

Health Information and Privacy Law in Ontario

June 1, 2018

In Ontario, the collection, disclosure, and use of personal health information are governed by the *Personal Health Information Protection Act, 2004*¹ (“PHIPA”). PHIPA provides a regulatory code with which health information custodians, i.e. a person or organization identified in section 3 of PHIPA, must comply when dealing with personal health information (a “Custodian”). Custodians include healthcare practitioners, hospitals, long-term care homes, ambulance services, and pharmacies.² However, among other exceptions, aboriginal healers and aboriginal midwives are exempt from PHIPA.³

What follows is an overview of some of the major requirements imposed on Custodians by PHIPA and the rights available under PHIPA to individuals whose personal health information (as that term is defined) is in the control of a Custodian. However, this is not a complete summary of all provisions. Lawyers providing legal advice should review PHIPA and its regulations as well as relevant decisions of the Information and Privacy Commissioner of Ontario (the “IPC”). Finally, a summary of the PHIPA complaints process is provided.

Custodian Obligations

Typically, a Custodian cannot collect, use, or disclose personal health information about an individual unless it has that individual’s consent and the information is necessary for a lawful purpose.⁴ Alternatively, health information can be used, disclosed, or collected by a Custodian under one of the exceptions provided for in PHIPA.⁵

¹ SO 2004, c 3, Sched. A (“PHIPA”).

² PHIPA, *supra*, at s. 3(1).

³ PHIPA, *supra*, at s. 3(4).

⁴ PHIPA, *supra*, at s. 29(a).

⁵ See PHIPA, *supra*, at ss. 36 – 50.

Under PHIPA and its regulations, Custodians must take certain steps to protect personal health information. Specifically, Custodians are required to ensure that personal health information is “protected against theft, loss and unauthorized use or disclosure and to ensure that the records containing the information are protected against unauthorized copying, modification or disposal”.⁶

When personal health information has been “stolen or lost or if it is used or disclosed without authority”, a Custodian must give notice to several parties. First, it must notify the person whose personal health information is at issue.⁷ Moreover, the Custodian must also advise that person that he or she is entitled to file a complaint with the IPC.⁸ Finally, the Custodian must give notice to the IPC where, among other reasons:

- Information was used or disclosed without authority;
- Information was stolen;
- Information will continue to be used or disclosed without authority;
- There has been a pattern of similar breaches; or
- If the Custodian otherwise concludes the breach was “significant” in light of:
 - The sensitivity of the information;
 - The volume of information involved;
 - The number of individuals affected; and
 - The number of custodians responsible.⁹

Moreover, beginning in 2019, a Custodian must on or before March 1 of each year file a report with the IPC setting out the number of times in the previous year that personal health information was stolen, lost, and used or disclosed without authority.¹⁰

Rights Under PHIPA

⁶ PHIPA, *supra*, at s. 12(1).

⁷ PHIPA, *supra*, at s. 12(2)(a).

⁸ PHIPA, *supra*, at s. 12(1)(b).

⁹ O. Reg. 329/04: General at s. 6.3 (the “Regulation”).

¹⁰ The Regulation, *supra*, at s. 6.4.

Individuals are provided with a number of rights under PHIPA, including a right to access his or her health records unless:

- The record or information is subject to a type of legal privilege;
- Production of the record is barred by court order or another provincial or federal statute;
- Access to the record would:
 - result in a risk of serious harm to the treatment or recovery of the individual;
 - result in a risk of serious bodily harm to the individual or another person;
 - lead to the identification of a person who was required by law to provide information in the record; or
 - lead to the identification of a person who provided information in the record to the Custodian in confidence if the Custodian considers it appropriate in the circumstances that the identity of that person be kept confidential.¹¹

In any event, a Custodian must respond in writing to a request for access to a record within 30 days after receipt of the initial request.¹² However, this timeline can be extended if the request requires a lengthy search or if it is “not reasonably practical” to respond within 30 days.¹³ Moreover, a Custodian may refuse to grant a request for access to a record where the request is frivolous, vexatious, or is made in bad faith.¹⁴

Next, PHIPA provides an individual with the right to request that his or her health record be corrected if that individual believes that the record is inaccurate or incomplete.¹⁵ A Custodian’s obligations to respond to such requests are similar to those in the case of a request for access to a record.¹⁶

The Information and Privacy Commissioner of Ontario

¹¹ PHIPA, *supra*, at s. 52(1)

¹² PHIPA, *supra*, at s. 54(1)(2)

¹³ PHIPA, *supra*, at s. 54(3).

¹⁴ PHIPA, *supra*, at s. 54(6).

¹⁵ PHIPA, *supra*, at s. 55.

¹⁶ PHIPA, *supra*, at s. 55(3)(4).

A complaint may be filed with the IPC when a person has reasonable grounds to believe that another person or organization has contravened, or is about to contravene, PHIPA.¹⁷ Typically, such complaints must be made within 1 year of the alleged wrongdoing coming to the attention of the complainant.¹⁸ However, the IPC can extend this deadline provided that it does not result in any prejudice to any person.¹⁹

Alternatively, the IPC may, on its own initiative, conduct a review of any matter if it has reasonable grounds to believe that a person or organization has contravened, or is about to contravene, PHIPA.²⁰

Past IPC decisions concerning complaints and IPC initiated files can be searched at <https://www.ipc.on.ca/decisions/>. In turn, IPC decisions can be appealed to the Ontario Divisional Court, which decisions can be searched at <https://www.canlii.org/en/on/onscdc/>²¹

Further Information

For further information, contact the OBA Health Law Section Technology Liaison whose contact details can be found at <https://www.oba.org/Sections/Health-Law/Executive>.

Moreover, further information about privacy law can be found on the OBA Health Law Section website at:

- Resources – <https://www.oba.org/Sections/Health-Law/Resources>; and
- Articles – <https://www.oba.org/Sections/Health-Law/Articles>.

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¹⁷ PHIPA, *supra*, at s. 56(1).

¹⁸ PHIPA, *supra*, at s. 56(2)(a).

¹⁹ PHIPA, *supra*, at s. 56(2)(b).

²⁰ PHIPA, *supra*, at s. 58(1).

²¹ PHIPA, *supra*, at s. 62.