



# SAFEGUARD

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

Volume 6, Issue 2

May 2022

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## This Issue:

- *PHIA* Offence Prosecution
- Representatives (Section 7)
- Complaints and Breach Notifications
- *PHIA* Resources
- Training Opportunity

### *PHIA* Offence Prosecution

On February 2, 2022, a sentencing decision on a *PHIA* offence prosecution was delivered by the Court. In this case, an individual pleaded guilty to accessing the medical records of another individual, who was a patient at the hospital. Section 88 of *PHIA* states:

*88.(1) A person who wilfully*

*(a) obtains or attempts to obtain another individual's personal health information by falsely representing that the person is entitled to the information;*

*...*

*is guilty of an offence and liable, on summary conviction, to a fine of not more than \$10,000 or to imprisonment for a term not exceeding 6 months, or to both.*

The decision highlights a number of safeguards the custodian had in place. For example:

- Executing an oath/affirmation of confidentiality on September 2011 and January 2012 stating familiarity with and understanding of policies on confidentiality and obligations under *PHIA* and *ATIPPA, 2015*. Further, "The oath/affirmation specifically addresses the impermissibility of accessing or using personal health information except as it is necessary for the performance of work duties."
- Completing a personal health information training session.
- Confirming that the workspace included a password protected computer and neither the workspace nor the computer were shared by other employees and was not accessible by the general public.
- Detailing the audit features of the Meditech system, noting that all system activity is recorded and discussing practical limitations.

While the individual involved received an absolute discharge, those who read the decision will note the Judge acknowledged that the individual lost their employment with the health authority and has struggled to obtain employment; as a result of the change in their financial situation, they lost a number of assets, including their home. The Judge also acknowledged the Victim Impact Statement, which demonstrated the victim's concerns and anxiety of knowing that their medical records were accessed.

OIPC recommends that custodians review this decision, as it outlines safeguards in place and summarizes previous *PHIA* prosecutions in the range of sentence section. See *R. v Elliott, 2022 CanLII 6306 (NL PC)* to read the full decision.

## Representatives (Section 7)

OIPC has had several inquiry calls regarding section 7 of *PHIA*, which addresses the matter of representatives. This article is the second in a series that identifies considerations and provides 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 third and final article will be featured in the August 2022 edition of *Safeguard*; sections 7(a) and (b) were discussed in the [February edition](#) of *Safeguard*.

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

...

*(c) by a court appointed guardian of a mentally disabled person, where the exercise of the right or power relates to the powers and duties of the guardian;*

Section 7(c) establishes a court appointed guardian of a mentally disabled person, where the exercise of the right or power relates to the powers and duties of the guardian. Custodians should satisfy themselves that the representative is a court appointed guardian and that the right they are trying to exercise relates to their powers and duties as guardian. This could generally be achieved with the production of Court documents to this effect.

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

...

*(d) by the parent or guardian of a minor where, in the opinion of the custodian, the minor does not understand the nature of the right or power and the consequences of exercising the right or power;*

Section 7(d) establishes the parent or guardian of a minor where, in the opinion of the custodian, the minor does not understand the nature of the right or power and the consequences of exercising the right or power. This section requires two distinct considerations. First, custodians should satisfy themselves that the parent or guardian are in fact who they say they are and have rights vis-à-vis the minor in question. Second, custodians should assess whether the minor understands the right or power under the Act that is under consideration (for example, whether to file a privacy complaint or make an access/correction request). If the minor understands, then presumably they can

exercise the rights or powers themselves. If the custodian is satisfied that both considerations have been met, then they could rely on this section.

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

...

- (e) *where the individual is deceased, by the individual's personal representative or, where there is no personal representative, by the deceased's nearest relative, and for this purpose, the identity of the nearest relative may be determined by reference to section 10 of the Advance Health Care Directives Act;*

Section 7(e) only applies when the individual is deceased. If deceased, the individual's personal representative or, if there is no personal representative, the nearest relative as per section 10 of the [Advance Health Care Directives Act](#), may exercise the rights or powers of the deceased individual. Section 10 states, in part:

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.*

Sections 10(2) to 10(5) address other situations, such as when a substitute decision maker is unavailable and considerations under the *Adult Protection Act*.

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

## Complaints and Breach Notifications

Between February 1 and April 30, 2022, OIPC received six breach notifications from four different entities. One involved a mailing error, one was a misdirected fax, one was an in-person pick-up error, one involved inappropriate discussion of an individual's personal health information in a public area, one involved personal health information of clients stored in the personal cloud of a former staff member, and one involved an intentional snooping incident. Labrador-Grenfell Health reported the snooping incident, where an employee on leave accessed 11 records, including their own. The

employee's access has been terminated and the RHA has launched an investigation. The matter has also been referred to the RHA's Human Resources division and reported to the College of Registered Nurses of Newfoundland and Labrador (CRNNL).

During this same timeframe, a total of 13 *PHIA* complaints were received by OIPC. One complaint involved the cyber incident from November 2021. A complaint was received under *PHIA* naming the Department of Health and Community Services, the Newfoundland and Labrador Centre for Health Information, Eastern Health, Central Health, Labrador-Grenfell Health and Western Health. The complaint stated:

*In November 2021, it was announced that personal health information was taken by an unauthorized third party. I request that the Commissioner investigate and report on what happened and ensure measures are in place to prevent this from happening again.*

Of the remaining complaints, six were privacy and one involved custodianship of records.

## *PHIA* Resources

Custodians are reminded that OIPC can offer *PHIA* training that is customized to their needs; interested custodians should email OIPC at [commissioner@oipc.nl.ca](mailto:commissioner@oipc.nl.ca). There are also a number of *PHIA* resources available on the OIPC's website. In addition to [website content](#) specifically for custodians, OIPC also publishes all *PHIA* [reports online](#). OIPC has developed a number of *PHIA* guidance documents, including:

- [PHIA Compliance Checklist for Custodians](#)
- [Sending Personal Health Information Via Email – Quick Tips](#)
- [Use of Email for Communicating Personal Health Information](#)
- [Disclosure of Personal Health Information for Research Purposes: Guidance for Researchers and Custodians of Personal Health Information](#)

## Training Opportunity

The province has seen first-hand the impact that a cyber attack can have. One of many training options available is Saegis Shield – an accredited, online cybersecurity and privacy education program. This e-learning program consists of short micro modules designed for busy health-care providers and their staff. For more information, please see the [Saegis Shield website](#).

The Newfoundland and Labrador Medical Association (NLMA) and the Family Practice Renewal Program are offering fee-for-service, community-based family physicians, specialists, and their clinic teams a free one-year subscription to Saegis Shield. Interested physicians should contact the [NLMA](#).