinct from “access” under Part V of the act.
 - disclosure is discretionary
 - can be made without the consent of the estate trustee *et al.*
 - can be done verbally



Disclosure – *cont'd.*

Decisions 19, 20, 21 and 22 all involve family members of deceased individuals who were not the estate trustee; they therefore could not request *access* under section 52(1).

Decision 19

- Individual asked MOHLTC to release OHIP records of deceased brother, showing list of medical practitioners, on basis that he needed the information to make decisions about his own health care

Decision 20

- Individual asked hospital to release medical records of deceased brother, on the basis that he needed them to make decisions about his own health care



Disclosure – *cont'd.*

- Can a complaint be made about the refusal to make a discretionary disclosure?
- Can a failure to disclose be viewed as a “contravention” of *PHIPA*?
- Can the IPC take jurisdiction over such a complaint?
- This issue was fully argued in Decision 19
- Conclusion:
 - An improper exercise of discretion could amount to a “contravention” of the act.



Disclosure – *cont'd.*

Result:

- **Decisions 19 and 20:** complainant did not show that he needed disclosure of the personal health information of his deceased brother for health care purposes.
- **Decision 20:** complainant could renew request to hospital but he should provide a statement from a health care practitioner describing specifically the kind of information sought and why it was required to make decisions about his health care and that of his children - a health care practitioner would be in a position to provide the best evidence of that need.



Disclosure – *cont'd.*

Decision 21

- Complainant asked for copies of health care records of his deceased sister, who received treatment for mental illness from a hospital.
- The hospital took the position that disclosure under 38(4) requires consent from SDM, which was not obtained.
- Also believed that only information about “specimens” that can be genetically mapped and analyzed are intended to be disclosable under the section and not PHI about mental illness.



Disclosure – *cont'd.*

Result

- Discretion to disclose does not depend on whether estate consents
- No reason to limit the application of that section to “specimens” as even PHI that cannot be scientifically analyzed in a laboratory may be relevant to health care decisions by family members.
- Information about mental health can be relevant to health care of family members
- Hospital should also consider disclosure under 38(4)(b)(ii) (information about circumstances of death)
- Hospital ordered to re-exercise its discretion and consider the request under both 38(4)(c) and (b)(ii).



Disclosure – *cont'd.*

Decision 22

- Complainant asked for a copy of her deceased mother's records for the last seven months of her life
- Complainant argued that she qualified for disclosure under section 38(4)(b)(ii) and (c)
- Argued that “circumstances of death”, referred to in 38(4)(b)(ii), should include the last seven months of her mother's life
- Also asserted that making decisions about health care should apply to assisting her to cope with grief.



Disclosure – *cont'd.*

Result

- A custodian may take into account a compassionate need for personal health information in deciding how much disclosure is “appropriate” under 38(4)(b)(ii)
- Consent of SDM not a requirement; absence of consent not a veto
- A custodian can choose to provide disclosure under these sections verbally, instead of through records.
- Directed custodian to consider disclosure of “circumstances of death”; cautioned complainant that this section is not likely to support broad disclosure about entire seven months



Discretionary Disclosures by Custodians: The IPC's Role

- In Decision 19, the MOHLTC was obviously concerned with the IPC taking jurisdiction over discretionary disclosures.
- Decision not intended to invite a flood of complaints or reviews under these provisions.
- Many cases will not require a review.
- If custodians provide reasons to support their decisions not to disclose more information or records to a relative, IPC will be satisfied if they reflect decision-making made in good faith, taking into relevant considerations.



Abandoned Records

- **PHIPA Decision 23**
 - Various respondents operating a multi-service health clinic made assignments in bankruptcy and records were left abandoned on the premises.
 - Open question about which of the parties (including the health clinic, the landlords and the trustee-in-bankruptcy) were custodians within the meaning of the act and regulation
 - Concerns about failure to protect records in accordance with duties under the act.
 - Interim order issued against one of the landlords requiring that they secure records of personal health information pending the completion of an IPC review (other landlords had taken steps to secure records and provide assurances)



Abandoned Records – *cont'd.*

- In deciding whether to make an interim order preserving the status quo, IPC was guided by the principles in *RJR MacDonald Inc. v. Canada (A.G.)*:
 - There was a serious issue to be tried;
 - That there was a possibility of irreparable harm if the records were not secured; and
 - That the balance of convenience favoured issuing an order against the landlord to secure the records, the order being time limited and not unduly onerous.



Abandoned Records – *cont'd.*

- The interim order required the landlord to secure records for two months, pending the IPC's review.
- In the end, all issues were resolved without the need to decide who was the health information custodian.
- In abandoned records files, IPC's goal is to find a party who will take responsibility for safeguarding the records and providing access if asked.
- IPC is not the only regulatory agency with responsibility in this area
 - In this case, a number of colleges took responsibility for records of their members
 - Query whether responsibility should be clarified in legislation



No Review Decision

PHIPA Decision 32

- Complainants unhappy with result of request for access to records relating to their young daughter
- Mediation was attempted without resolution
- Complaint therefore assigned to an adjudicator
- Adjudicator reviewed complaint file and formed preliminary view that no review was warranted
- Invited complainants to respond to this preliminary view
- After reviewing submissions, adjudicator decided not conduct a review and issued decision



Unauthorized access

- The IPC receives about 300-350 complaints about privacy breaches in the health sector per year.
- Most are caused by carelessness, such as the loss or theft of portable devices or misdirected emails or faxes.
- About 2 or 3 cases per month of intentional “snooping” into records of personal health information
- Very few snooping cases have resulted in orders - custodians (mainly hospitals) take them seriously and take steps to address IPC’s concerns about any systemic issues that have contributed to the snooping.



Goal of IPC Investigations

- Determine whether to refer to Attorney General for prosecution
- Determine whether response of health information custodian was adequate including:
 - Notice to affected patients
 - Disciplinary response
 - Addressing systemic issues
 - Auditing/logging
 - Training
 - Confidentiality agreements
 - Privacy warnings on electronic systems



Referrals to Prosecution

- It is an offence to wilfully collect, use or disclose personal health information in contravention of *PHIPA* or its regulations.
- IPC does not prosecute, but rather refers certain matters to the Attorney General.
- In deciding whether or not to refer a case to the AG, some of the factors the IPC considers are:
 - Were the actions “wilful”
 - recent privacy training
 - recently signed confidentiality agreement
 - ignoring privacy warnings on the system
 - Number of occurrences
 - Motive
 - Disciplinary action taken; complaint to professional college
 - Interests/views of the patient



Referrals to Prosecution - – *cont'd.*

➤ To date, six individuals have been referred for prosecution:

2011

A nurse at the North Bay Health Centre

2015

Two radiation therapists at the University Health Network (Mayor Rob Ford)

A social worker at a family health team

A registration clerk at a regional hospital

2016

A regulated health professional at a Toronto hospital



Referrals to Prosecution – *cont'd.*

Outcome of referrals

- Case from 2011 dismissed for delay
- UHN case
 - two convictions; each individual fined \$2000
- Registration clerk
 - 443 patients
 - Pled guilty; \$10,000 fine, \$2500 victim surcharge
- Family Health Team in small community
 - Trial pending
- Health professional at hospital
 - Referred to AG earlier this year



The Rouge Settlement

- **PHIPA Order HO-013**

- Two employees of the Rouge Valley Health System gathered information about new mothers and sold their contact information to RESP providers
- IPC investigated and concluded that the hospital did not take reasonable steps to protect personal health information.
- Several orders were made, one of which was that the hospital change its electronic information systems to ensure the ability to audit all instances of access to PHI



The Rouge Settlement – cont'd.

- The hospital appealed HO-013 to the Divisional Court.
- After discussions between the hospital and the IPC, the hospital withdrew its appeal on the following basis:
 - The hospital and the IPC would cooperate on strategies to implement the Order provisions relating to its electronic information systems.
 - The IPC and the hospital would agree on a work plan setting out a time frame for the actions noted in the plan.
- Hospital and IPC have now agreed on the plan



The Rouge Settlement – cont'd.

The Plan Going Forward

- The hospital identified electronic systems containing personal health information.
- The hospital will buy software that performs logging and auditing.
- The IPC and the hospital agreed on the systems that will be covered by the software.
- The software will not be deployed to systems, for example, that are due to retire soon, to which limited staff have access, or which only conduct real-time monitoring and do not record personal health information.
- A schedule was developed for deployment.



Communicating PHI by Email

- **Fact Sheet**
 - Issued in September
 - describes the risks of using email and custodians' obligations under PHIPA.
 - outlines some of the technical, physical and administrative safeguards needed to protect personal health information when communicating by email and the policies, procedures and training custodians should have in place.
- Fact Sheet distinguishes between custodian to custodian and custodian to patient communications
- For email between custodians, IPC expects encryption, barring exceptional circumstances



Communicating PHI by Email – *cont'd.*

- Email between custodians and patients
 - Use of encryption where feasible
 - Otherwise, consider risk-based approach
 - Approach to emailing patients should be captured in a policy
 - Consent of patients should be obtained
- Data minimization principle applies, even with patient consent
- Custodians have obligation to retain and dispose of emails containing PHI in a secure manner
- Only retain emails containing PHI as long as necessary to serve purpose; avoid duplication
- Encrypt portable devices



Bill 119 Amendments

- Amendments to *PHIPA* that have been proclaimed in force include the following:
 - Privacy breaches meeting a threshold must be reported to the IPC and to health regulatory colleges (in certain circumstances)
 - Threshold on reporting to IPC to be prescribed in regulation
 - Six month time limit on laying charges under *PHIPA* removed
 - Fines for offences under *PHIPA* doubled from \$50,000 to \$100,000 for individuals and \$250,000 to \$500,000 for organizations.
 - Persons other than Attorney General may commence prosecution, with AG's consent



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