



# SAFEGUARD

A quarterly newsletter published by the Office of the Information and Privacy  
Commissioner

Volume 6, Issue 1

February 2022

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### *PHIA* Review

The Department of Health and Community Services communicated its plans for the next five year review of *PHIA* to OIPC in a letter dated January 18, 2022. A senior Departmental official has been identified to lead the review, along with other parties that will be appointed; Terms of Reference and timelines have yet to be determined.

The Minister is obligated by section 91 of *PHIA* to review the statute every five years. The first five-year review was announced late in 2016 and the [final report](#) was delivered in 2017. No amendments have been made since this comprehensive review.

OIPC looks forward to participating in this process once it moves forward.

### Complaints and Breach Notifications

Reminder: Custodians who are also public bodies should ensure that they understand the breach reporting expectations of both pieces of legislation and assess which legislation is applicable when reporting the breach.

Between November 1, 2021 and January 31, 2022, OIPC received nine *PHIA* breach notifications from four different entities. Two involved misdirected faxes, one involved incorrect registration information on a requisition form, one involved three separate group emails sent without use of “bcc” feature, and one involved the use of an MCP card by another individual.

The remaining four related to the cyber attack on the health sector, with *PHIA* breaches being reported by the Newfoundland and Labrador Centre for Health Information, Eastern Health, Central Health and Labrador-Grenfell Health.

Anyone who believes their personal health information (PHI) may have been accessed or stolen as a result of the cyber attack on our health system has a right to file a complaint with OIPC. We wish to advise, however, that the Information and Privacy Commissioner has already decided to launch a privacy investigation. Unless you believe there are very specific circumstances particular to your own case that would warrant an individual complaint, it will not be necessary for individuals to file a complaint.

If you have any questions or are not sure if you should file an individual complaint, feel free to contact our Office to discuss further. For more information about the cyber attack and how it has impacted the health system and the personal information of residents, it is recommended that you refer to the [resources](#) prepared by the Department of Health and Community Services or use the Department's toll free number (1-833-718-3021).

During this same timeframe, a total of six *PHIA* complaints were received by OIPC. Five were privacy complaints; one was assessed to be outside OIPC jurisdiction. There was one access/correction complaint received. Two of the complaints initially assessed as privacy complaints ended up with an access twist. A custodian (a physician), had ceased their practice and had not made arrangements for the medical records in their custody. Essentially, the records were abandoned.

Custodians are reminded that *PHIA* establishes clear requirements regarding custodianship of medical records. Section 4(3) states:

*(3) Except as otherwise provided in subsections (4) and (5), a custodian does not cease to be a custodian with respect to a record of personal health information until complete custody and control of the record, where applicable, passes to another person who is legally authorized to hold the record and the duties imposed by this Act and the regulations on a custodian with respect to personal health information shall continue to apply until the passage of custody and control of the record.*

The College of Physicians and Surgeons of Newfoundland and Labrador has both a [Practice Guideline: Closure of Medical Practice and Extended Leave From Practice](#) and [By-Law 6: Medical Records](#) to address this matter as well.

## Faxing

OIPC Saskatchewan recently issued a [report](#) that examined the issue of faxing. This same office previously completed a [robust review](#) of systemic issues with faxing personal health information in 2010.

The most recent report, however, found that while some of the misdirected faxes involved the use of a traditional fax machine, most resulted from the use of fax features associated with electronic systems (19 of the 23 incidents). The report placed the 23 incidents into categories:

*Category 1: Pick-list error (7 cases). These are cases where an employee used a drop-down menu in a software program to select the intended recipient. The incorrect recipient is selected from the pick-list.*

*Category 2: Dictation or transcription errors (5 cases). These are cases where reports were sent to the incorrect physician due to a physician committing a dictating or transcription error (such as the dictating physician not identifying the first name of an intended recipient).*

*Category 3: Reliance on a Google search for a physician's contact information (3 cases). These are cases where employees conducted a search of physicians' names on Google. The Google search led the employees to my office's website where they erroneously mistook my office's fax number for that of the intended physicians.*

*Category 4: Miscommunication (3 cases). These are cases where a miscommunication occurred between a patient and provider and the miscommunication contributed to the privacy breach. In one case, a language barrier existed between the provider and patient.*

*Category 5: Misdialing (1 case). There was one case where a report containing personal health information was sent to a non-profit organization. The non-profit organization's telephone number was identical to the intended recipient's fax number except for one digit.*

*Category 6: Patient-driven (3 cases). These are cases where reports (such as lab reports) were sent to a physician because the patient identified a particular physician to be their family physician; however, the physician indicated that the patient is not their patient.*

*Category 7: Staff not following procedure (1 case). There was one case in which the family physician on a patient's standing requisition order had retired. Instead of having the Ordering Physician update the family physician field on the requisition as instructed by written procedure, the staff member had crossed out the retired family physician's name on the requisition and handwrote "Dr. J.S. McMillan's" name after consulting with the patient. The result was a lab report sent to Dr. J.S. McMillan even though Dr. J.S. McMillan did not recognize this patient as his patient.*

While recommendations were made to each trustee, overarching recommendations include working towards eliminating the use of the traditional fax machine, disabling the auto-suggest features in electronic systems, and designing electronic systems to reduce data-entry errors.

The Commissioner also recommended changes to Saskatchewan's *Health Information Protection Act* to require trustees complete privacy impact assessments and to require trustees to report to the Commissioner's office any theft, loss, or unauthorized use or disclosure of personal health information, something that *PHIA NL* already requires for material breaches.

## Representatives (Section 7)

OIPC has had several inquiry calls regarding section 7 of *PHIA*, which addresses the matter of representatives. This article is the first of a series that will identify considerations and provide

additional information on each of the subsections. Rather than providing the complete wording of section 7 up front, the text of each subsection is included as the introduction to the discussion of each subsection. The second article will be featured in the May 2022 edition of Safeguard.

7. *A right or power of an individual under this Act or the regulations may be exercised*

(a) *by a person with written authorization from the individual to act on the individual's behalf;...*

In theory, 7(a) is fairly easy to determine, as the representative will have written authorization to act on an individual's behalf. This could take many forms, such as a note made by a health care professional or provider on the individual's medical record or a signed document provided by the individual identifying the representative. Custodians accepting someone as a representative should ensure due diligence has been conducted and they are satisfied that the individual is who they claim to be and that they do have the authority to represent the individual.

7. *A right or power of an individual under this Act or the regulations may be exercised*

*...(b) where the individual lacks the competency to exercise the right or power or is unable to communicate, and where the collection, use or disclosure of his or her personal health information is necessary for or ancillary to a "health care decision", as defined in the Advance Health Care Directives Act, by a substitute decision maker appointed by the individual in accordance with that Act or, where a substitute decision maker has not been appointed, a substitute decision maker determined in accordance with section 10 of that Act;...*

For 7(b) to apply, two key components must be in place:

- The individual must lack the competency to exercise the right or power or is unable to communicate AND
- The collection, use or disclosure of his or her personal health information must be necessary for or ancillary to a "health care decision".

Even if this section applies, custodians are reminded that 7(b) establishes a right of access to PHI but only as necessary for or ancillary to a "health care decision". The term "health care decision" is defined in section 2(b) of the *Advanced Health Care Directives Act (AHCDA)*:

(b) *"health care decision" means a consent, refusal to consent, or withdrawal of consent of any care, treatment, service, medication, or procedure to maintain, diagnose, treat, or provide for an individual's physical or mental health or personal care and includes*

- (i) *life-prolonging treatment,*
- (ii) *psychiatric treatment for a person other than a person admitted to a psychiatric unit as an involuntary patient under section 24 or detained in a psychiatric unit under subsection 81(4) or released into the community under a community treatment order under subsection 40(2) of the Mental Health Care and Treatment Act,*
- (iii) *the administration of nutrition and hydration, and*

- (iv) *admission to treatment facilities and removal from those institutions, other than the admission, transfer, removal or discharge of a person admitted as an involuntary patient under section 24 or detained in a psychiatric unit under subsection 81(3) or released into the community under an assisted community treatment order under subsection 40(2) of the Mental Health Care and Treatment Act;*

In the definitions contained in section 2 of [AHCDA](#), it states, “(e) “substitute decision maker” means the person appointed by the maker of an advance health care directive to make health care decisions on his or her behalf.”

If a substitute decision maker has not been identified, section 10 addresses how the decision maker should be determined:

*10.(1) Where a person requires the administration of health care but lacks the competency to make a health care decision and has not, while he or she was competent, appointed a substitute decision maker, or a guardian has not been appointed for the purpose by a court, or a person has been appointed but is unable or refuses to act, the first named person or a member of the category of persons on the following list may, if he or she is at least 19 years of age, act as a substitute decision maker:*

- (a) the incompetent person's spouse;*
- (b) the incompetent person's children;*
- (c) the incompetent person's parents;*
- (d) the incompetent person's siblings;*
- (e) the incompetent person's grandchildren;*
- (f) the incompetent person's grandparents;*
- (g) the incompetent person's uncles and aunts;*
- (h) the incompetent person's nephews or nieces;*
- (i) another relative of the incompetent person; and*
- (j) the incompetent person's health care professional who is responsible for the proposed health care.*

Section 4 of the [AHCDA](#) indicates that the authority of the substitute decision maker does not become effective until the client ceases to be competent, stating, “4. *An advance health care directive and the authority of a substitute decision maker become effective when the maker ceases to be competent to make and communicate health care decisions and continue to be effective for the duration of that period.*”

Watch for information on remaining subsections in the May 2022 edition of Safeguard!

**Save the Dates – Next APSIM is April 26 – 28**

The Office of the Information and Privacy Commissioner, with the support and involvement of key partners, has begun planning the next Access, Privacy, Security and Information Management (APSIM) Conference. This free conference will again be held virtually and is tentatively scheduled for April 26 - 28, 2022.