



SAFEGUARD

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This Issue:

- OIPC Outreach to Custodians
- Client Access to Personal Health Information
- Entities that are both Custodians and Public Bodies
- Private Physician's Inappropriate Use of eHealth system in Saskatchewan
- Complaints and Breach Notifications

OIPC Outreach to Custodians

OIPC reached out to custodian groups, such as regulatory bodies and advocacy groups, by email on April 21st offering education sessions and consultations. If you did not receive the email and/or are interested in a training session or consultation opportunity, please contact our office at 729-6309 or commissioner@oipc.nl.ca. Positive feedback was received from a recent education session offered to the College of Licensed Practical Nurses. Contact us to develop a presentation for your organization today!

In accordance with the *Personal Health Information Act (PHIA)*, custodians are obligated to develop policies and procedures on how custodians and their employees collect, protect, use, and disclose personal health information of patients and clients. While the OIPC cannot train on the specific policies and procedures of an individual custodian, we can train on the fundamentals of *PHIA*, and review existing policies and procedures and offer recommendations on how to strengthen these protocols.

This is one of our proactive advocacy activities to assist custodians with *PHIA* compliance. OIPC has also developed a number of resources to assist with *PHIA* compliance, available on our [website](#).

Job Opportunity – Central Health

Central Health is currently advertising for the permanent position of Regional Privacy Manager. For more information, please see the full job ad on Central Health's website [here](#).

Client Access to Personal Health Information

Custodians are reminded that *PHIA* provides clients with a right of access to their own personal health information, with limited exceptions. After reviewing this information, some clients may feel that the information contained in the record is not correct; in such circumstances, they have the right to make a correction request. The process of an individual requesting access is discussed below; correction requests will be discussed in the November edition of Safeguard.

Custodians should note that while *PHIA* establishes a formal framework for access requests, nothing in the Act prevents informal access. OIPC encourages custodians to communicate with individuals in an open and transparent manner; such communication benefits both parties.

Access

Section 52 establishes an individual's right of access to their own personal health information, with limited exceptions. Section 7 of *PHIA* provides that this right of access can extend to a representative of the individual in certain circumstances; for example, by a person with written authorization from the individual to act on the individual's behalf. Custodians can require such requests to be in writing, unless the individual has limited ability to read or write English, or has a disability or condition that impairs their ability to make the request in writing. The request needs to have enough detail to help the custodian identify and locate the record; if the request doesn't provide enough information, the custodian must offer to assist the client to re-word the request.

Custodians must respond within 60 days of receiving the request; custodians may extend this timeline by 30 days in certain circumstances. Custodians that extend the time to respond must notify the client of this extension. Custodians that do not respond within the timeframe established under *PHIA* are considered to have refused access and the individual can appeal that refusal to the Trial Division or request a review of the refusal by the Commissioner. While custodians are allowed to charge a fee, the fee can be waived and cannot exceed the limit established by the Minister. OIPC discussed the matter of fees in [Report AH-2012-001](#).

PHIA also establishes requirements for the content of the final response to such requests. Custodians that grant access must make the record available for examination and, at the request of the client, provide a copy. Custodians that refuse access (in whole or in part) must provide the individual making the request with a written notice that the request has been denied, along with the reasons for the denial, and the fact that the individual has the right to appeal the decision to the Trial Division or request a review by the Commissioner. Custodians that cannot locate responsive records should provide written notice that, after reasonable efforts, the records do not exist or cannot be found.

Custodians that receive a request for access to an individual's personal health information and are unsure what to do are able to contact OIPC at 729-6309 for guidance.

Entities that are Both Custodians and Public Bodies

Some entities are both public bodies under the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* and custodians under the *Personal Health Information Act (PHIA)*. This dual role was examined recently in a report out of Nova Scotia's Office of the Information and Privacy

Commissioner. Please note that entities in Nova Scotia are subject to different legislation, however the wider learnings are applicable to organizations here as well.

Nova Scotia's OIPC issued [Review Report 21-07](#) in June. This report examined a complaint involving the Driving While Impaired Program (DWI Program), a mandatory program for drivers whose licenses have been suspended due to an impaired driving offence; the program is administered by Nova Scotia Health (NSH). The program involves a standardized education component, an optional referral to healthcare treatment services and a biopsychosocial assessment resulting in an individualized risk rating that is disclosed to the Registry of Motor Vehicles (RMV) for its use in its administrative decision-making about whether to reinstate the driver's license.

Although NSH is both a public body and a custodian, the Commissioner determined that, when operating the DWI Program, it was acting as a public body. To reach this conclusion, the Report examined if the DWI Program was providing health care as defined by the Act.

NSH maintained the information created for the DWI Program in the participant's medical record, as it felt that the DWI Program delivered healthcare and would fall under Nova Scotia's *Personal Health Information Act* (NS PHIA). The Commissioner, in considering this matter, examined if the personal health information at issue was contained in a record primarily created for a purpose other than healthcare. At paragraph 25, the Commissioner states,

It is important to remember that s. 8(3) of PHIA states that FOIPOP [Nova Scotia's Freedom of Information and Protection of Privacy Act] applies where personal health information is contained in a record primarily created for a purpose other than for health care. It does not state that if a custodian is providing health care, PHIA applies. Rather, the purpose of the creation of the record is key.

The Commissioner concluded that the primary purpose for the creation of records for the DWI Program was to complete the DWI Program and to supply the RMV with evidence of satisfactory rehabilitation for its administrative decision-making purpose. At paragraph 37, the Commissioner stated, "While some activities may resemble healthcare activities, that is not determinative of their purpose."

Part of the privacy complaint examined NSH's access, collection, use and disclosure of the individual's personal health information. While the program had the authority to collect information directly from the individual, the Commissioner concluded that it did not have the authority to collect information from collateral sources; for example, the individual's existing medical record in the custody and control of NSH.

The report also examined the concept of consent in detail. While NSH submitted that it had the individual's consent, the individual indicated that they felt that they had no choice in providing consent. He had to participate in this program in order to get his drivers license back and in order to participate, he had to provide consent. He also raised concerns about the impact that program access to medical records would have on an individual's willingness to speak freely to medical professionals, especially about sensitive mental health topics.

The Commissioner makes a number of recommendations to NSH including conducting a privacy impact assessment of the DWI Program and developing fulsome procedures and guidelines to better govern its administration of the DWI Program in compliance with its statutory authorities.

Key learnings for entities who are both a public body and a custodian in Newfoundland and Labrador:

- Conduct a privacy assessment and determine which legislation applies; do not make assumptions, do a fulsome analysis. Readers interested in more about how *ATIPPA, 2015* and *PHIA* interact can start by examining Section 6 of *ATIPPA, 2015* and Sections 4, 5 and 12 of *PHIA*.
- Develop procedures and guidelines for all programs to better ensure compliance with legislation.
- For consent to be valid under *PHIA*, it needs to meet the criteria established in section 23; it must be voluntary, knowledgeable, and cannot be obtained through deception or coercion.

Private Physician's Inappropriate Use of eHealth System in Saskatchewan

In July, Saskatchewan's Office of the Information and Privacy Commissioner (OIPC) released [Investigation Report 351-2019](#). This Report examines a suspected privacy breach reported by the Ministry of Health (Health) involving a private practice physician, Dr. Ugwumba (a trustee under Saskatchewan's *Health Information Protection Act*). The Report notes that it is the OIPC's understanding that the College of Physicians and Surgeons of Saskatchewan and the Regina Police Service are also investigating the matter involving the physician's conduct.

Health advised that the physician may have been inappropriately accessing, obtaining, and using beneficiaries' health services numbers and other personal health information through one or more of the health registration systems; the concern arose from a random audit. Health had concerns about billings and, as part of the investigation, sent letters to patients. Many of the patients contacted denied receiving services billed by the physician and several indicated that they had never seen the physician as a patient.

Health made eHealth Saskatchewan (eHealth) aware of the matter because the concern involved eHealth's health registration systems; eHealth promptly terminated the physician's access. The information accessed was registration information, including name, date of birth, health services number and gender.

As the Report examined the physician's actions in an eHealth system, the issue of custody and control was examined. Of note are comments at paragraph 8:

[8] Custody is physical possession with a measure of control. Control need only be considered if there is no custody by a trustee. At the material time when Dr. Ugwumba or her clinic entered eHealth's PHRS Viewer, Dr. Ugwumba collected and had custody of the personal health information at issue. Therefore, the second element is met.

During the course of the investigation, the matter of reasonable safeguards arose, as the physician lost data from her EMR that she indicated could support her assertions that the access was authorized. The privacy breach report from the physician's legal counsel indicated that the clinic's electronic medical records system failed on October 11, 2019 and the clinic did not have any back-up records. The Commissioner concluded that this alleged malware and backup failure should be addressed in the Report, as it appeared that the physician has lost control over the personal health

information she collected because of this failure. As this system failure meant that the physician was unable to support her authority for collection, the Commissioner found that no authority existed.

Another issue regarding safeguards involved the sharing of accounts; the physician had shared her log-in information with the billing clerk. The Report states, “In order to maintain proper safeguards, authorized users must have their own log-in capabilities.”

While the Report examined many aspects of *HIPA* compliance, paragraph 27 summarized the potential impact of non-compliance:

[27] If a trustee fails to achieve satisfactory compliance with HIPA requirements, there is a greatly increased risk that patient's personal health information will fail to be protected from exposure to others who would have no legitimate need-to-know that personal health information. There is also a heightened risk that patient confidence in their health providers will be undermined and that this will negatively impact health care outcomes. Such a lack of confidence could also compromise the effectiveness of the electronic health record system that has rolled out across the province.

Although the breach stemmed from the actions of a private physician, as it involved Health and eHealth, the Commissioner recommended that these entities provide notice of the breach to affected individuals.

Key learnings for custodians in Newfoundland and Labrador:

- Investigations may involve multiple entities.
- The concept of custody or control can be complicated.
- Notification is not always the responsibility of the custodian that is not in compliance with the Act.

Complaints and Breach Notifications

*Please note that our breach statistics will return to a standard three month time frame in the next edition of Safeguard, as they do in our *ATIPPA, 2015* newsletter Above Board. The November edition of Safeguard will feature breach statistics from August 1, 2021 – October 31, 2021.

Between May 27 – July 31, 2021, OIPC received four breach notifications related to *PHIA*; all four involved human error. The four breaches were reported by two different Regional Health Authorities. Two e-mail breaches were reported, with one involving an incorrect attachment and the other a misdirected e-mail; a fax was sent to the incorrect number; and a record was placed in the incorrect patient's file.

Two new privacy complaints were received during this timeframe. One raises concerns about the information required upon entering a hospital to visit a patient and the other involves allegations of an inappropriate merger of patient files.

Newsletter Content Suggestions

Do you have suggestions for our newsletter, including privacy or access topics you would like to see featured? Contact our Office at 729-6309 or commissioner@oipc.nl.ca with your ideas!