

ACCESS & PRIVACY
WORKSHOP, 2006

M/FIPPA / PHIPA
INTERACTION ISSUES:
ONE YEAR LATER

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LEARNING OBJECTIVES

- M/FIPPA institutions that are also PHIPA health information custodians (“M/FIPPA Custodians”) must navigate the differences between the two Acts. Keeping them distinct, remembering that the privacy rules and access exemptions are different can sometimes be a challenge. Identifying major differences can help you manage complex interactions issues.
- Although M/FIPPA institutions that are *not* custodians must also be aware of interaction issues if they employ/retain custodians, we will be focusing on “dual” institutions that are subject to both Acts.
- We will present “real life” interaction scenarios, and propose practical solutions.
- We will discuss the few PHIPA Orders and court decisions that can help you interpret PHIPA provisions you work with every day.

M/FIPPA institutions that are also PHIPA Custodians “M/FIPPA Custodians”

- Some examples:
 - >MOHLTC (FIPPA)
 - >Provincial Psychiatric Hospitals (FIPPA)
 - >Boards of Health / Medical Officer of Health (MFIPPA)
 - >Municipal Ambulance Services (MFIPPA)
 - >Municipal Homes for the Aged (MFIPPA)
 - >Part of Ministry/City that operates a centre/program/service for community or mental health if primary purpose is provision of health care (FIPPA or MFIPPA)
- For these M/FIPPA institutions, determining which Act applies depends on whether information is phi, pi or neither.

MAJOR DIFFERENCES

Difference in Purpose: M/FIPPA is a freedom of information AND protection of privacy statute: two Acts in one, with a dual purpose; by contrast, PHIPA is only a “protection of privacy” statute, and not an access to information statute: single purpose.

Difference in Notice requirements: M/FIPPA ss. 29/39 require Notice of Collection for direct and indirect collections, and regardless of consent; PHIPA s. 18 Notice of Purpose requirement is tied to consent and serves as evidence of “knowledgeable” consent under s. 18(5). Notice of Purpose required only where collection, use or disclosure is *with consent* - - express or implied. If consent not required, no notice obligation. However, all custodians must have publicly available “information practices”: s.16.

Difference in Collection/Use/Disclosure Authorities: PHIPA authorities are more extensive, to ensure no interference with provision of health care. Note that “use” in PHIPA is broader concept than in M/FIPPA; includes flow of phi between custodian and its agents/employees. [s.6(1)]

Difference in Right to access pi/phi on behalf of others: M/FIPPA s. 54/66 is more restrictive than PHIPA SDM provisions in ss. 23-26. Note: Bill 190 amends M/FIPPA ss. 14/21, extending access to “close relatives” of deceased, for “compassionate reasons”. Is comparable to PHIPA ss. 38(4).

Employment Related Records
Hooper v. College of Nurses of Ontario, 2006 CanLII
22656 (ON S.C.D.C.)

- Judicial Review of a hospital's decision to disclose nurse's (employee's) occupational health records (OHS) to the College of Nurses as part College's investigation of nurse's conduct;
- Court concluded that nurse/employee's OHS records were *phi* as per s. 4(1), and did not fall under s.4(4) exclusion (record maintained primarily for a purpose *other than* provision of health care to employee)
- How to reconcile with interpretation of M/FIPPA ss.52(3)/65(6)?
- In Orders M-996, MO-1342 and MO-1426, IPC held Employee Assistance records and WSIB-related records such as medical assessments and reports, rehab reports and modified work programs were employment-related and thus excluded from MFIPPA;
- In future cases can we expect the IPC to follow *Hooper* or the analysis it has followed under M/FIPPA?

DETERMINING WHICH ACT APPLIES TO YOU

- Are you a custodian as well as an M/FIPPA institution? [s.3;O.Reg. 329/04];
- If you are a custodian, are you acting as one when performing your ordinary work? [s.3(3) 1-3]
- Are you an “agent” of a custodian? [ss.2,17]
- Is the information at issue phi or pi? [s.4(1)-(4)]
- Does PHIPA state whether PHIPA or M/FIPPA applies in the circumstances? [ss. 8(1), (4); 51(3); 52(1)(f)]

Disentangling M/FIPPA and PHIPA

If you are an M/FIPPA Custodian:

- PHIPA applies to all your records of phi, including “mixed” records that contain pi (ie. OHIP record listing insured services provided to Mr. X, and his address and phone number: is all phi subject to PHIPA): [s.4(1),(3)]
- M/FIPPA applies to your records of pi, if no phi is also in the record. (ie. financial information about individuals);
- M/FIPPA continues to apply to certain types of information; s. 8(2) lists M/FIPPA provisions that apply to records of phi;
- M/FIPPA continues to apply to your institution’s general records that contain no pi or phi (ie. financial, governance or management records);
- M/FIPPA access rules continue to apply to your records of phi that also contain general information - - *if all phi is readily severable from record* [s. 8(4)]

Agent Issues

Definition of PHIPA “agent” extends application of Act to non-custodians who work for/ are retained by M/FIPPA custodians and deal with phi on the M/FIPPA custodian’s behalf.

- a non-custodian acting for/on behalf of the M/FIPPA Custodian in respect of phi *for the custodian’s purposes*, is a PHIPA agent and needs to be aware of its PHIPA obligations.[s.2]

Best practice: recognize relationship and address it in formal agent agreement between M/FIPPA Custodian and agent, to set out respective duties and obligations.

- Agent concept also applies to non-custodian M/FIPPA institutions dealing with phi on M/FIPPA Custodian’s behalf.(ie. Ministry X processing phi on behalf of the MOHLTC);
- In Order HO-001, IPC found that a custodian can act as agent of another custodian;
- Flow of phi between custodian and agent is a *use, not a disclosure*: [s.6(1)]
- Agent’s limitations and obligations:[s. 17]

AGENT Issues, cont'd

- In Order **HO-002**, IPC makes it clear that if agent deals with phi in an unauthorized manner, it is still an agent and thus subject to PHIPA sanctions, and IPC's jurisdiction:

“[B]ecause the nurse, in the normal course of her duties, acts with the hospital's authorization, and on its behalf, in respect of phi, and does so for the hospital's purposes, I find she is an agent of the hospital” [p.6]

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“The... idea of “agency” is included in the Act to ensure that employees ...are expressly covered by the restrictions and potential sanctions in the Act with respect to improper collection, use or disclosure.... As well, section 17...clearly contemplates the possibility of improper collection, use or disclosure by agents, which would be impossible if their status as agents ended when they ceased acting for the custodian's purposes and began acting for their own. [Emphasis added]

Agent Issues, cont'd

- In Order **HO-001**, the IPC issued specific orders against a custodian's agent (a paper disposal company) that would not otherwise be subject to PHIPA.
- The M/FIPPA Custodian is ultimately responsible for the inappropriate actions of its agents. In Order HO-002, IPC issue orders against Custodian (hospital), not agent (nurse).

When M/FIPPA Institutions employ/retain custodians as agents

Although not the focus of this presentation, be aware of the following issues:

- Custodians who work for/are retained by M/FIPPA institutions (ie. nurse in correctional institution; psychologist in a school or university), are subject to PHIPA, not M/FIPPA; must comply with PHIPA privacy protection rules applicable to all custodians: (ie. collection, use, disclosure and information practice rules),
- **Exception**: these custodians are not subject to access and correction provisions in PHIPA Part V; does not apply to custodian's records of phi, if individual has right to request access from employing institution under M/FIPPA. Status quo: requests for custodian's records of phi *are processed under M/FIPPA by the institution.* [ss. 8(1), 51(3)]
- Agent can disclose phi to their M/FIPPA institution if a PHIPA disclosure authority applies to the particular disclosure: [ss.38-50];
- M/FIPPA institution may collect this pi indirectly from the custodian based on M/FIPPA ss. 29/39(1)(h) because collection is authorized by/ under PHIPA: [O.Reg. 329/04, s.19]

Interaction Issues in Access Requests

- For M/FIPPA Custodians, trickiest interaction issues arise in the context of access requests by individuals for their own phi/pi.
- Provisions to be aware of when processing access requests under PHIPA or M/FIPPA:
 - s.4(3): mixed record rule: extends definition of phi to include pi (identifying information) of a third party, if contained in individual's record of phi;
 - s.8(1): M/FIPPA does not apply to phi unless PHIPA states otherwise; see s.51(3): M/FIPPA applies to access requests for agent's records;
 - s.8(4): M/FIPPA continues to apply to access requests for non-phi; preserves right of access to general records;
 - s. 52(3): PHIPA right of access limited to phi about individual if record is “not dedicated primarily” requester's phi
 - O.Reg. 329/04, s. 24(3): Requester has no right of access to phi in a record “dedicated primarily” to the phi of *another* individual

Interaction Scenarios in Access Requests

Facts:

- X makes access request to M/FIPPA custodian for his own phi. One of the records is a briefing note that contains some of X's phi, but also, issues management information related to X's situation.

Issues:

Q: is this record “dedicated primarily to” X's phi? [s. 52(3)]

A: if not, X has a right of access only to part of record containing his phi;

Q: how can X access rest of record? [s.8(4)]

A: X must make M/FIPPA access request for the rest [ss. 4/10]; or, if not exempt information, M/FIPPA Custodian can simply give rest of record under “informal” disclosure [ss. 50/63]

Interaction Scenarios, cont'd

Facts:

- Public Health Nurse (PHN) visits mother and newborn. On several occasions, father is at home during PHN visit. Father confides in PHN that he's depressed, and concerned he may lose his job; mother not home during these discussions. PHN creates family health record. Mother and father make separate access requests for record.

Issues re: Mother's access to record

Q: Is record "dedicated primarily to" mother? [s. 52(3)];

Q: If yes, is mother entitled to information about father too?

Q: Does confidentiality exemption apply to phi about father? [s.52(1)(e)(iii)]

NB: PHIPA does not include exemption for "unjustified invasion" of another individual's privacy.

Interaction Scenarios, cont'd

See Facts in previous slide

Issues re: Father's access to record

Q: Is father entitled to his phi that's in the record?

Q: Can custodian sever and disclose phi to father as per s.52(2); or, does father have no right of access under PHIPA as per ss. 24(3) of O.Reg. 329/04?

Q: Could father make M/FIPPA request for his pi as per PHIPA s. 8(4)?
Note that severing obligation in ss. 8(4) applies **only to ss. 4(1) phi, and not ss.4(3) pi as well**

Q: Is it possible that neither mother or father would get phi about father?

Administrative Solution:

Consider creating separate continuation sheet for father.

Access requests for general records

- Right of access to general records of M/FIPPA custodian is preserved, if phi is severable from record; [s.8(4)]
- PHIPA (not M/FIPPA) requires that all phi be removed;
- PHIPA provides that M/FIPPA *does not apply* to custodian's records of phi; [s.8(1)]
- Therefore, access to phi is denied under s. 8(1) of PHIPA - - and *not* because the phi may be exempt under M/FIPPA ss.14/21. Is a jurisdictional issue of application.

Resources & Contact Information

- IPC's website for M/FIPPA and PHIPA Fact Sheets, Orders and Privacy Reports/Resolutions: www.ipc.on.ca;
- MOHLTC's website for PHIPA: www.health.gov.on.ca/english/public/legislation/bill31/personal_info.html
- Perun, Orr & Dimitriadis, *The Guide to the Ontario Personal Health Information Protection Act* (Irwin Law, 2005)
- Lise Hendlisz, Legal Counsel, Ministry of Health and Long-Term Care, (416) 327-8593, email: lise.hendlisz@moh.gov.on.ca
- Jane Speakman, Legal Counsel, City of Toronto, (416) 392-1563; email: jspeakma@toronto.ca