

AN OUTLINE OF THE PRIVACY PRINCIPLES IN MANITOBA'S *PERSONAL HEALTH INFORMATION ACT*¹

THE PERSONAL HEALTH INFORMATION ACT (PHIA) IN A NUTSHELL

The Personal Health Information Act of Manitoba deals with 'informational privacy' – the handling and protection of recorded personal health information about identifiable individuals. It

- sets out rules governing the collection, use, disclosure, accuracy, retention, protection and destruction of personal health information by trustees;
- provides individuals with a right of access to, and the right to request correction of, their personal health information maintained by trustees; and
- provides for an independent review of the decisions of trustees under the Act.

PHIA also contains special rules about:

- disclosures to family;
- collecting and using an individual's Personal Health Identification Number (PHIN) by persons who are not trustees of personal health information;
- information managers who act on behalf of a trustee;
- health research projects; and
- prohibiting the sale of personal health information by trustees (except when selling a health professional's practice, health care facility or health services agency).

Personal health information is recorded information about an identifiable individual that relates to:

- the individual's health, or health care history (including genetic information about the individual); or
- the provision of health care to the individual; or
- payment for health care provided to the individual.

Personal health information includes the PHIN and any other identifying number, symbol or particular assigned to an individual. It also includes any identifying information about the individual that is collected in the course of, and is incidental to, providing health care or paying for health care. (See the Glossary at page 7 for explanations of this and other terms.)

PHIA applies to personal health information maintained by "trustees". Trustees under PHIA are:

- "public bodies" – such as Manitoba government departments and agencies, municipalities, universities, school divisions, regional health authorities, etc.;
- "health care facilities" such as hospitals, personal care homes, laboratories, etc.;
- "health professionals" such as doctors, nurses, etc.; and
- "health services agencies" providing health care under an agreement with a trustee.

The Manitoba Ombudsman reviews the decisions and actions of trustees about personal health information, and handles complaints under PHIA. The Ombudsman makes recommendations, not orders. The Ombudsman can also initiate complaints and investigations under PHIA.

¹ Prepared April 2007 by G. E. Mildren, General Counsel, Civil Legal Services, Manitoba Justice, for "Prairie Health Information Privacy Day 2007". The information in this paper is general in nature and is not intended to be legal advice. Also, comments are personal, and do not represent the views of the Government of Manitoba or of Manitoba Justice.

SOURCE OF THE PRIVACY PRINCIPLES IN PHIA

The privacy principles in PHIA flow from the 8 international 'fair information principles' issued by the Organization for Economic Cooperation and Development (commonly called the OECD Privacy Guidelines).² These 8 principles are: collection limitation; data quality; purpose specification; use limitation; security safeguards; openness; individual participation; and accountability.

As these fair information principles are (with a bit of variation) also the basis for other public and private sector information privacy legislation in Canada, there are common 'themes' which flow through all these laws.³

PRINCIPLE #1: ACCOUNTABILITY

Each trustee is responsible for the personal health information it "maintains" (that is, for the personal health information in the trustee's custody or under the trustee's control) and for complying with PHIA.⁴

Trustees are also responsible for the actions of their contractors and agents. If a contractor or agent is an "information manager" as defined in PHIA, the contractor or agent has responsibilities under the legislation as well as responsibilities under its contract with the trustee – but the trustee is still responsible for the personal health information.⁵

PRINCIPLE #2: LIMITS ON COLLECTION

Collection of personal health information must be authorized.

Under PHIA, a trustee must not collect personal health information about an individual unless:

- the information is collected for a lawful purpose connected with a function or activity of the trustee; and
- the collection of the information is necessary for that purpose.⁶

Collection must be limited to only as much information as is reasonably necessary to accomplish the purpose for which it is collected.⁷

PRINCIPLE #3: COLLECTION FROM THE INDIVIDUAL

Wherever possible, a trustee must collect personal health information directly from the individual it is about, unless the individual or PHIA authorizes the trustee to collect it from another source ('indirect collection').⁸

² Canada became a signatory to the OECD Privacy Guidelines in 1984.

³ For example, the privacy principles in the Schedule to the *Personal Information Protection and Electronic Documents Act* (Canada) are: accountability; identifying purposes; consent; limiting collection; limiting use, disclosure and retention; safeguards; openness; individual access; challenging compliance.

⁴ For example, sections 57, 58 and 61.

⁵ Section 25.

⁶ Section 13(1).

⁷ Section 13(2).

⁸ Section 14.

PRINCIPLE #4: IDENTIFYING THE PURPOSE OF COLLECTION

If personal health information is collected from the individual it is about, the trustee must take reasonable steps to inform the individual of the purpose of collection and (if the trustee is not a health professional) who to contact with questions. This information should be provided before personal health information is collected, or as soon after as practicable.⁹

PRINCIPLE #5: ACCESS TO ONE'S OWN PERSONAL HEALTH INFORMATION

An individual has the right, on request, to examine and receive a copy of a record of his or her personal health information in the custody or under the control of a trustee, with limited exceptions.¹⁰

These limited exceptions to the right of access to personal health information are:

- knowledge of the information could reasonably be expected to endanger the health or safety of the individual or another person;
- disclosure would reveal personal health information about another person;
- disclosure could reasonably be expected to identify a third party (other than another trustee) who supplied the information in confidence under circumstances in which confidentiality was reasonably expected;
- the information was compiled and is used solely: for peer review by health professionals; for review by a hospital or facility standards committee; by a body responsible for discipline of health professionals or for the quality or standards of professional services; or for risk management assessment;
- the information was compiled principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding.¹¹

If some information in a record falls within an exception to access in PHIA, and some does not, the trustee must sever the information that cannot be examined or copied and permit the individual to examine and receive a copy of the rest of the information in the record.¹²

A trustee may require that a request for access be in writing. The trustee must respond promptly, and not later than 30 days after receiving a request. The trustee may charge a reasonable fee for providing access. The trustee must explain any term, code or abbreviation used in the record, on request.

PRINCIPLE #6: CORRECTING ONE'S OWN PERSONAL HEALTH INFORMATION

An individual may request that a trustee correct any personal health information that the individual may examine or copy.¹³ The trustee cannot charge a fee for such a request.

If the trustee agrees that the personal health information should be corrected, the trustee must add the correcting information to the record of the information so that it will be read with and form part of the record or be adequately cross-referenced to it.

⁹ Section 15.

¹⁰ Sections 5 to 11.

¹¹ Section 11(1).

¹² Section 11(2).

¹³ Section 12.

If the trustee refuses the request to correct the personal health information, the individual's statement of disagreement must be added to the record so that it will be read with and form part of the record or be adequately cross-referenced to it.

The trustee must, when practicable, notify other public bodies or trustees who have received the personal health information from the trustee in the past year of the correction, request or statement of disagreement.

PRINCIPLE #7: ACCURACY

Before using or disclosing personal health information, a trustee must take reasonable steps to ensure that it is accurate, up to date, complete and not misleading.¹⁴

PRINCIPLE #8: CONSENT TO USE AND DISCLOSE

While consent is not the only legal authority for using and disclosing personal health information under PHIA, obtaining the individual's consent will often be the preferred approach.¹⁵

Consent can be express or implied (note: care should be taken when relying on implied consent). Express consent can be written or verbal, but if consent is not provided in writing, it is good practice to record the fact that consent was given.

A valid consent is:

- voluntary;
- informed (or knowledgeable) – that is, the individual must understand the effect of the consent, the consequences that will result from it and the consequences of refusing consent; and
- specific.

Under PHIA, certain persons are authorized to consent to the use and disclosure of personal health information on behalf of another individual (for example, an individual's proxy appointed in a health care directive).¹⁶

PRINCIPLE #9: LIMITS ON USE

(a) Use of personal health information must be authorized.¹⁷

Personal health information must be used only for the purposes for which it was collected or received unless:

- the individual has consented to another use; or
- use for another purpose is authorized by PHIA.¹⁸

Use of personal health information for a purpose other than the purpose for which it was collected or received is a 'secondary' use. The individual must consent to a secondary

¹⁴ Section 16.

¹⁵ Sections 21(b) and 22(1)(b).

¹⁶ Section 60.

¹⁷ Section 20(1).

¹⁸ Section 21.

use of his or her information, or it must be authorized under PHIA. For example, PHIA provides that a 'secondary' use is authorized if necessary to prevent or lessen a serious and immediate threat to an individual, public health or public safety.

- (b) Every use of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.¹⁹
- (c) Only those employees and agents of a trustee who need to know the information to carry out the purpose for which it was collected or received, or to carry out an authorized purpose, can use personal health information.²⁰

PRINCIPLE #10: LIMITS ON DISCLOSURE

- (a) Disclosure of personal health information must be authorized.²¹

A trustee must not disclose personal health information unless the individual it is about consents, or the disclosure is authorized under PHIA.²² For example, PHIA provides that a trustee may disclose personal health information without consent:

- to a person providing health care to the individual (to the extent necessary), unless the individual has instructed otherwise;
- if necessary to prevent or lessen a serious and immediate threat to an individual, public health or public safety;
- if authorized or required by other legislation of Manitoba or Canada; etc.

- (b) Every disclosure of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.²³

PRINCIPLE #11: SAFEGUARDING PERSONAL HEALTH INFORMATION

A trustee must protect personal health information by adopting reasonable administrative, technical and physical safeguards that:

- ensure its confidentiality, security, accuracy and integrity; and
- protect it against risks such as unauthorized access, use, disclosure or destruction.²⁴

In determining what are reasonable safeguards, the trustee must take into account the sensitivity of the information.²⁵

PHIA and the *Personal Health Information Regulation* under PHIA contain some specific security requirements for personal health information (specific controls; requirements for periodic audits; etc.).²⁶

¹⁹ Section 20(2).

²⁰ Section 20(3).

²¹ Sections 20(1).

²² Section 22.

²³ Section 20(2).

²⁴ Section 18.

²⁵ Section 19.

²⁶ Section 18(2) and (3) of PHIA, etc.

PRINCIPLE 12: RETENTION AND DESTRUCTION

Trustees must have written policies for the retention and destruction of records containing personal health information, and must comply with these policies.²⁷

Policies, practices and procedures for retaining and destroying records containing personal health information should take into account the individual's right of access to the information.

Destruction of records containing personal health information must be carried out in a manner that protects the privacy of the individuals the information is about.²⁸ Trustees must keep a record respecting the destruction of personal health information.²⁹

Where the trustee is a Manitoba government department or government agency, the policies and requirements for retaining and disposing of all its records, including those containing personal health information, are set out in *The Archives and Recordkeeping Act* which requires that record schedules be prepared for all government or agency records.

PRINCIPLE #13: OPENNESS

Trustees should be open about their information practices and policies, and endeavour to make information about these practices and policies available on request so that individuals can verify how their personal health information is being collected, used, protected, disclosed and destroyed. The *Personal Health Information Regulation* requires that trustees have written policies and procedures about their security measures.

PRINCIPLE #14: CHALLENGING COMPLIANCE

An individual has the right to complain to the Manitoba Ombudsman if he or she believes that a trustee has

- collected, used or disclosed his or her personal health information in violation of PHIA; or
- has refused to provide access to, or to correct, his or her personal health information. If the individual has first complained to the Ombudsman, he or she may appeal a refusal of access to the Manitoba Court of Queen's Bench and (with leave) to the Manitoba Court of Appeal.³⁰

In addition to investigating complaints, the Ombudsman may initiate complaints, initiate investigations, conduct audits and make recommendations under PHIA.³¹ The Ombudsman makes recommendations, not orders.

Trustees must respond to complaints, cooperate with the Ombudsman when she is investigating complaints and conducting audits, and must respond to the Ombudsman's recommendations.

²⁷ Section 19.

²⁸ Section 17(3).

²⁹ Section 17(4).

³⁰ Part 5.

³¹ Parts 4 and 5.

GLOSSARY

(terms marked * are defined in section 1 of PHIA)

“Control” of a record or information means the trustee has, or retains, the power or authority to make decisions about the management, use or disclosure of the record or information.

“Custody” of a record or information means the trustee is in possession of the record or information.

“Disclose” or **“disclosure”** means to make information available, to release it or to make it known to another person outside the trustee's organization.

“Identifiable individual”: Personal health information is defined in PHIA as recorded information about an identifiable individual. This includes

- information that directly identifies an individual (such as a name); and
- information that may be non-identifying by itself, but which, when combined with other information available, may lead to the identification of an individual or individuals.

In other words, potentially identifying information, as well as identifying information, should be handled and protected in accordance with the privacy requirements of PHIA.

“Health” means the condition of being sound in mind, body and spirit.

“Health care” means any care, service or procedure

- (a) provided to diagnose, treat or maintain an individual's health,
- (b) provided to prevent disease or injury or promote health, or
- (c) that affects the structure or a function of the body,

and includes the sale or dispensing of a drug, device, equipment or other item pursuant to a prescription.

“Information manager” means a person or body that

- (a) processes, stores or destroys personal health information for a trustee, or
- (b) provides information management or information technology services to a trustee.

“Personal health information” means recorded information about an identifiable individual that relates to

- (a) the individual's health, or health care history, including genetic information about the individual,
- (b) the provision of health care to the individual, or
- (c) payment for health care provided to the individual,

and includes

- (d) the PHIN [*the Personal Health Identification Number assigned to an individual*] and any other identifying number, symbol or particular assigned to an individual, and
- (e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care.

“Record” or **“recorded information”** means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means, including by graphic, electronic or mechanical means, but does not include electronic software or any mechanism that produces records.

“Use” means handling or dealing with personal health information within the trustee's organization, and includes use of the information by a contractor or agent on the trustee's behalf.

A FEW USEFUL WEBSITES

1. *The Personal Health Information Act* of Manitoba
<http://web2.gov.mb.ca/laws/statutes/ccsm/p033-5e.php>
2. *The Freedom of Information and Protection of Privacy Act* of Manitoba
<http://web2.gov.mb.ca/laws/statutes/ccsm/f175e.php>
3. Laws of Manitoba <http://web2.gov.mb.ca/laws/statutes/index.php>
4. Manitoba Ombudsman: <http://www.ombudsman.mb.ca/>
5. Department of Health's *Personal Health Information Act* site <http://www.gov.mb.ca/health/phia/>
6. Department of Culture, Heritage and Tourism *Freedom of Information and Protection of Privacy Act* site: <http://www.gov.mb.ca/chc/fippa/index.html>
7. Department of Culture, Heritage and Tourism – Government Records Office site:
<http://www.gov.mb.ca/chc/archives/gro/index.html>
8. Information Commissioner of Canada: <http://www.infocom.gc.ca/>
9. Privacy Commissioner of Canada: <http://www.privcom.gc.ca/>
10. Information and Privacy Commissioner of Alberta: <http://www.oipc.ab.ca/home/>
11. Information and Privacy Commissioner of Saskatchewan: <http://www.oipc.sk.ca/>
12. Information and Privacy Commissioner of Ontario: <http://www.ipc.on.ca/>
13. Information and Privacy Commissioner of British Columbia: <http://www.oipcbc.org/>
14. Freedom of Information and Protection of Privacy Review Office of Nova Scotia:
<http://www.foipop.ns.ca/>