



SAFEGUARD

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Representatives (Section 7)

OIPC has had several inquiry calls regarding section 7 of PHIA, which addresses the matter of representatives. This is the final article in a series that identifies considerations and provides additional information on each of the subsections; see the [February](#) and [May](#) editions of Safeguard for discussions on the others. Rather than providing the complete wording of section 7 up front, the text of each subsection is included as the introduction to the discussion of each subsection.

- 7. A right or power of an individual under this Act or the regulations may be exercised...(f) where the individual is a neglected adult within the meaning of the Neglected Adults Welfare Act, by the Director of Neglected Adults appointed under that Act; or*

The *Neglected Adults Welfare Act* was repealed when the *Adult Protection Act* was passed. While this Act amended *ATIPPA, 2015*, among other pieces of legislation, it did not amend *PHIA*. However, this Office is taking references to the *Neglected Adults Welfare Act* to mean the *Adult Protection Act* and the Director of Neglected Adults appointed under the Act to be the Provincial Director of Adults in Need of Protective Intervention.

Section 7(f) only applies if the individual has been declared a neglected adult or an adult in need of protection. Further, the request should come from the Provincial Director. When relying on section 7(f), custodians are reminded of the principles established in section 8 of the *Adult Protection Act*, in particular 8(c) and (g), which state,

- 8. The following principles apply to the delivery of programs and services under this Act:*

- (c) *an adult who is or may be in need of protective intervention should be involved to the greatest possible extent in decisions relating to him or her;...*
- (g) *an adult who is or may be in need of protective intervention should, if desired, be encouraged to obtain support, assistance and advice from family and friends to help that adult understand choices, and to make and communicate decisions.*

Basically, even if declared an adult in need of protection, the individual should be as involved as possible in any rights being exercised under *PHIA*.

- 7. *A right or power of an individual under this Act or the regulations may be exercised...(g) where an individual has been certified as an involuntary patient under the Mental Health Care and Treatment Act, by a representative as defined in that Act, except as otherwise provided in this Act.*

Section 7(g) only applies when an individual has been certified as an involuntary patient under the *Mental Health Care and Treatment Act (MHCTA)*. If the *MHCTA* has been engaged, there are a number of considerations. Section 2(t) of that Act defines representative as:

- (t) *"representative" means a person, other than a rights advisor, who has reached the age of 19 years and who is mentally competent and available who has been designated by, and who has agreed to act on behalf of, a person with a mental disorder and, where no person has been designated, the representative shall be considered to be the next of kin, unless the person with the mental disorder objects;*

If no representative has been designated by the individual, then section 2(1)(m) of the *MHCTA* must be considered, as it defines "next of kin" as:

- (m) *"next of kin" means the first named person or a member of the category of person on the following list who has reached the age of 19 years and is mentally competent and available:*
 - (i) *a spouse or cohabiting partner,*
 - (ii) *son or daughter,*
 - (iii) *father or mother,*
 - (iv) *brother or sister,*
 - (v) *grandson or granddaughter,*
 - (vi) *grandfather or grandmother,*
 - (vii) *uncle or aunt, and*
 - (viii) *nephew or niece;*

Custodians are also reminded that the *MHCTA* provides for a Rights Advisor, as well as involvement of both the patient and their representative when deemed appropriate.

Complaints and Breach Notifications

Between May 1 and July 31, 2022, OIPC received five breach notifications from three different entities. During this same time frame, a total of five *PHIA* complaints were received by OIPC involving three Regional Health Authorities.

One breach involved a missing first page of a discharge prescription pad (patient/client copy was missing); one involved a requisition form that had the incorrect identifying information for the patient; one involved a special authorization request being sent to the incorrect Nurse Practitioner; and two breaches were caused by a change in process. When the automatic faxing feature was unavailable, reports that required faxing were printed. These reports were inadvertently included with other documents in a fax. The custodian reminded staff to check all records before faxing and started to print to a different printer.

PHIA Privacy Complaint Report

In February, OIPC released [Report PH-2022-001](#), which examined a privacy complaint involving registration at a clinic. During the registration process at a blood collection clinic, the clerk assisting the Complainant loudly asked a co-worker for assistance with a registration code. The code contained “HIV”, as the Complainant is HIV positive. This loud exclamation was repeated four times and the Complainant believed that it could have been overheard by others – both other staff and other patients – in and around the registration desk.

The RHA investigated the incident and indicated that the clerk was reminded of the importance of patient privacy and reminded that they should keep their voice down. It was also noted that the clinic has plastic barriers, social distancing, and there is typically a radio or televisions playing, all of which serve to limit the ability of others to overhear conversations at the registration desk.

While the RHA asserted that, because there is no objective evidence that the clerk was overheard, there is no breach, the Commissioner concluded that this was a flawed argument. In order to be deemed a violation of section 15, it is not necessary to prove that the information has definitively been disclosed. Rather, it must only be established that the custodian has failed to take reasonable steps to secure information against inappropriate disclosure.

The Commissioner noted that spreading clients across the whole waiting area, including near the registration desks, for social distancing purposes may actually place people closer to the desks than usual. While the plastic barriers may block some sound, their presence may also require people to speak louder than they regularly would, potentially increasing the likelihood of being overheard. Further, staff checking in patients at a blood collection clinic should be sufficiently trained in the codes required to do their job, and should be cognizant of the volume and content of their speech, particularly when discussing such matters as HIV status.

The Commissioner concluded that a breach had occurred and that it was a material breach and recommended that a breach report be filed with OIPC. The Commissioner also recommended that signage be posted to help remind staff to be discrete when discussing personal health information. The Report also contains a cautionary discussion regarding breaches and overhead information, starting at paragraph 20:

[20] *For clarity, this determination is not saying that every instance of potentially-overheard personal health information would result in a material breach. The notion that people can overhear personal health information being collected and disclosed in the process of providing health services is an issue that has emerged from time to time over the years. This issue has been exacerbated by the precautions taken as a result of the COVID-19 pandemic, particularly given that staff and members of the public are wearing masks and often communicating through plexiglass or similar barriers more often than had previously been the case, leading them to have to talk more loudly and thus be overheard. Any assessment must look at the reasonableness of the policies and procedures in place.*

[21] *The province's health authorities have to provide health services to the population as best as they reasonably can, while also protecting privacy in a way that is commensurate with the sensitivity of the information. While Eastern Health has policies and procedures in place to protect against inappropriate disclosure of personal health information, there may be circumstances where the expectation of privacy is diminished. The same is true for people receiving health care services in a hospital ward, waiting in a waiting room at a physician's clinic, being dispensed drugs at a pharmacy, or even simply being present in a clinic of another health care provider. The standard to secure personal health information, as described in section 15, is a contextual one where efforts must be made that are reasonable in the circumstances. Loud, oral communication of sensitive personal health information where greater discretion could have been applied does not meet that standard.*

OIPC Hosting National Meeting in September

Commissioner Harvey is looking forward to welcoming his counterparts from across the country this September as he hosts the 2022 Meeting of the Federal, Provincial and Territorial (FPT) Privacy and Information Ombudspersons and Commissioners.

These meetings provide an opportunity to discuss jurisdictional reports, legislative updates and joint resolutions, along with other topics of mutual interest. This year's tentative agenda includes sessions on cybersecurity, developments in employee privacy, challenges to access to information, use of privacy invasive technologies by law enforcement, oversight of biometric data collection regulations, digital ID, and experience of frequent users of access to information, among other topics.