

## Personal Health Information Privacy and Access Act – Brief Analysis

Status – Introduced May 29, 2009

Suggestions from our Submission to the Law Amendments Committee	Legislation	Result
Addition of an accountability component in the purpose clause.	Purpose Clause now includes 2 (e) to establish mechanism 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.	YES
Inclusion of unrecorded information in definition of personal health information	Section 1 now states 'identifying information about an individual in oral or recorded form'	YES
Inclusion of employers and insurance companies as custodians	Custodian <b>does not</b> include employers and insurance companies. They are specifically exempted under paragraph 3(2) (c).	NO
Inclusion of Department of Education and other public bodies as custodians.	The definition of custodian includes public bodies as defined under the Right to Information and Protection of Privacy Act (Bill 89).	YES
Only a limited number of acts should prevail over this legislation	Mental Health Act and sections 11.1, 11.2 and Part III and Part V of the FSA subsection 4(2)(3)	YES
List of exemptions when Custodian may refuse access – should be narrower.	They removed the clause can refuse access if request is frivolous or vexatious.	YES
Cannot withhold consent for purposes of the electronic health record – clarification.	Paragraph states '22(1)An individual may refuse to grant his or her consent or withdraw his or her consent to the collection, use or disclosure of the individuals' personal health information by a custodian <b>except</b> if (c) the collection, use or disclosure is for the purposes of the creation or maintenance of an electronic health record.	NO
Clarification needed on what is the research ethics committee?	Section 43 – review body that meets the requirements prescribed by regulations.	NO
When <b>shall/may</b> the custodian disclose information without consent?	<b>May</b> – for purpose of providing care, verifying eligibility, determining payment, or the purpose of delivering, evaluating or monitoring a program that relates to payment, to an information manager, audit, legal services, error management or risk management services, to CIHI, to successor, for health and safety, to superintendent of a correctional facility, for the purpose of a proceeding in which custodian is expected to be a party or witness, committee referred to in the	The list of situations in which the Custodian may disclose personal health information without

	Evidence Act for peer review, proposed litigation guardian, laying information or making an application for an order, detect or prevent fraud or limit abuse in health care, for research purposes, registration info (to public body to verify info of public body, government of Canada, person or body designated in regs), <b>Shall</b> – recovering health care costs, audits, to or via an information network designated in the regulations in which personal health information (phi) is recorded, to a custodian who maintains a registry of phi for purposes of facilitating or improving provision of health care or relates to the storage or donation of body parts or substances, to Chief Medical Officer, for public health purposes, statutory body responsible for discipline of healthcare providers, complying with summons etc, investigation, inspection authorized by this Act, required by law, monitoring health care payments.	consent and when they must disclose is quite long and requires further scrutiny.
Disclosure of Medicare number should be limited.	Section 48 –No person other than Custodian or person authorized by regs may require production of Medicare number.	<b>YES</b> unless we see long list in regs
Need to be specific on safeguards.	Some specifics but more in regs	<b>YES</b>
Independent oversight – order making power.	No. Section 73 – recommendation only.	<b>NO</b>
Review – initially in 3 years and 5 years after.	Within four years. No requirement after that.	<b>NO</b>

### **Key improvements:**

*Expanded purposive clause* – I am pleased to see the purposive clause has been expanded from the discussion paper to include the concepts of accountability and safeguards. These are important concepts and are two of the OECD principles on which most privacy legislation in Canada is based and are considered a universal standard.

*Inclusion of oral records* – From a privacy perspective, I was also pleased to see the inclusion of oral records in the definition of personal health information.

*Limit on access refusals* – The discussion paper had proposed that a Custodian could refuse an access request if they believed the request for access was frivolous or vexatious. The removal of this provision will provide a stronger right of access for the applicant and will avoid it being abused.

**Key concerns:**

*Limited applicability* – In our submission to the Committee we had raised concern about the legislation not applying to employers and insurance companies as both groups collect, use and disclose large quantities of personal health information. These groups have slipped into the gap of privacy protection between the federal and provincial governments. If they are not to be included in the *Personal Health Information Privacy and Access Act* I would hope that we can expect legislation down the road that will protect the privacy of personal health information in the possession of employees and insurance customers.

*No opt out from EHR any electronic health record* – Under paragraph 22(1) (c) of the new legislation, an individual cannot refuse to consent or cannot withdraw his consent from the collection, use or disclosure for the purposes of the creation or maintenance of an electronic health record. Is this provision specific to the ‘One Patient One Record’ (OPOR) initiative pursued by the Department of Health? If so it should be more specific. However, as OPOR is still being created, even if the clause is more specific, it is unclear as to what this provision means. If the technological features of the OPOR do not allow a patient to block information or limit access, the erosion of patient privacy is potentially enormous. Additionally, give technology, one can imagine that eventually all health information will be recorded electronically and will hence be an ‘electronic health record’. I hope that the legislature will delve more closely into the ramifications of this clause.