

FREQUENTLY ASKED QUESTIONS
FOR CUSTODIANS

THE PRINCE EDWARD ISLAND
Health Information Act

Disclaimer

Disclaimer: This document is intended to provide custodians with responses to some frequently asked questions respecting the Health Information Act, the “Act”. This document is not intended to provide legal advice.

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I. Introduction, Interpretation and Application of the Act

What is the purpose of the Act?

There is no information that is more sensitive and in need of protection than personal health information (referred to as “PHI” throughout these materials). This is information about our bodies and our minds. The health sector relies on the flow of PHI between health care providers in order to diagnose, treat, and care for Islanders and to manage the health care system.

The Act provides uniform requirements under which PHI may be collected, used and disclosed across the health care system, in both the public and private sectors. The principles upon which the Act is premised include:

- protecting the privacy of individuals and the confidentiality of their PHI;
- ensuring that PHI is shared appropriately; and
- ensuring that records containing PHI are managed and protected appropriately.

The Act strikes a balance between the personal privacy of Islanders with the need to appropriately share PHI so that Islanders receive the best possible health care. In striking this balance the Act:

- grants certain rights to individuals; and
- imposes certain obligations upon custodians.

What is personal health information (PHI)?

The Act defines PHI as “identifying information collected about an individual in oral or recorded form that:

- (i) relates to the individual’s physical or mental health, family health history or health care history, including genetic information about the individual,
- (ii) relates to information about an individual that is collected for the purpose of registering the individual for the provision of health care, including a health number, medical record number and any other identifier assigned to an individual,
- (iii) relates to the provision of health care to the individual,
- (iv) relates to an individual’s entitlement to benefits under or participation in a health care program or service,
- (v) is collected in the course of, and is incidental to, the provision of a health care program or service or payment for a health care program or service,
- (vi) relates to a drug, a health care aid, device, product, equipment or other item provided to an individual under a prescription or other authorization issued by a health care provider,

- (vii) relates to information about payments or eligibility for health care in respect of the individual, or eligibility for coverage for health care in respect of the individual,
- (viii) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any body part or bodily substance,
- (ix) identifies the individual's substitute decision maker, or
- (x) identifies an individual's health care provider.”

What is health care?

The Act defines health care as “any observation, examination, assessment, care, service or procedure that is carried out, provided or undertaken for a health-related purpose, including

- (i) the diagnosis, treatment or maintenance of an individual's physical or mental condition,
- (ii) the prevention of disease or injury or promotion of health,
- (iii) rehabilitative or palliative care,
- (iv) the compounding of a drug for the use of an individual pursuant to a prescription,
- (v) the dispensing or selling of a drug, device, equipment or any other item to an individual for use by the individual, pursuant to a prescription,
- (vi) a program or service related to health care prescribed by regulation, and
- (vii) the taking of a donation of blood, blood products, body tissues or organs.”

Who is considered a custodian under the Act?

The Act defines a custodian as “a person or organization that collects, maintains, uses or discloses personal health information for the purpose of providing or assisting in the provision of health care or treatment or the planning and management of the health care system or delivering a government program or service.” Custodians include the Minister, Health PEI, Island EMS, health care facilities, nursing homes and independent health care professionals including, but not limited to pharmacists, medical practitioners, chiropractors and optometrists.

Example: Beth is a chiropractor in private practice who rents space at a fitness facility. As a chiropractor she has custody and control of records containing PHI of her clients. Her relationship to the fitness facility is as a tenant. Therefore Beth is a custodian under the Act not the fitness facility.

Example: Bob is one of five physiotherapists employed by a private physiotherapy clinic. Each physiotherapist collects PHI from clients which is stored in records of the clinic. The physiotherapy clinic would be considered the custodian under the Act and the individual physiotherapists would be agents of the custodian.

Who is not considered a custodian under the Act?

The definition of custodian does not include everyone who may collect, use or disclose PHI in the course of their work. For example, it does not include most provincial government departments and agencies or local public bodies such as schools, post-secondary institutions and municipalities. Although insurance companies and employers may collect, use and disclose large amounts of PHI they are not considered custodians for the purposes of the Act as they are not providing health care to the individual.

Example: Insurance companies collect PHI about their clients in order to make decisions on eligibility for benefit coverage. Since the PHI is not used for the purpose of delivery of health care, insurance companies are not considered to be custodians for the purposes of the Act.

Example: Schools and educational institutions may collect PHI on some students, such as information on food allergies, drug allergies and notable health history. This PHI is collected for the purposes of assessing the needs of the student and to be aware of known risks and to prepare for potential adverse events. The PHI is not collected for the purpose of delivering health care to the student, so the schools and educational institutions are not considered to be custodians for the purposes of the Act.

Who is considered an agent of a custodian?

The Act anticipates that large organizations will appoint one or more “agents” to act on behalf of the custodian in respect of PHI and may include an employee, volunteer, a custodian’s insurer or legal representative. An agent may collect, use, disclose, retain or securely destroy PHI on behalf of a custodian.

Example: Dr. Smith owns a private dental practice and is considered a custodian under the Act. Dr. Smith’s receptionist, dental assistant and dental hygienist are all considered to be agents under the Act as they are his employees and they may collect, use and disclose PHI.

II. Consent

What is consent and how is it obtained?

The general rule is that a custodian needs to obtain an individual's consent to collect, use and disclose PHI unless the Act allows the collection, use or disclosure without consent.

An individual's consent may be implied or express. To be valid, consent should be:

- given by the individual (or a substitute decision maker in certain circumstances);
- knowledgeable;
- able to be withheld or withdrawn;
- voluntary (not obtained through deception or coercion); and
- related to the PHI in question.

The Act provides that when an individual provides PHI to a custodian, the custodian is entitled to assume that consent is implied to collect and use that PHI or to disclose that PHI to another custodian for the purpose of providing health care to that individual.

Express consent provided by an individual for the collection, use or disclosure of PHI is consent that is explicit, clear and direct. It may be given verbally, in writing or by electronic means, depending on the policies of the custodian collecting the consent. Express consent is required when:

- a custodian proposes to disclose the PHI to a non-custodian (i.e., an insurance company or an employer); or
- a custodian proposes to disclose the PHI to another custodian, other than the Minister, for a purpose other than the provision of health care.

Recommendation: A custodian may want to develop a form for the purpose of obtaining express consent containing information such as:

- ***the individual's name, date of birth and Provincial Health Number***
- ***the date of signing***
- ***indicate what PHI is being disclosed***
- ***indicate to whom the PHI is being disclosed***
- ***indicate that consent may be withdrawn at any time***
- ***the withdrawal of consent must be in writing***
- ***indicate if consent is withdrawn any PHI disclosed prior to withdrawal does not have to be retrieved***

Can consent be withdrawn?

An individual may withdraw his or her consent at any time with respect to the collection, use and disclosure of their PHI by providing notice to the custodian. The regulations require the notice to be in writing, signed and dated by the individual. A withdrawal of consent is not retroactive, but no further collection, use or disclosure of PHI may occur. Where disclosure of PHI has already been made prior to withdrawal of consent, the custodian is not required to retrieve the PHI that has already been disclosed.

Example: Raymond has been receiving services from a psychologist for several months. Initially he was comfortable with a report being sent periodically to his family physician on his progress. However, he has changed his mind and no longer wants reports to go to his physician. Raymond requests that the psychologist no longer send reports. The psychologist does not have to request the return of reports already sent, but must take reasonable steps to comply with Raymond's request.

III. Collection, Use and Disclosure of PHI

How is PHI collected?

Collection in relation to PHI means to gather, acquire, receive or obtain the personal health information by any means from any source. Whenever possible, the Act requires the custodian to collect PHI directly from the individual to whom it relates. The Act recognizes there may be circumstances under which the collection of PHI directly from the individual is not possible and in those limited situations, the custodian may collect PHI by other means.

Example: Jim is admitted to an emergency department of a hospital with chest pain but he doesn't know if there is a family history of heart disease in his family. Another family member could be asked about the family history of heart disease.

Example: Ryan arrives by ambulance to the emergency department of a hospital and he is unconscious. His mother arrives at the same time. Staff of the emergency department would be justified asking Ryan's mother for relevant health information in order to deliver safe health care.

What are the obligations of custodians respecting the collection of PHI?

The Act provides that the custodian or the custodian's agent shall collect only the PHI necessary to meet the custodian's needs with respect to the provision of health care and the management of the health system.

How can PHI be used?

In the Act "use" means to handle or deal with the PHI for a purpose and includes reproducing the PHI but does not include disclosing the PHI.

What are the obligations of custodians respecting the use of PHI?

Generally, a custodian may rely on an individual's implied consent to use the PHI, as long as the use is related to the provision of health care and the individual has not expressly stated otherwise. When using PHI, a custodian must take reasonable steps to ensure that the individual's PHI is accurate, complete and up-to-date. The Act provides several acceptable uses of PHI in addition to the provision of health care such as complying with another law, and preventing or reducing a risk of significant harm to the public. When a custodian is authorized to use PHI, the custodian

may provide the information to an employee or agent of the custodian to use it for that purpose on behalf of the custodian. The sharing of information between a custodian and an agent is considered to be a use and not a disclosure of the PHI.

How is PHI disclosed?

The Act defines disclosure as allowing PHI in the custody or under the control of a custodian to become available or to release it to another custodian or person, but does not include using the PHI.

What are the obligations of custodians respecting the disclosure of PHI?

As a general rule, consent is required to disclose an individual's PHI unless the Act provides for disclosure without consent. A custodian may rely on implied consent for the disclosure of PHI to other persons participating in and activities related to the provision of health care to the individual to whom the PHI relates. For example, the PHI of a hospital patient would be disclosed to the doctors, nurses and other health professionals (i.e., laboratory and x-ray staff) delivering care to that patient. As always, the disclosure must be reasonably necessary for the provision of health care and the individual to whom the PHI relates has not expressly stated otherwise.

Example: A family physician is referring his patient, Fran, to an orthopedic surgeon for an issue related to her knee. The family physician should disclose only the PHI that the orthopedic surgeon needs to assist with his assessment of the issue such as previous x-rays, previous injuries of the knee, etc. The family physician should not disclose PHI not related to the orthopedic referral such as Fran's most recent mammogram results.

Example: An employer calls a health care facility to request information related to one of her employees and his attendance at appointments at the facility. The employer wants a list of the dates and times of all appointments and the purpose of the appointments for this employee between January 10 and February 16. The custodian cannot disclose this PHI to the employer without the patient's express consent.

IV. Access and Correction Requests

What are the obligations of custodians regarding an individual's access to their own PHI?

The general principle under the Act is that an individual has the general right to access their PHI that is in the custody or under the control of a custodian. This presumption is consistent with the long-standing principle stated by the Supreme Court of Canada that a patient is entitled, upon request, to examine and request a copy of all or part of their PHI.

If requested, the Act requires custodians to assist individuals in reviewing their PHI.

Recommendation: Custodians may consider creating an “Access to Personal Health Information” form for the purpose of assisting individuals with access requests. The form may include the following information:

- *name*
- *date of birth*
- *Provincial Health Number (PHN)*
- *mailing address*
- *phone number (for the purpose of contacting the person if there are questions and to notify the person when the information is ready)*
- *space to describe what information is being requested (eg. a copy of the report of a CT scan from January 6, 2016 or a copy of my entire medical record held by Dr. X)*
- *a note to indicate that it is preferable that the individual pick up the requested information when it is ready and they will be required to present a photo ID when doing so*

Can an individual be denied access to their own PHI?

Section 10 establishes the limited circumstances and conditions under which a custodian may deny access to an individual's PHI. These include:

- if knowledge of the PHI could reasonably be expected to endanger the health or safety of the individual or another person;
- if disclosure of the PHI would reveal PHI about another person who has not consented to the disclosure;
- if disclosure of the PHI could reasonably be expected to identify a third party, other than another custodian, who supplied the PHI in confidence under circumstances in which confidentiality was reasonably expected; and
- the PHI was used as part of an investigation.

In some cases, the grounds for denial of access to PHI will not apply to all PHI in a record. If possible, custodians who have grounds to deny access to PHI based on one of the circumstances above shall, to the extent possible, sever (i.e. black out) the PHI that cannot be examined or copied and permit the individual to examine and receive a copy of the remainder of the PHI.

Example: Judy is receiving treatment for cancer at the Cancer Treatment Centre. In a private discussion, Judy's husband discloses to her medical oncologist that, due to the stress of his wife's diagnosis and treatment, he has needed to seek counseling for depression. He doesn't want Judy to know as he feels it may affect her recovery. If this information was recorded in Judy's health records, and if Judy requests a copy of her record, this information about her husband's depression should be removed to protect his privacy.

How long does a custodian have to respond to a request for access to PHI?

Custodians are required to respond to a request for access “openly, accurately and completely” and within 30 days of receiving the request. The Act provides exceptions to the 30 day response period which may allow a custodian up to an additional 30 days or a longer period with the prior approval of the Commissioner. Custodians are required to provide the applicant with written notification if the Commissioner has approved an extended response period. The notification should indicate when the custodian expects to provide a response and the ability of the applicant to file a complaint with the Commissioner respecting the extended response time period.

Exceptions to the 30 day response period include, but are not limited to:

- where there is insufficient detail provided by the individual for the custodian to identify the information;
- there is a large volume of records to be searched;
- if the time period would interfere unreasonably with the operations of the custodian;
- the individual does not respond to a request for clarification by the custodian.

Can an individual request corrections to their PHI?

The Act provides that an individual who believes that his or her PHI is incomplete or inaccurate may request that a custodian correct the record. An individual seeking a correction to his or her PHI is required to submit a detailed written request (with supporting evidence, if available) to the custodian believed to have custody or control of the PHI.

Within 30 days of receiving the request, the custodian is required to do one of the following:

- make the requested correction;
- inform the individual, in writing, if the PHI no longer exists or cannot be located;

- inform the individual if the custodian does not have the PHI under its custody or control and where it might be located, if known; or
- refuse the request for correction and provide reasons for the refusal.

Can a custodian deny an individual's request for corrections to their PHI?

A custodian may refuse a request for correction of PHI but is required to notify the person who made the request, in writing, of the refusal, the reasons for the custodian's refusal and the person's right to request a review of the refusal by the Information and Privacy Commissioner. In addition, the custodian who refuses a request for correction must allow the person to file a concise statement of disagreement, stating the correction requested and the reason for it, and must add the statement of disagreement to that person's record.

Example: John Doe submits a request to have a letter from a psychiatrist removed from his record held by his family doctor. John indicates that he doesn't agree with the medical diagnosis that the psychiatrist provided in the letter. This letter should not be removed from the John's record. It is a professional opinion of the psychiatrist and must remain. John can provide the custodian with a statement explaining that he disagrees with the opinion and diagnosis and this statement would become part of John's record.

Can a custodian disregard a request for access to or correction of PHI?

A custodian may request the Commissioner to authorize the custodian to disregard requests from an applicant. This applies to both requests for access to PHI and requests for correction to PHI. The custodian is required to present evidence in support of the request. The Commissioner may authorize a custodian to disregard a request if it is:

- repetitious or systemic in nature, and processing the request would unreasonably interfere with the operations of the custodian, or amount to an abuse of the right to make requests; or
- frivolous or vexatious.

When a custodian asks for authorization to disregard a request the processing time of that request stops and:

- if the Commissioner authorizes the custodian to disregard, the request the processing time ends;
- if the Commissioner does not authorize the custodian to disregard the request, the processing time clock resumes once the custodian is advised of the Commissioner's decision.

V. Custodial Obligations

What should custodians do to ensure the appropriate security of PHI in their custody and control?

The type of security a custodian should have for PHI in their custody and control will depend on the medium in which the PHI is stored. Security is about the protection put in place to ensure that PHI is safeguarded and appropriately used and disclosed.

Security requires a multi-faceted approach including:

- Physical security:
 - locked doors,
 - locked file rooms/cabinets,
 - alarm systems,
 - restriction of access to authorized employees only
- Administrative security:
 - policies,
 - procedures,
 - guidelines,
 - education
- Technological security:
 - strong passwords,
 - firewalls,
 - encryption.

How should custodians assist their agents with respect to their obligations under the Act?

Custodians should ensure that their employees and agents are educated and familiar with their obligations under the Act related to the collection, use and disclosure of PHI. Custodians can accomplish this by:

- developing policies and procedures for the collection, use and disclosure of PHI;
- providing education for their employees regarding the Act and their obligations under the Act;
- appointing an employee as the privacy lead or key contact person - this person will be the go-to person for both employees and the public;
- developing a privacy breach policy and procedure for the site; and
- developing a fee schedule for providing copies of PHI to the individuals who request their information.

VI. Commissioner

What is the role of the Commissioner?

The Information and Privacy Commissioner is designated as the Commissioner for the purposes of the *Health Information Act* as well as the province's *Freedom of Information and Protection of Privacy Act*. The Commissioner is independent from government and has general responsibility for monitoring how both Acts are administered to ensure that their stated purposes are met.

Can a custodian seek advice from the Commissioner with respect to the custodian's obligations under the Act?

The Act allows a custodian to request, and the Commissioner to provide, advice and recommendations respecting rights or duties under the Act. For example, a custodian may seek advice from the Commissioner on general procedures or matters of interpretation relating to an access request, or on appropriate information management practices. It is expected that the advice would normally be sought through a letter from a custodian to the Commissioner. Advice given in response to a request from a custodian will be in written form and of a general nature and not relate to a specific case. The advice might include recommendations on the administration and application of the Act generally or more particularly to a specific custodian.

What types of matters can the Commissioner investigate?

The Act provides that the Commissioner may investigate and attempt to resolve complaints that allege that:

- the duty to assist Applicants in reviewing their own PHI has not been fulfilled (subsection 8(9));
- an extension of time for responding to a request is not in accordance with section 8 or 11;
- a fee charged for a service provided under the Act is inappropriate;
- a correction of PHI under section 11 has been refused without justification; or
- PHI has been collected, used or disclosed in contravention of Part 4 of the Act.

Can statements or answers provided during an inquiry by the Commissioner be used in other legal proceedings?

Section 52 states that statements made or answers given by a person during an investigation or inquiry by the Commissioner are inadmissible in evidence in court or any other proceeding except:

- in a prosecution for perjury;
- in prosecution for an offence under the Act; or
- in an application for judicial review or an appeal from a decision of that review.

VII. Fees

Are there fees associated with an individual's access to their PHI?

No, custodians cannot charge a fee when allowing an individual to examine their PHI in a record.

Are there fees associated with correcting PHI in a record?

No, the Act expressly prohibits custodians from charging a fee for correcting a record.

Can a custodian charge fees for making copies of PHI in a record?

The regulations made under the Act, allow custodians to charge fees for making copies of a PHI in a record. The fee schedule provides maximum fees that can be charged and should not exceed actual costs of the service.

Can fees be waived?

An individual may request, in writing, that the fee be waived. It is not required, but the custodian may waive a fee if the custodian feels the individual cannot afford the fee, or it is appropriate for other reasons to waive the fee.

If the custodian decides to charge a fee, the custodian is required to provide a fee estimate to the individual before providing the copies of PHI.

VIII. Offences

What are considered offences under the Act?

The Act creates offences for someone who:

- collects, uses or discloses PHI contrary to the Act;
- sells or discloses PHI for consideration (unless a custodian is selling their business practice as a going concern, ie., the sale of a dental practice);
- fails to protect PHI in a secure manner as required by the Act;
- discloses PHI contrary to the Act with the intent of obtaining a monetary or other material benefit or to confer a benefit on a custodian or other person; or
- takes any adverse employment action against an employee because the employee has complied with a request or requirement to provide PHI or evidence to the Commissioner, or a person acting for or under the direction of the Commissioner, under the Act.

What are the penalties that can be imposed under the Act?

If a person is charged with an offence under the Act, a judge from the Supreme Court of PEI will determine whether the person is guilty and, if so, the appropriate penalty to be imposed.

Individuals who are found guilty of an offence may be fined up to a maximum of \$15,000, and/or up to six months imprisonment. Corporations that are found guilty of an offence may be fined up to a maximum of \$50,000.

The Act does not provide financial compensation to an individual whose personal privacy has been breached.