

GUIDE TO THE
PRINCE EDWARD ISLAND
Health Information Act



May 2017

Warning and Disclaimer

These materials have been prepared by the Department of Health and Wellness as a general guide to assist residents of Prince Edward Island and custodians of personal health information to understand their rights and meet their obligations under the *Health Information Act*.

These materials are for general information purposes only. They should be adapted to the circumstances of each person using the materials.

These materials are not intended, and should not be construed, as legal or professional advice or opinion.

Persons concerned about the applicability of privacy legislation to their activities are advised to seek legal or professional advice based on their particular circumstances.



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Introduction

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. Currently, there are inconsistent rules governing the flow of PHI between the public and private sectors.

The *Health Information Act*, the “Act” (also sometimes referred to as “HIA”), is Prince Edward Island’s new health-sector specific privacy legislation. The Act, which is expected to come into force on July 1, 2017, 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.

By establishing a level playing field for all health care professionals, the Act builds upon many of the existing high standards and protections represented in the common law, various professional codes, policies and guidelines.

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

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

Rights of the Individual

The Act provides individuals with the right to:

- be informed of the purposes for the collection, use and disclosure of PHI;
- refuse or give consent to the collection, use or disclosure of PHI and in certain circumstances to withdraw consent by providing notice to a custodian;
- request access to their PHI;
- request corrections to their PHI.

The Act establishes a formal process for individuals to access or request correction of their PHI and the right to file a complaint with the Prince Edward Island Office of the Information and Privacy Commissioner when concerns arise relating to their PHI.

Obligations of the Custodian

The Act requires custodians of PHI to:

- obtain an individual's consent for the collection, use and disclosure of PHI unless otherwise provided for by the Act;
- collect only the PHI that is necessary to accomplish the purpose for which it is collected;
- take reasonable precautions to safeguard PHI including:
 - protection against loss or theft;
 - protection against inappropriate access;
 - protection against unauthorized use, disclosure, copying, modification or destruction;
 - in some instances provide notification to an individual at the first reasonable opportunity if their PHI is lost, stolen, inappropriately disclosed or accessed by an authorized person;
- ensure that records are as accurate, up-to-date and complete as necessary for the purposes for which they are used or disclosed;
- ensure that records are stored, transferred and disposed of in a secure manner;
- respond to access requests;
- respond to correction requests; and
- ensure that all parties acting under the authority of the custodian are appropriately informed of their duties and obligations under the Act.

The provisions contained in the Act were designed to give individuals greater control over how their PHI is collected, used and disclosed while concurrently providing health care professionals with a flexible framework to access and use the PHI necessary in order to deliver appropriate and timely health care to Islanders.

These materials are designed as a brief reference tool to help individuals apply and comply with the Act. These materials follow the scheme and order of the Act.

Once proclaimed the Act and the regulations can be found at
<https://www.princeedwardisland.ca/en/legislation/health-and-wellness>

Note: The duties and obligations imposed on custodians under the Act are in addition to any duties and obligations they may have under the Personal Information Protection and Electronic Documents Act (Canada).

Part 1: Interpretation, Purposes and Application (Sections 1-7)

This Part of the Act sets out the definitions, purposes, application and non-application of the Act.

Key Definitions (Section 1)

Section 1 of the Act defines key terms and phrases including “custodian”, “health care” and “personal health information”.

Custodian

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 are the trusted gatekeepers of PHI. Custodians must ensure that:

- the amount and type of PHI to be collected, used and disclosed is necessary and appropriate to achieve an authorized purpose under the Act;
- the custodian has the authority to collect, use and disclose the PHI; and
- any express wishes of the individual or other factors are considered before the collection, use or disclosure of PHI.

Examples of 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.

The definition of custodian does not include everyone who may collect or use PHI in the course of their work. Most provincial government departments and agencies and public bodies such as schools, post-secondary institutions and municipalities will not be considered custodians for the purposes of the Act. Likewise, 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.

Note: Schools and educational institutions may collect PHI on some students, for example, information on food allergies, drug allergies and notable health history. This PHI is collected for the purpose of having a full picture on the needs of the student and to be aware of known risks and what to do should an adverse event occur. 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.

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.”

If PHI is collected for purposes other than “health care” then the Act will not apply to that information. Examples of this non-application include information that is collected, used and disclosed by employers and insurance companies.

Note: Insurance companies collect PHI relating to their clients in order to make decisions on eligibility for benefit coverage. Since they do not use the PHI for the purpose of delivery of health care they are not considered to be custodians for the purposes of the Act.

Personal Health Information

PHI is identifying information collected about an individual in oral or recorded form as it:

- (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.

Other definitions of note are “agent”, “Commissioner”, “information manager”, and “record.”

Agent

The Act permits an organization to appoint one or more agents to act on behalf of the custodian in respect of PHI. Agents may include employees, volunteers, a custodian’s insurer or legal representative. The agent may collect, use, disclose, retain or securely destroy PHI on behalf of a custodian.

Note: Agents may include, but are not limited to:

- ***employees such as a registered nurse, a licensed practical nurse, a resident care worker or a receptionist working in a medical practitioner’s office***
- ***a volunteer working in a hospital or long term care facility***
- ***a lawyer who provides legal services to a custodian***
- ***an employee who manages the records of a custodian***

Commissioner

The Act provides that the Prince Edward Island Information and Privacy Commissioner (the Commissioner) is responsible for overseeing the administration of the Act. The Commissioner, an Officer of the Legislative Assembly and independent from government, is tasked with monitoring compliance by custodians and investigating complaints pursuant to the Act. The functions and powers of the Commissioner are addressed at length in Parts 5 and 6 of the Act.

Information Manager

The Act defines an “information manager” as “a person or organization that on behalf of a custodian

- (i) possesses, stores, retrieves, archives or disposes of personal health information,
- (ii) de-identifies or otherwise transforms personal health information, or
- (iii) provides information management or information technology services.”

Information managers are generally third parties who have entered a contractual relationship with a custodian for the provision of IT support.

Note: In the public sector the information manager is IT Shared Services. In the private sector the information manager might be a private IT company under contract with a custodian to provide IT support to that custodian.

Record

A “record” means a record containing information in any form, including information that is oral, written, photographed, recorded or stored in any manner, on any storage medium or by graphic,

electronic, mechanical or any other means, but does not include electronic software or any mechanism that produces records.

Purposes of the Act (Section 2)

The purposes of the Act are set out in section 2:

- “(a) to establish a set of rules for custodians regarding the collection, use, disclosure, retention and secure destruction of personal information that protects the confidentiality of personal health information and the privacy of the individual to whom the personal health information relates;
- (b) to enable personal health information to be shared and accessed, where appropriate, for the better provision of health services and the planning and management of the health care system;
- (c) to provide an individual with the right to examine and receive a copy of the individual’s personal health information maintained by a custodian, subject to limited and specific exceptions, as set out in this Act;
- (d) to provide an individual with the right to request the correction of or amendment to the individual’s personal health information maintained by a custodian, as set out in this Act;
- (e) to establish mechanisms to ensure the accountability of persons having custody or control of personal health information and to safeguard the security and integrity of the personal health information in their custody or control;
- (f) to provide for an independent review of decisions made by custodians and the resolution of complaints made with respect to custodianship of personal health information; and
- (g) to provide effective remedies for contraventions of this Act.”

Application of the Act (Sections 3-7)

As stated above, the Act applies to PHI that is collected, used or disclosed, or is in the custody or control of a custodian as of the date the Act comes into force. There is no obligation for custodians to retroactively seek consent for PHI collected prior to that date. However, once the Act is in force, custodians who want to use or disclose PHI collected prior to the coming into force of the Act must comply with the Act with respect to the proposed use and disclosure of the PHI.

The Act does not apply to PHI in certain circumstances including:

- anonymous or statistical information that does not permit the individual to be identified;
- PHI about an individual who has been deceased for twenty years; and
- court records.

In addition, the Act does not apply to a record that is created or information held under specific legislation including, but not limited to, the *Adult Protection Act*, the *Child Protection Act*, the *Narcotics Safety and Awareness Act* and the *Public Health Act*.

The Act does not:

- restrict information available by law to a party to legal proceedings;
- affect the power of a court or tribunal to compel a witness to testify; and
- interfere with the activities of a body with statutory responsibility for the discipline of health care providers.

Section 6 provides that in the event of a conflict or inconsistency between a provision of the Act and a provision in other provincial legislation, respecting PHI, the provision in the Act prevails unless the other legislation expressly provides otherwise. Failing an express provision in the other legislation, the access, collection, use, disclosure, retention and destruction of PHI must be made in accordance with the Act.

Section 7 clarifies the relationship between the Act and the *Freedom of Information and Protection of Privacy Act*, “FOIPP”, in that FOIPP will not apply to PHI, but it does apply to other information that may be combined with PHI. A request for access to or correction of PHI made under section 8 or 11 of the Act that relates to that other information is deemed to be a request under FOIPP in respect of that other non-PHI information.

Example: John Doe attends the Emergency Department at the QEH. While waiting to be seen by a medical practitioner, John becomes involved in an altercation with staff and is injured during the incident. Information relating to John’s diagnosis, treatment and care is considered PHI and subject to the Act. The details of the altercation is not PHI and would be subject to FOIPP.

Part 2: Access to Personal Health Information (Sections 8-12)

The general principle under the Act is that an individual has the general right to access their PHI record that is in the custody or under the control of a custodian, subject to limited and specific exceptions. 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 record. The individual is not entitled to the records themselves as the tangible records belong to the custodian.

Right of Access by the Individual

Section 8 establishes the rules relating to requests for access to PHI and to the duties of custodians in dealing with such requests.

Individuals should request PHI from the custodian believed to have custody and control of the PHI. A request should contain sufficient detail as to permit the custodian to identify the PHI that is being requested. In instances where a request contains insufficient details, custodians are required to assist the individual in reformulating the request to assist the custodian in identifying the PHI being requested.

Custodians have the discretion to determine whether a request to access PHI should be in oral or written form.

Note: 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*

Response of the Custodian

Subsection 8(6) requires custodians to respond to a request for access “openly, accurately and completely” and within 30 days of receiving the request. Subsection 8(11) provides exceptions to the 30 day response period which may allow a custodian up to an additional 30 day response period. They include:

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

The 30 days are calendar days so weekends and holidays are counted. If the custodian is not available for a period of time, for example, on medical leave or vacation, an alternate arrangement should be pre-arranged to respond to a request for access to PHI.

Subsection 8(12) provides that a custodian may, with the prior approval of the Commissioner, further extend the response period beyond the additional 30 days.

In the event of an extension under subsection 8(11) or (12) the custodian is required to advise the individual in writing the reason for the extension and when a response can be expected.

Within 15 days of receiving a request for access under subsection 8(2), a custodian may transfer the request to another custodian if the PHI is maintained by that other custodian, and in that event the person making the request shall be notified in writing of the transfer. A custodian to whom a request is transferred is also subject to the requirements of section 8 as it relates to response times.

Subsection 8(8) provides that in responding to a request, the custodian may make the PHI available and provide a copy, or inform the person who made the request in writing if the PHI cannot be provided or that the request is refused for a specified reason under section 10.

Subsection 8(7) provides that the failure of a custodian to respond to a request within the 30 day period is considered a refusal to permit the individual access to their PHI. A person whose request for access is refused has a right to request a review of the refusal by the Commissioner under Part 6 of the Act.

Obligations of the Custodian

Section 9 requires a custodian to be satisfied as to the identity of a person who requests access to PHI before allowing examination or copying of that PHI. In addition, custodians are required to take reasonable steps to ensure that any PHI intended for an individual is received only by that individual or the individual's representative. Custodians should consider developing policies and procedures to identify the above-noted persons.

Note: To assist with this obligation, a custodian may develop a policy and an "Access to Personal Health Information" form such as that set out on page 8.

Refusal by the Custodian

Section 10 establishes the limited circumstances and conditions under which a custodian may refuse access to 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 or redact the PHI that cannot be examined or copied and permit the individual to examine and receive a copy of the remainder of the PHI.

Request to Correct PHI

Section 11 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 to the custodian believed to have custody or control of the PHI.

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

- 1) make the requested correction;
- 2) inform the individual, in writing, if the PHI no longer exists or cannot be located;
- 3) 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
- 4) refuse the request for correction for one of the reasons set out in clause 11(3)(d).

A custodian who refuses a request for correction 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 under Part 6. 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 the custodian 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 medical practitioner. 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 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.

Part 3: Consent (Sections 13-16)

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. The Act provides for three primary models of consent to the collection, use and disclosure of PHI: implied consent, express consent, and no consent.

Criteria for Valid Consent

Section 13 sets out the requirements for valid consent to the collection, use or disclosure of PHI including consent that is:

- given by the individual (or a substitute decision maker in certain circumstances);
- knowledgeable (understands why the PHI is being collected, used or disclosed);
- able to be withdrawn or withheld;
- voluntary (not obtained through deception or coercion);
- related to the PHI in question;
- express or implied.

Note: A custodian could post a notice in the reception/waiting area, on their website, or on their appointment letters, explaining the purpose of the custodian's collection, use and disclosure of PHI. Extra measures may be required for patients who do not speak English, cannot read, or cannot understand what they read.

Note: An individual can limit the scope of their consent. For example, Fred could authorize disclosure of certain PHI to immediate family members except Uncle Joe.

Implied Consent

As noted above, consent given under the Act can be either implied or express. Implied consent permits custodians to assume from the surrounding circumstances that an individual would reasonably agree to the collection, use or disclosure of their PHI. For example, when an individual discloses his or her PHI for the purposes of filling a prescription, a pharmacist can reasonably assume that the individual has consented to the collection of that PHI.

A custodian who receives PHI from the individual, a substitute decision-maker or another custodian for a purpose for which consent was required, is entitled to assume that consent was given and that the custodian has the individual's ongoing implied consent to collect, use or

disclose the PHI for that purpose unless the custodian is aware that the individual has expressly withheld or withdrawn the consent.

Express Consent

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.

Withdrawal or Refusal of Consent

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. This means that where disclosure of PHI has already been made prior to the withdrawal of consent, the custodian is not required to retrieve the PHI that has already been disclosed.

Subsection 13(11) provides that where an individual has refused to grant consent or has withdrawn his or her consent to the collection, use or disclosure of his or her PHI, the custodian is required to take steps to act in accordance with the decision, to inform the individual of the potential implications associated with the refusal or withdrawal and to inform other custodians holding the individual's PHI of the decision.

Custodians may refuse to comply with a refusal or withdrawal of consent to the collection, use or disclosure of an individual's PHI if that refusal or withdrawal is likely to endanger the health of the individual or another person. Custodians who refuse to comply with the refusal or withdrawal of consent are required to inform the individual as soon as possible, in writing, of the collection, use or disclosure of the individual's PHI.

Capability of Individual to Consent

The Act provides that individuals are capable of giving consent to the collection, use or disclosure of their own PHI if the individual is able to understand the information relevant to

making that decision and to appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing the consent.

Section 14 provides that an individual is presumed to be capable, and a custodian may rely on that presumption unless the custodian has reasonable grounds to believe the contrary. An individual may be capable of giving consent at one time and not capable at another.

Substitute Decision Maker

The Act permits substitute decision-makers to give, withhold and withdraw consent for the collection, use and disclosure of PHI when an individual is incapable of consenting or communicating their consent. Section 15 establishes a list of persons in descending order of priority, who may, if an individual is incapable of consenting to the collection, use or disclosure of the individual's PHI, give, withhold or withdraw consent on behalf of the individual.

Note: Substitute decision makers include:

- ***a person who has been authorized, in writing, by the individual to provide consent;***
- ***a guardian;***
- ***a spouse;***
- ***an adult child;***
- ***a parent;***
- ***an adult sibling;***
- ***adult next of kin of the individual;***
- ***the individual's health care provider;***
- ***the Public Guardian; and***
- ***if the individual is deceased, the personal representative, spouse, adult child or parent of the individual***

Note: There is no standardized document appointing a substitute decision maker. Custodians should be satisfied that any written documentation relied on by a substitute decision maker includes the power to consent to the collection, use and disclosure of PHI.

Section 16 establishes the factors that a substitute decision-maker must take into consideration in making a decision on behalf of an individual respecting the collection, use or disclosure of the individual's PHI. These include any written instructions, the wishes, values and beliefs of the individual, the purpose for the collection, use or disclosure of PHI and whether or not the collection, use or disclosure is necessary.

Part 4: Collection, Use and Disclosure of PHI (Sections 17-46)

This Part sets out how PHI can be collected, used, disclosed, retained and destroyed in the provision of health care to an individual or for the planning and management of the health care system.

Collection of PHI (Sections 17-21)

Section 1 of the Act defines “collect” as follows:

“collect” in relation to personal health information, means to gather, acquire, receive or obtain personal health information by any means from any source.

Section 18 of the Act requires custodians to collect PHI directly from the individual to whom it relates, but sets out several exceptions to this requirement, including, but not limited to, when:

- the individual has authorized another method of collection;
- the collection of the PHI directly from the individual could reasonably be expected to endanger the health or safety of the individual or another person;
- the collection of the PHI is in the interest of the individual and time or circumstances do not permit collection directly from the individual;
- the collection of the PHI directly from the individual could reasonably be expected to result in the collection of inaccurate information;
- another method is authorized or required by a court order or other legislation;
- the individual is unable to provide the PHI and a substitute decision-maker consents to another method of collection;
- the PHI is collected for the purpose of determining the individual’s eligibility to participate in a health care program or to receive a benefit, product or health care service from a custodian and the PHI is collected in the course of processing an application made by or for the individual to whom it relates;
- the PHI is collected for the purpose of verifying the eligibility of an individual who is participating in a health care program or receiving a benefit, product or health care service from a custodian to participate in the program or to receive the benefit, product or service;
- the custodian is collecting PHI for the purpose of analysis or compiling statistical information respecting the management, evaluation or monitoring of the allocation of resources to, or planning for all or part of, the health care system, including the delivery of services, and the person from whom the PHI is collected has in place practices and

procedures to protect the privacy of the individual whose PHI it receives and to maintain the confidentiality of the PHI.

Section 17 allows a custodian to collect PHI relating to an individual from a person other than the individual only with that individual's consent or under the authority of the Act, unless:

- the individual is incapable of providing consent;
- the consent of a substitute decision-maker cannot be obtained in a timely manner; and
- the collection of the PHI is necessary for the provision of health care to the individual.

Section 19 prohibits a custodian, unless required to do so by law, from collecting PHI if other information will serve the same purpose, and from collecting more PHI than is reasonably necessary to satisfy the purpose for which it is collected. However, section 20 provides that a custodian may collect de-identified information for any purpose. De-identified information is PHI that has been stripped, encoded or otherwise transformed so that the identity of the individual cannot be readily determined.

Section 21 requires a custodian to inform an individual from whom PHI is collected of the purpose of the collection and, if the custodian is not a health care provider, how to contact an officer or employee of the custodian who can answer the individual's questions about the collection. This requirement does not apply when the custodian has recently informed the individual about the collection of the same or similar PHI for the same or a related purpose.

Use of PHI (Section 22)

Section 1 of the Act defines "use" as follows:

"use", in relation to personal health information in the custody of or under the control of a custodian, means to handle or deal with personal health information or to apply the personal health information for a purpose and includes reproducing the personal health information, but does not include disclosing the personal health information.

Section 22 establishes the conditions under which a custodian is permitted to use 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 exercise the highest level of care and take reasonable steps to ensure that the individual's PHI is accurate, complete and up-to-date for the purpose which the custodian uses the PHI. 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.

Custodians are required to limit the use of PHI to only those employees and agents who need to know the PHI to carry out the purpose for which it was collected or another purpose authorized under section 22.

The Act permits a custodian to use PHI in its custody or under its control for several purposes, including, but not limited to, the following:

- for the purpose for which the PHI was collected or created and for all the functions reasonably necessary for carrying out that purpose, unless the individual expressly instructs otherwise;
- another use to which the individual who is the subject of the PHI consents;
- to prevent or reduce a risk of significant harm to the health or safety of the public or a group of people;
- if the custodian is a public body, for planning or delivering programs or services that the custodian provides or that the custodian funds in whole or in part, allocating resources to any of those programs or services, evaluating or monitoring any of them or detecting, monitoring or preventing fraud or any unauthorized receipt of services or benefits related to any of them;
- for the purpose of risk management or error management or for the purpose of activities to improve or maintain the quality of health care or to improve or maintain the quality of any related programs or services of the custodian;
- for educating agents of the custodian to provide health care;
- for the purpose of disposing of the PHI or de-identifying the PHI;
- for the purpose of seeking the individual's consent, or the consent of the individual's substitute decision-maker;
- for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is, or is expected to be, a party or witness, if the PHI relates to or is a matter in issue in the proceeding or contemplated proceeding;
- if the custodian is a Minister of the Crown, for the purpose of recovering health care costs;
- for the purpose of obtaining payment for or processing, monitoring, verifying or reimbursing claims for payment for the provision of health care or related goods and services;
- for research in accordance with section 30;
- to produce de-identified information; and

- for the purpose of the custodian’s
 - planning and resource allocation,
 - health system management,
 - public health surveillance,
 - health policy development, or
 - delivery or administration of health care.

Disclosure of PHI (Sections 23-46)

Section 1 of the Act defines “disclose” as follows:

“disclose” in relation to personal health information in the custody or under the control of a custodian or person, means to make the personal health information available or to release it to another custodian or to another person, but does not include using the personal health information.

The primary provisions governing the disclosure of PHI are found in Part 4 of the Act in sections 23 and 24. These provisions allow for the disclosure of PHI to someone other than the individual to whom the information relates, usually to a third party. The Act attempts to strike a balance between protecting the individual’s privacy and the necessary disclosure of PHI to allow for the effective and efficient delivery of health care.

The Act provides that custodians making PHI accessible to other custodians via the Prince Edward Island Electronic Health Record System, “PEI EHR”, or the Drug Information System, “DIS”, does not constitute disclosure.

Disclosure may be in the form of a release, transmittal, exposure, revealing, showing, providing copies of, or providing PHI by any means to any person or organization, including to another custodian or non-custodian. Disclosure includes oral transmission by telephone, voice mail or in-person; provision of the PHI on paper, by facsimile or in another format; and electronic transmission through electronic mail, data transfer or via the Internet.

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 may be disclosed to the doctors, nurses and other allied 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.

The Act recognizes the need for a flexible approach to regulating information exchanges between custodians of health information to ensure the effective and efficient operation of the health system. In certain circumstances, disclosure is mandatory and in others it is discretionary. Set out below are some of the most relevant provisions respecting disclosure of PHI.

Prohibitions on Disclosure of PHI

A general prohibition on the disclosure of PHI is set out in subsection 23(1). This subsection provides that a custodian shall not disclose PHI except in accordance with the Act.

Subsection 23(2) limits custodians to disclosing the minimal amount of PHI that is necessary to accomplish the purpose for which it is disclosed. Not all the PHI under the custody and control of a custodian may be relevant or necessary to carry out a specified purpose or address a request for information. For example, a custodian should not release a patient's complete file without first knowing to whom the PHI is being disclosed, why the PHI is required, and whether the same purpose could be achieved by releasing less PHI than requested. Subsection 23(6) prohibits custodians from disclosing PHI if other information will serve the purpose of the disclosure.

Subsection 23(3) limits the disclosure of PHI by custodians to only those employees and agents who need to know the PHI to carry out a specified purpose such as an assessment, diagnosis, treatment or care of the individual to whom the PHI relates.

Subsection 23(4) permits custodians to disclose for any purpose PHI that has been de-identified. Clause 1(g) of the Act defines "de-identified information" as PHI that has been "stripped, encoded or otherwise transformed so as to ensure that the identity of the individual who is the subject of the PHI cannot be readily ascertained from the de-identified information."

Subsection 23(5) prohibits a custodian from disclosing PHI under its custody or control unless it has the individual's consent or the disclosure is permitted or required by the Act.

The remainder of section 23 and section 24 set out the circumstances in which disclosure is mandatory (required) or optional and at the discretion of the custodian.

Mandatory Disclosure of PHI

Subsections 23(11) and (12) require custodians to disclose PHI without consent to the Minister or another custodian for administrative matters related to health systems management, including audits by external persons. Persons conducting audits shall: 1) agree in writing to destroy any PHI at the earliest opportunity after the audit is concluded; and 2) not to disclose any PHI to any other person except as required to conduct the audit. In addition, custodians are required to release PHI to the Chief Public Health Officer for purposes set out in the *Public Health Act* such as the prevention or containment of diseases.

Subsection 23(15) requires custodians to disclose to the Minister PHI without the consent of the individual to whom it relates for a number of purposes including, but not limited to:

- planning or delivery of programs or services funded by the government;
- monitoring or verifying claims for payment of health care or drugs provided under those programs or services;
- allocation of resources to programs and services; and
- the evaluation of the health and safety of the general public.

Subsections 24(3), (6), and (9) require custodians to disclose PHI without the consent of the individual to whom it relates in the following circumstances:

- in disciplinary proceedings against health professionals;
- for compliance with a summons, subpoena, order, or warrant, etc.;
- to comply with the rules of court;
- for legal proceedings;
- for investigative, inspection, or procedural purposes; or
- if otherwise required by law.

Optional or Discretionary Disclosure of PHI

Unless the disclosure is contrary to an express request of the individual, subsection 23(7) provides that a custodian may disclose PHI without the consent of the individual to whom the PHI relates:

- to another custodian or person, when disclosure is necessary for the provision of health care to the individual; or
- to a person for the purpose of contacting a relative, spouse, or potential substitute decision maker when the individual is injured, incapacitated, or ill and unable to consent.

Subsection 23(9) allows custodians in health care facilities to disclose limited PHI relating to an individual patient or resident if the individual does not object to the disclosure. This disclosure must not be contrary to the express request of an individual. The limited PHI permissible for disclosure under this subsection includes:

- the fact that the individual is a patient or resident in the facility;
- the individual's general health status (such as critical, poor, fair, stable, or satisfactory); and
- the general location of the individual in the facility.

Note:

- *a long term care facility may list a person's name and room number on a board in the entrance to the facility so visitors may locate and visit with the resident; and*
- *hospitals may provide volunteers access to a list of patients and their location within the hospital. This is to allow the volunteers to assist family and friends to visit patients. Volunteers should not have access to any other patient PHI.*

Subsection 23(10) allows custodians to disclose PHI relating to an individual who is deceased or presumed to be deceased to a limited number of individuals for the purposes:

- identifying the individual;
- informing those persons whom it is reasonable to inform of the death and the circumstances surrounding the death, if appropriate; or
- facilitating tissue or organ donation.

Subsection 23(13) provides custodians with the discretion to release PHI without consent for a number of purposes including, but not limited to:

- determining or verifying the eligibility of an individual to receive health care or related services;
- determining or providing payment to the custodian for the provision of health care;
- delivering, evaluating or monitoring a program related to the provision or payment of health care;
- the review and planning necessary for the provision of health care to the individual to whom the PHI relates; or
- to allow a potential successor of a custodian to assess, evaluate or assume the practice of the custodian (this latter provision would, for example, enable a medical practitioner or other health professional to transfer his or her patient files to another medical practitioner who is assuming the practice of the first medical practitioner).

Subsection 24(1) allows custodians to release PHI for health or safety reasons. For example, this provision allows custodians to disclose information to law enforcement officials, if the custodian reasonably believes that disclosure will reduce a risk of significant harm to the health or safety of any person.

Subsection 24(2) allows custodians to disclose PHI without the consent of the individual to whom it relates to the superintendent of a correctional facility or the administrator of a facility in which the individual is lawfully detained to assist the superintendent or administrator, as the case may be, respecting arrangements for the provision of health care for the individual.

Privacy Impact Assessments and Data Matching (Sections 25-29)

The Act requires that privacy impact assessments be conducted for the new collection, use or disclosure of PHI or any change to the collection, use or disclosure of PHI. A privacy impact assessment evaluates how the proposed administrative practices and information systems relating to the collection, use and disclosure of PHI may affect the privacy of the individual to whom the information relates. The objective is to assess the information governance practices of a specific program, research project or initiative to ensure the confidentiality, accuracy and integrity of the information, to minimize the risk of breaches, and to ensure that PHI is being managed in accordance with the Act. The Act requires that privacy impact assessments be submitted to the Commissioner for review and comment.

Research Using PHI (Sections 30-33)

Section 1 of the Act defines “research” as follows:

“research” means a systemic investigation designed to develop or establish principles, facts or general knowledge, or any combination of them, and includes the development, testing and evaluation of research.

In recognizing the importance of health research, the Act permits the use or disclosure of PHI for research purposes without the consent of the individuals to whom the PHI relates if strict conditions are met.

Custodians who wish to use PHI for research and researchers seeking disclosure of PHI for research, must both submit an application to a research ethics board for approval. In reviewing a research proposal involving the use and disclosure of PHI, the research ethics board will consider

whether the consent of the individual to whom the PHI relates is required and whether or not the research can be accomplished without the use or disclosure of PHI.

The research ethics board is required to assess the following:

- whether the proposed research is of sufficient importance that the public interest in the proposed research outweighs to a substantial degree the public interest in protecting the privacy of the individuals to whom the PHI relates to be used in the research;
- whether the research will contribute to:
 - the identification, prevention or treatment of disease or illness;
 - the promotion and protection of the health of individuals; or
 - improvements in health systems management and the delivery of health services;
- whether the researcher is qualified to carry out the research;
- whether adequate safeguards are in place to protect the privacy of individuals and the confidentiality of their PHI; and
- whether obtaining consent of the individuals to whom the PHI relates is unreasonable, impractical or not feasible.

Subsection 30(5) and (6) require the research ethics board to provide a written response to a researcher. If the proposed research plan is approved, the research ethics board will set out its recommendations and any applicable terms and conditions.

If a research plan is approved by the research ethics board, the researcher may apply to a custodian for the disclosure of PHI. A custodian may, but is not required to, disclose the PHI to facilitate the research.

If a custodian decides to disclose the requested PHI, the custodian shall impose on the researcher the conditions recommended by the research ethics board in addition to any other conditions that the custodian imposes relating to the use, protections, disclosure, return, disposal of the PHI in order to further safeguard the privacy of the individuals to whom the PHI relates. If the research ethics board recommends that consents from the individuals to whom the PHI relates be obtained prior to the release of the PHI, the custodian is responsible for obtaining those consents.

Subsection 32(5) authorizes custodians to charge researchers the costs associated with preparing the PHI for disclosure, making copies of the PHI, and obtaining any necessary consents. These costs are not to exceed the actual cost of the service provided.

If a custodian decides to disclose PHI to a researcher, the researcher will be required to:

- comply with the conditions imposed by the research ethics board, if any;
- use PHI only for the purpose set out in the application;

- not publish PHI in a form that could identify the individuals to whom the PHI relates;
- not disclose PHI unless required by law to do so;
- not attempt to contact the individual to whom the PHI relates unless the custodian first obtains the consent of that individual;
- allow the custodian to access or inspect the researcher's premises to confirm compliance with the Act and any conditions or requirements imposed by the custodian in relation to the disclosure of the PHI.

If a custodian is denied access to or inspection of the researcher's premises, the custodian may apply to the Supreme Court under section 33 for an order to enforce compliance with the Act.

Management of PHI (Sections 34-46)

Regardless of the size of the organization or the number of employees, section 34 of the Act requires all custodians who disclose PHI without the consent of the individual to whom it relates to record the following information:

- the name or unique user identification of the person to whom the PHI is disclosed;
- the date and purpose of the disclosure; and
- a general description of the PHI disclosed

Section 36 of the Act requires custodians to establish and implement information practices to ensure that PHI in their custody or control is kept secure. This includes protection from theft, loss and unauthorized access, use or disclosure; protection against unauthorized copying or modification; and ensuring that records in their custody or control are retained, transferred and disposed of in a secure manner.

Section 36 also requires custodians to promote openness and transparency of policies and procedures toward the public. These policies and procedures should include:

- protecting the confidentiality of PHI that is in its custody or under its control and the privacy of the individual to whom the PHI relates;
- restricting access to an individual's PHI by an employee, agent, contractor, or volunteer of the custodian or by a health care professional who has the right to treat persons at a health care facility operated by the custodian to only that PHI that is required to carry out the purpose for which the information was collected or will be used; and
- providing for the secure storage, retention and disposition of records to minimize the risk of unauthorized access to or disclosure of PHI.

Note: All public bodies in PEI are required to establish and follow retention and disposition schedules for their records under the Archives and Records Act. These schedules provide guidance as to how long a record should be kept on site after last date of activity, how long it should be stored off site in a secure records centre and when it may be destroyed.

Note: In some cases health profession insurers, such as the Canadian Medical Protective Association, (CMPA), provide physicians with guidance regarding retention and disposition of medical records. The CMPA recommends that its members retain medical records for at least 10 years from the date of last entry or, in the case of minors, 10 years from the time the patient attains the age of majority.

Note: In some instances, legislation will mandate the retention period for records. For example, the Regulated Health Professionals Act Practice of Pharmacists and Pharmacy Technicians Regulations requires pharmacists to retain patient records for a minimum period of ten years in certain circumstances. The Pharmacy Act General Regulations requires pharmacies to retain patient records for a minimum period of ten years.

A custodian's policies and procedures should include appropriate measures to address the risks associated with the storage of PHI, taking into account the manner and form in which the PHI is recorded, the location of the storage, and the degree of sensitivity of the PHI to be protected.

Privacy Breaches

Section 36 also addresses privacy breaches, which is any collection, use, or disclosure of PHI that is not authorized under the Act, including when PHI is stolen, lost, disposed of (except as permitted by the Act), or is disclosed to, or accessed by, an unauthorized person. Custodians are required to notify the individual to whom the PHI relates and the Commissioner at the first reasonable opportunity if PHI has been breached unless the custodian reasonably believes that the privacy breach will not have an adverse impact:

- on the provision of health care to the individual;
- on the mental, physical, economic or social well-being of the individual to whom the PHI relates; or
- lead to the identification of the individual to whom the PHI relates.

Section 38 provides that non-custodians to whom PHI is disclosed shall not use or disclose the PHI for any purpose other than for which the information was disclosed.

Note: PHI disclosed to a regulatory body for discipline proceedings against Dr. X with respect to a complaint by Patient A cannot be used in discipline proceedings against Dr. X with respect to a complaint by Patient B.

Information Practices

Section 39 requires custodians who have custody or control of PHI to develop information practices that including reasonable administrative, technical and physical safeguards to ensure the confidentiality, security, accuracy, and integrity of the information to be protected. These practices and procedures should address the manner of collection, storage, transfer, copying, modification, use and disposition of PHI and deal with issues such as:

- establishing and implementing controls to limit access to only those persons who may use PHI in the custody and control of the custodian;
- establishing and implementing safeguards and controls to ensure that the proposed use of the PHI is in compliance with the Act;
- establishing and implementing procedures to prevent interception of PHI by unauthorized persons;
- providing for the secure storage, retention, and disposal of records;
- ensuring that requests for disclosure of PHI contain sufficient information to identify the individual to whom it relates;
- ensuring that agents and information managers adhere to the information practices. (This may require proactive training, auditing, monitoring and testing of the established procedures.)

Other information practices that a custodian might consider include:

- establishing and maintaining an adequate level of information control to ensure that all records containing PHI can be located and retrieved within the required time limits;
- ensuring adequate safeguards and information security measures are in place for the protection of all PHI in all forms (paper, electronic, etc.); and
- establishing procedures for authenticating the identity of individuals and of those persons to whom PHI is disclosed.

Section 40 permits custodians to strip, encode or otherwise transform PHI to create non-identifying information. Custodians should establish procedures for these processes, if it intends to create non-identifying information.

Section 41 requires custodians who retain the services of an agent to collect, use, disclose, retain or securely destroy PHI to enter into a written agreement with the agent setting out the duties of the agent including the protection, retention and secure destruction of PHI. Agents are required to meet the same duties and obligations that the custodian is required to meet under the Act.

Section 42 provides that custodians may retain the services of an information manager for the purpose of processing, storing, retrieving or destroying the PHI or otherwise providing the custodian with information management or information technology services. Prior to disclosing PHI to an information manager, a custodian is required to enter into a written agreement with the information manager providing for the protection of PHI against risks such as unauthorized access, use, or disclosure, secure destruction or alteration of PHI.

Section 43 provides that an information manager hired by a custodian is required to comply with the duties imposed by the agreement and the requirements concerning the protection, retention and secure destruction of PHI that the custodian is required to comply with under the Act.

Section 44 imposes two additional obligations on custodians:

- they are to take reasonable steps to ensure that the PHI under their custody and control is accurate, current, and complete; and
- they are to ensure that disclosure is made only to the person intended and authorized to receive the PHI.

Ceasing to be a Custodian

The Act recognizes that custodians may cease to be custodians for a number of reasons. Section 45 provides that a custodian will only cease to be a custodian for the purposes of the Act when complete custody and control of the PHI passes to another person who is legally authorized to hold the PHI. There is an obligation to notify the person to whom the PHI relates that:

- the PHI will be or has transferred;
- where the individual may direct a written request for access to PHI;
- the period during which the PHI will be retained.

Section 46 requires that in the event of the death of an individual custodian, the personal representative of the deceased custodian assumes the duties and powers of a custodian until such time as the custody and control of the PHI is either

- transferred to another custodian; or
- securely destroyed.

Part 5: Commissioner (Sections 47-57)

The Prince Edward Island Information and Privacy Commissioner is designated as the Commissioner for the purposes of the Act. The Commissioner is independent from government and is required to provide an annual written report to the Speaker of the Legislative Assembly respecting the work of the Commissioner's office and other matters relating to the protection of PHI.

Functions of the Commissioner

Section 47 provides that the Commissioner has general responsibility for monitoring how the Act is administered to ensure that its stated purposes are met. Specifically, the Commissioner may:

- conduct investigations to ensure compliance with any provision of the Act or compliance with rules relating to the destruction of records in accordance with rules relating to the destruction of PHI set out in any other provincial legislation;
- review privacy impact assessments submitted by custodians and make recommendations respecting proposed changes;
- review the response of a research ethics board under section 30;
- issue an order respecting duties under the Act including granting or refusing access to a record; administrative matters such as extensions of time, payment of fees, and the correction, collection, use, disclosure, creation or destruction of PHI;
- inform the public about the Act;
- examine and comment on legislation and program activities in terms of any implications for access to and the protection of PHI;
- comment on the implications for protection of PHI through the use of disclosure of PHI for data matching;
- bring to the attention of a custodian any failure by the custodian to assist individuals under section 8; and
- give advice and recommendations of general application to custodians regarding the rights and obligations of custodians.

The Commissioner may use the advice and recommendation power to suggest improvements on the way a custodian deals with requests. The power will likely only be used when there is evidence of:

- poor administration, such as inadequate training or failure to locate records;
- wanton disregard for provisions in the Act; or
- systemic problems, such as regular delays, improper interpretation of exceptions or complaints about breaches of PHI.

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

- the duty to assist applicants under subsection 8(9) has not been fulfilled;
- 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; and
- PHI has been collected, used or disclosed in contravention of Part 4 of the Act.

Section 48 of the Act authorizes 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 anticipate or 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.

Authorization to Disregard a Request

A custodian may, under section 50 of the Act, request the Commissioner to authorize the custodian to disregard a request from an applicant under section 8 (access) or section 11 (correction). The custodian is required to present evidence to the Commissioner in support of the request to disregard a request from an applicant. 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 under section 50, 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.

It is anticipated that the Commissioner's authorizations to disregard under section 50 will be rare. Custodians should ensure that they have met their obligations to assist applicants in a full and forthright manner and have a strong case before seeking permission from the Commissioner to disregard requests from one or more applicants.

Note: The Commissioner may advise the applicant that the custodian has sought authorization to disregard the request and provide the applicant with an opportunity to respond to the custodian's submissions.

Powers of the Commissioner

The Act provides the Commissioner with all the powers, privileges and immunities of a Commissioner under the *Public Inquiries Act* when conducting an investigation or an inquiry or in giving advice and recommendations. These powers, privileges and immunities include the power to compel a witness to attend and answer questions at an inquiry, to compel records to be produced, to hold a person in contempt and to obtain assistance from law enforcement officers.

Section 51 provides that the Commissioner may require any record to be produced and may examine any information in a record, whether or not the record is subject to the Act. Custodians shall produce any record or copy of a record requested by the Commissioner within 10 days. All custodians are required to comply with the request from the Commissioner regardless of any other provincial legislation unless otherwise provided in the Act. If it is not practicable for the custodian to make a copy of a record, the custodian may request that the Commissioner examine the original at its site. The Commissioner is required to return all records or copies of records to the custodian after completing a review or investigating a complaint.

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

These conditions also apply to evidence that there is or was an investigation or inquiry conducted by the Commissioner. Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the Commissioner is privileged.

Prohibition on Disclosure of PHI by the Commissioner

The Act places restrictions on the disclosure of PHI by the Commissioner and anyone acting for and under the direction of the Commissioner. They are prohibited from disclosing information, including PHI that they obtain in the course of their duties, with the following exceptions:

- disclosure of information that is necessary for the conduct of an investigation under the Act or to establish the grounds for findings and recommendations under the Act;
- disclosure to the Minister of Justice and Public Safety and Attorney General relating the commission of an offence if the Commissioner reasonably believes that there is evidence of an offence; or
- disclosure of information in the course of a prosecution of perjury for an offence under the Act, or in an application for judicial review or an appeal arising from that application.

When conducting an investigation or inquiry and when writing a report, the Commissioner and anyone acting for and under the direction of the Commissioner shall not disclose any PHI that a custodian would be required or authorized to refuse to disclose. They must also ensure that they do not disclose the fact that PHI exists where, in the refusal to provide PHI, the custodian did not indicate whether or not the PHI exists.

Section 56 provides that the Commissioner may delegate, in writing, to any other person any duty, power or function of the Commissioner under the Act with the exception of the power to delegate.

Part 6: Review, Investigation and Inquiry (Sections 58-66)

Request for Review by the Commissioner

The right to an impartial review of decisions or actions of a custodian is fundamental to ensuring access to and the protection of PHI. The review mechanism ensures that these rights are interpreted consistently among custodians and the purposes of the Act are achieved. The orders, which summarize the issues, reasons and findings of the Commissioner, also provide guidance to custodians regarding the proper interpretation of the Act.

A review by the Commissioner of the decision of a custodian is intended to be an avenue of last resort. An individual's first course of action when raising concerns about their PHI should be to address and attempt to resolve the issue with the custodian. If the issue is not resolved then the individual may ask the Commissioner to review the matter. Even in instances where the person asks the Commissioner to review a decision, issues can often be settled through mediation and an inquiry may not be necessary.

Section 58 of the Act provides individuals who have made a request for access to or correction to or amendment of their PHI under Part 2 with the right to ask the Commissioner to review any decision, act or failure to act by a custodian. Failure by a custodian to respond to a request for access to a record within the time frames provided in the Act is treated as a decision to refuse access. An individual who believes that his or her PHI has been collected, used or disclosed in contravention of the Act may also ask the Commissioner to review the matter. All requests for review should be in writing and observe the time frame provided in subsection 58(3).

Section 59 sets out the Commissioner's duties in the review process including:

- to provide a copy of the request to the custodian and to anyone else affected; and
- provide a summary of the review process and an anticipated date for a decision to the individual, the custodian and to anyone else affected.

Section 60 provides for the Commissioner to authorize a mediator to investigate and attempt to settle the matter that is the subject of a request for review where the Commissioner considers it appropriate. The mediator does not impose a settlement—rather, mediation is intended to assist the custodian and the individual requesting a review to arrive at a settlement before a formal inquiry is initiated. The mediator may make recommendations to the custodian.

Inquiry by the Commissioner

Failing resolution through mediation, section 61 requires a Commissioner to conduct an inquiry. The Commissioner has broad discretion to determine how an inquiry will be conducted, whether it will be public or private and whether representations will be made orally or in writing. Either way, the persons concerned will be given an opportunity to make representations, including through counsel or an agent, during the inquiry, but no one has the right to be present during another person's representation.

In the case of a refusal of access, the Commissioner has the right and duty to view all records that have been withheld from disclosure in whole or in part. This right pertains regardless of the exception that the custodian has used or the fact that the custodian believes the records are excluded from the scope of the Act.

An inquiry must be completed within 90 days after the request for review is received unless the Commissioner extends that period and provides notice to the persons concerned of the extension and the anticipated completion date for the review.

Section 62 authorizes the Commissioner to refuse to conduct an inquiry. This may occur when issues raised in requests for review may replicate issues already dealt with by the Commissioner in a previous order or investigation report. The Commissioner also has the discretion to refuse to conduct an inquiry if the circumstances warrant the refusal.

Section 63 establishes that where the burden of proof lies in various situations relating to access to a record:

- generally, the burden of proof rests with the custodian refusing access to all or part of a record. This means that under normal circumstances the custodian must prove, on the balance of probabilities, that particular PHI may be exempted from release under the Act or excluded from its scope. Consequently, custodians should carefully document their reasons for refusing the request;
- where the refusal relates to a record or part of a record that contains the PHI of a third party, the burden of proof is on the applicant to prove that the disclosure of the third party's PHI would not be an unreasonable invasion of privacy; and
- if the inquiry relates to a decision to give an applicant access to a record or part of a record that contains the PHI of a third party, the burden of proof is on the third party to prove that the applicant has no right of access to the third party's PHI.

Order Issued by the Commissioner

Upon completion of an inquiry, section 64 of the Act requires the Commissioner to issue an order, with or without conditions. If the inquiry concerns a refusal to grant access to all or part of a record, the Commissioner may by order do the following under subsection 64(2):

- (a) require the custodian to give the applicant access to all or part of the PHI, if the Commissioner determines that the custodian is not authorized or required to refuse access;
- (b) either confirm the decision of the custodian or require the custodian to reconsider it, if the Commissioner determines that the custodian is authorized to refuse access;
- (c) require the custodian to refuse access to all or part of the PHI, if the Commissioner determines that the custodian is required to refuse access.

If the inquiry relates to any other matter, subsection 64(3) provides that the Commissioner may, by order, do one or more of the following:

- (a) require that a duty imposed by the Act or the regulations be performed;
- (b) confirm or reduce the extension of a time limit under section 8;
- (c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including where a time limit is not met;
- (d) confirm a decision not to correct PHI;
- (e) specify how PHI is to be corrected;
- (f) require a custodian to stop collecting, using or disclosing PHI in violation of Part 4;(g) require a custodian to destroy PHI collected in violation of this Act(4) The Commissioner may specify any terms or conditions in an order made under this section.

Section 65 provides that an order of the Commissioner is final and section 66 requires a custodian to comply with an order of the Commissioner within 40 days of the end of the period for bringing an application under the *Judicial Review Act* R.S.P.E.I. 1988, Cap. J-3, for judicial review of the order, unless an application for judicial review is made within that period.

Part 7: Prince Edward Island Electronic Health Record System (Sections 67-73)

Note: At the time of proclamation of the Act (anticipated on July 1, 2017) the PEI EHR will not be established nor will the regulations contain provisions relating specifically to the PEI EHR.

Note: Set out below are some general observations respecting the PEI EHR. In advance of the eventual rollout of the PEI EHR, this section of the materials will be updated.

Section 68 authorizes the Minister to establish an integrated system of electronic health records to be known as PEI EHR in which prescribed PHI is recorded and stored and may be accessed, shared and used by authorized custodians

Section 69 requires an authorized custodian to make prescribed PHI accessible to other authorized custodians by means of the PEI EHR. It also provides that an authorized custodian is entitled to access prescribed PHI by means of the PEI EHR, subject to the regulations. The Minister is an authorized custodian.

Section 70 provides that it is an offence for an authorized custodian to fail or refuse to make prescribed PHI accessible by means of the PEI EHR or to access it improperly. The penalties for a contravention are those set out in subsections 79(1) and (2).

Section 71 sets out the purposes for which prescribed PHI that is accessible by means of the PEI EHR may be used by the Minister and other custodian. This section also requires an authorized custodian to establish and maintain an electronic log of information respecting the use of prescribed PHI accessed by means of the PEI EHR and to retain the log for a period of 10 years after the date of the use.

Section 72 provides in respect of an authorized custodian, that use of the prescribed PHI does not constitute collection or disclosure of the PHI for the purposes of the Act, and making prescribed health information accessible by means of the PEI EHR, or accessing it, does not constitute disclosure of the prescribed PHI or require the consent of the individual to whom it relates.

Section 73 authorizes the Minister to establish a committee to provide recommendations to the Minister respecting access, use, disclosure and retention of prescribed PHI that is accessible by means of the PEI EHR.

Part 7.1 Drug Information System (Sections 73.1-73.9)

This Part of the Act covers the provincial computerized pharmacy network and database known as the Drug Information System, the “DIS” which is maintained and administered by the Minister.

Purposes of the DIS

The purposes of the DIS are as follows:

- (a) to electronically link authorized custodians with a secure database for the maintenance and sharing of the medication profiles of patients to assist in patient care;
- (b) to provide for the monitoring of information respecting drug use by patients for the purpose of establishing and administering provincial drug programs;
- (c) to act as a repository of information for health planning, research and the evaluation of the beneficial and adverse effects of drugs used by patients;
- (d) to provide for the monitoring of patient compliance with drug therapy; and
- (e) to provide for the monitoring of drug prescribing and dispensing practices for the purposes of the *Narcotic Safety and Awareness Act*.

All pharmacies in PEI are required to be electronically linked to the DIS. When a drug is dispensed in a pharmacy, other than a hospital pharmacy, pursuant to a prescription or a type of drug set out in regulations is otherwise provided to a patient, the dispenser is required to collect and record in the DIS PHI including the patient’s name, date of birth and provincial health number.

Access to the DIS

The Act sets out an application process for access to the DIS by custodians and authorized custodians. Access may be granted to applicants with or without any restrictions. Health care providers who have access to the DIS under the former legislation are deemed to have been granted access under this section. The regulations provide that authorized custodians include LPN’s, medical practitioners, nurse practitioners, pharmacists, pharmacy technicians and registered nurses.

The DIS manager is required to keep a register of custodians and authorized custodians that have been granted access to the DIS. Every custodian and authorized custodian granted access to the DIS is provided with a unique user ID. Access by an authorized custodian to the DIS may be suspended or revoked in circumstances set out in the regulations including registration, expiry,

suspension or cancellation of the authorized custodians licence to practice or if the authorized custodian ceases to be employed or engaged at a health care facility.

The DIS automatically keeps an electronic record of the user ID, date and time and information accessed each time a user accesses the DIS. The Act requires that these electronic records be retained in the DIS for at least 10 years after the date of access.

The Act permits an individual whose PHI is accessed in the DIS to request a copy of the access record. Part 2 of the Act will apply to any such request.

Under limited circumstances, the Minister may disclose information held in the DIS. Subsection 73.6(1) permits the Minister to disclose to any person non-identifying information or de-identified information stored in the DIS for reports or planning activities or research approved by a research ethics board. Subsection 73.6(2) permits the Minister to disclose information stored in the DIS, other than PHI, respecting a health care provider to a professional regulatory body for the purpose of an investigation or hearing into the health care provider's professional conduct or competence. This information would primarily relate to the health care provider's access activities or prescribing or dispensing practices.

Section 73.7 provides that an individual may request access to, a copy of, or a correction to the individual's PHI stored in the DIS, and Part 2 of the Act shall apply to that request.

Collection, Use and Disclosure of PHI on the DIS

The Act prohibits any person other than an authorized custodian from collecting PHI for the purposes of the DIS, using PHI stored in the DIS unless it was disclosed to the person by an authorized custodian, or disclosing PHI stored in the DIS. Part 4 of the Act applies to the collection, use, management and disclosure of PHI stored in the DIS.

Personalized Passwords

Under the former legislation, a person could request a personalized password to control access to their PHI on the DIS. The Act permits these individuals to continue to use the personalized password to control access by authorized custodians to his or her PHI stored in the DIS. No new personalized passwords will be issued under the Act. Furthermore, personalized passwords are not assignable or transferable to another person.

The Act prohibits an authorized custodian from accessing the PHI stored in the DIS of a person who has a personalized password unless the person provides the password or the person requires treatment in emergency circumstances and isn't able to provide the password. At any time the person may notify the DIS manager that they no longer wish to use the personalized password.

Part 8: General (Sections 74-81)

This final section of the Act contains a wide range of provisions that deal with disclosure to the Commissioner.

Identity of Employees Protected

Employees of a custodian can disclose to the Commissioner any PHI that the employee believes in good faith ought to be disclosed by the custodian or is being collected, used or disclosed in contravention of the Act. In addition, the Act protects the identity of employees who disclose information to the Commissioner and custodians are prohibited from taking employment action against employees who disclose such information.

When the Act requires any notice or other document to be given to a person, section 75 provides how that notice is to be given.

Any right or power given to an individual under the Act may be exercised on the individual's behalf by:

- the individual's personal representative, if the individual is deceased;
- a guardian or trustee;
- a parent or guardian of a minor;
- a proxy appointed by the individual; or
- any person with written authorization to act on the individual's behalf.

Any notice required to be given to an individual under the Act may be given to that specified person.

The Act provides protection for the Crown, a custodian or a person acting for or under the direction of a custodian from an action or proceeding for damages resulting from a disclosure of or failure to disclose PHI, in good faith, or a failure to give notice if reasonable care was taken to give the notice as required.

Offences

Subsection 78(1) of the Act makes it an offence for a person to:

- collect, use or disclose personal health information unless permitted under the Act;
- attempt to gain or gain access to PHI unless permitted under the Act;
- knowingly make a false statement to, or mislead or attempt to mislead, the Commissioner or another person in the performance of the functions of the Commissioner or other person;
- obstruct the Commissioner or another person in the performance of the functions of the Commissioner or other person under this Act;
- fail to comply with an order made by the Commissioner;
- destroy, alter, falsify or conceal any PHI, or direct another person to do so, with the intent to evade a request for access to the PHI; or
- destroy, alter, falsify or conceal PHI, or direct another person to do so, to affect the outcome of an audit or an investigation authorized under this Act or other legislation.

Additional offences occur when:

- employees of a custodian or information manager who, without the authorization of the custodian or information manager, discloses PHI in violation of the Act in circumstances where the custodian or information manager would not be permitted to disclose the information under the Act;
- an individual sells PHI unless authorized by the Act, (e.g. selling a professional practice as a going concern);
- a custodian fails to protect PHI in a secure manner as required by the Act; or
- a custodian 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 this Act.

Penalties

The penalties for violating a provision of the Act or the regulations, if convicted, or failing to comply with an order of the Commissioner are significant:

- in the case of an individual, a maximum fine of \$15,000, or six months in jail, or both;
- in the case of a corporation, a maximum fine of \$50,000.

Offences that continue, for example, failing to comply with an order of the Commissioner, is considered to be a continuing offence and the penalty applies to each day that the individual is in violation of the Act. This could lead to potentially substantial penalties.

Fees

Custodians are authorized to charge fees for services provided under the Act, including fees for creating photocopies of PHI. However, the fees cannot exceed the costs of providing the service. Custodians are required to provide a total fee estimate prior to providing the service. A custodian may waive part or all of a fee if appropriate to do so.

The regulations set out the fees charged under the Act. The fees and fee estimates and the refusal of a request to waive a fee may all be reviewed by the Commissioner, so custodians should always be prepared to defend its decision(s) respecting fees.

The examination of an individual's PHI by the individual is always free of charge.

Note: Since questions concerning fees may be the subject of a review, the Commissioner cannot discuss particular files, estimates or requests for waiver with a custodian or an applicant.