

MANITOBA OMBUDSMAN PRACTICE NOTE

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OVERVIEW OF PHIA AMENDMENTS

Significant amendments to PHIA came into force on May 1, 2010 and further amendments concerning the Information and Privacy Adjudicator were proclaimed on January 1, 2011. This Practice Note refers to some of these changes.

For the complete amendments, see:

- *The Personal Health Information Amendment Act* and
- *The Personal Health Information Regulation Amendment*.

For the current updated version of PHIA, refer to:

- *The Personal Health Information Act* (PHIA)
- *The Personal Health Information Act (PHIA) Regulation*.

In addition to this Practice Note, Manitoba Ombudsman has produced the following resources that include information on the May 1, 2010 PHIA amendments:

- brochure co-produced with Manitoba Health titled, *Health Information Access and Privacy: A Guide to The Personal Health Information Act*, and
- the PHIA web pages on the Manitoba Ombudsman website.

SOME PROVISIONS IMPACTING ALL TRUSTEES

1. Exercising the Rights of Another Person (subsections 60(2) and (3))

The Act now addresses the situation where an individual is incapacitated and no representative as described in PHIA subsection 60(1) is available to exercise, on behalf of the individual, his or her PHIA rights. Relatives are ranked on a list. The first adult relative listed who is willing and available to do so, can exercise the individual's rights. Where there is more than one relative in a ranking (ex. more than one child or sibling), the oldest is to be preferred to another of those relatives.

2. Notice of Right of Access to Information (section 9.1 and Regulation section 1.4)

There is a new notice provision that a trustee must take reasonable steps to inform individuals:

- of their right to examine and receive a copy of their personal health information that the trustee maintains;
- how to exercise that right; and
- of their right to authorize another person to examine and receive a copy of the information.

This information must be set out:

- clearly in a manner that the individual can reasonably be expected to understand;
- in the form of a sign, poster, brochure or other similar type of notice; and
- prominently in as many locations and in such numbers as the trustee reasonably considers adequate to ensure that the information is likely to come to individuals' attention.

3. Timeframes for Responding to Access Requests (section 6)

The PHIA timeframe for responding to an access request remains unchanged in that any trustee must respond to a request as promptly as required in the circumstances, but the response time is now to be no later than:

- 24 hours after receiving the request if the individual is a patient admitted to hospital and the access request is about the care the individual is currently receiving (access in this situation consists of examining the information);
- 72 hours after receiving the request if the individual is not a patient admitted to hospital and the access request is about the care the individual is currently receiving (access in this situation may include receiving a copy of the information as well as examining it); and
- 30 days after receiving the request in any other case, unless the request is transferred to another trustee.

4. Consent Explained (section 19.1)

The meaning of "consent" is now explained where PHIA requires an individual's consent for the use or disclosure of personal health information. The consent must:

- relate to the purpose for which the information is used or disclosed;
- be voluntary;
- not be obtained through misrepresentation; and
- be knowledgeable (meaning the individual must be provided with the information that a reasonable person in the same circumstances would need in order to make a decision about the use or disclosure).

Consent may be implied or express, but must be express if a trustee makes a disclosure to a person who is not a trustee, or a trustee makes a disclosure to another trustee for a purpose other than providing health care or assisting in providing health care. Express consent does not need to be in writing.

An individual may give consent subject to conditions, but if a condition has the effect of restricting or prohibiting a trustee from recording personal health information as required by

law or established standards of practice, the condition will not have effect. An individual who has given consent to the use or disclosure of personal health information may withdraw it by notifying the trustee. A withdrawal of consent does not have retroactive effect.

5. New Indirect Collections (subsection 14(2))

Whenever possible, a trustee must collect personal health information directly from the individual the information is about. There are exceptions to this in PHIA subsection 14(2), two new exceptions being:

- 14(2)(d.1)(i) - compiling an accurate family or genetic health history of the individual
- 14(2)(d.1)(ii) - relating to determining or verifying the individual's eligibility in a program or to receive benefits or services

6. New Uses Permitted (section 21)

A trustee may use personal health information only for the purpose for which it was collected or received. There are exceptions to this in PHIA section 21, three new exceptions being:

- 21 (c.1)(i) - using of the individual's name, address, telephone number and e-mail address ("demographic information") or Personal Health Identification Number (PHIN) to confirm eligibility for health care or payment for health care
- 21(c.1)(ii) - using the above information to verify the accuracy of the demographic information or PHIN
- 21(c.2) - relating to collecting a debt owed by the individual to the trustee or provincial government, if the trustee is a department (demographic information only)

7. Amended Disclosures (subsection 22(2) and 24(3))

A trustee may disclose personal health information only with the consent of the individual that the information is about, except where PHIA permits the disclosure without consent. There are disclosure provisions that have been changed, these being:

- 22(2)(a) - relating to a person who will be providing health care unless the individual tells the trustee not to make the disclosure
- 22(2)(h) - relating to a computerized health information network
- 22(2)(k) and (k.1) - relating to civil, quasi-judicial proceedings, prosecution of an offence
- 24(3)(d) - relating to health research approved under subsection 24(3)

8. New Disclosures Permitted (various sections)

A trustee may disclose personal health information only with the consent of the individual that the information is about, except where PHIA permits the disclosure without consent. There are new disclosure provisions, these being:

- 22(2)(g.1) - relating to another trustee who is evaluating or monitoring the quality of their services
- 22(2)(g.2) - relating to determining or verifying the individual's eligibility in a program or to receive benefits or services (demographic information only)
- 22(2)(g.3) - for the purpose of another trustee de-identifying the personal health information
- 22(2)(i.1) - relating to collecting a debt owed by the individual to the trustee or provincial government, if the trustee is a department (demographic information only)
- 22(2)(l.1) - if required by the police to assist in locating an individual reported

as a missing person (demographic information only)

- 22(2.2) - in specified circumstances to another Canadian jurisdiction relating to an individual who normally resides in the other jurisdiction and where other conditions set out in this provision apply
- 23.1(1) - in specified circumstances to a representative of a religious organization **unless the individual tells the trustee facility not to make the disclosure** (see synopsis below)
- 23.2(1) - in specified circumstances to a charitable fundraising foundation **unless the individual tells the trustee facility not to make the disclosure** (see synopsis below)
- 24.1(1) - relating to a health research organization set out in the regulations that meets the provisions of section 24.1

9. Ombudsman to Publish Recommendations (subsection 48(7))

Another new provision is that the Ombudsman must make available to the public all recommendations made in PHIA complaint investigations (PHIA Part 5 investigations). These recommendations will be published on the Ombudsman website at www.ombudsman.mb.ca

10. Ombudsman may Request Review by Adjudicator (subsections 48.1 - 48.14)

With the proclamation of amendments to *The Freedom of Information and Protection of Privacy Act* (FIPPA) on January 1, 2011, a new officer of the Legislative Assembly has been created, the Information and Privacy Adjudicator. The complaint process under PHIA (and also FIPPA) has been amended to include this additional level of independent review and complaint resolution available to the Ombudsman.

Where a trustee has not acted on a recommendation made by the Ombudsman in an access to information or privacy complaint, the Ombudsman may refer the matter to the Adjudicator for review. The Adjudicator has the power to make various orders, including requiring a trustee to give the applicant access to requested information, confirming a trustee's access decision or requiring a trustee to cease or modify practices of collecting, using or disclosing personal health information contrary to PHIA. An application can be made to the Manitoba Court of Queen's Bench for judicial review of an order made by the Adjudicator.

An appeal to Court can be made by an individual about a trustee's decision concerning a refusal of access only if the individual has first made a complaint to the Ombudsman, the Ombudsman has provided a report about the complaint and the Ombudsman has not asked the Adjudicator to review the complaint.

These provisions do not apply to PHIA complaints under investigation by the Ombudsman at the time the amendments concerning the Adjudicator came into effect.

SOME PROVISIONS IMPACTING HOSPITALS AND PERSONAL CARE HOMES, AND OTHER SPECIFIC TRUSTEES

11. Timeframes for Disclosure to Family (subsection 23(1.1))

There are now timeframes in the situation where personal health information is being disclosed, in accordance with PHIA subsection 23(1), by a hospital, personal care home or trustee providing health care services at home, to a family member or person with a close

personal relationship to the in-patient, resident or health care services recipient. The trustee must disclose the information as soon as reasonably possible, but no later than:

- 24 hours after the request is made if the individual is a patient admitted to hospital and the information is about the care the individual is currently receiving; or
- 72 hours after the request is made, in any other case.

12. Disclosure to Religious Organization (section 23.1)

A hospital or personal care home may disclose to a representative of a religious organization the following information about an in-patient or resident **unless the individual tells the facility not to do so:**

- name;
- general health status (ex. critical, stable, satisfactory); and
- location in the facility, unless the disclosure would reveal specific information about the individual's health.

The trustee may only make this disclosure if:

- the trustee has notified the individual in writing that it might disclose personal health information about the individual to a representative of a religious organization, or has posted a notice to this effect where it is likely to come to the individual's attention;
- the notice is in a form that the individual can reasonably be expected to understand; and
- the individual has been given a reasonable opportunity to object to the disclosure and has not done so.

13. Disclosure for Fundraising (section 23.2 and Regulation section 8.1))

A hospital, personal care home, other health care facility or designated health services agency may disclose to an associated charitable fundraising foundation the following information about an individual who has or is receiving services from the facility or agency **unless the individual tells the facility not to do so:**

- name; and
- mailing address

The trustee may only be able to make this disclosure if:

- the trustee has notified the individual in writing that it might disclose personal health information about the individual to a charitable fundraising foundation, or has posted a notice to this effect where it is likely to come to the individual's attention;
- the notice is in a form that the individual can reasonably be expected to understand;
- the individual has been given a reasonable opportunity to object to the disclosure and has not done so; and
- the trustee and foundation comply with any additional requirements specified in the regulations.

The Regulation sets out that a trustee must not disclose this personal information to a charitable fundraising foundation if:

- the individual has requested the trustee not to disclose this information;
- the individual has died while in the trustee's care;
- the individual is a child; or
- the trustee is a hospital and the reason for the patient's admission would reasonably be considered to be sensitive personal health information.

A charitable fundraising foundation that receives the personal health information from a trustee must:

- not use it if the foundation's records indicate that the individual has previously requested that he or she does not wish to receive communication from the foundation;
- clearly inform the individual to whom it sends a solicitation that he or she may refuse any further solicitation; and
- provide a telephone number that the individual may call to communicate a refusal.