



Ontario College of
Social Workers and
Social Service Workers

Privacy Toolkit for Social Workers and Social Service Workers

Guide to the Personal Health Information Protection Act, 2004 (PHIPA)

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Warning and Disclaimer

- This Toolkit is provided for general information purposes only. The Toolkit is not intended, and should not be construed, as legal advice or professional advice and opinion.
- The description of the Personal Health Information Protection Act, 2004 in this Toolkit is based on current information and may change as experience with the legislation and its enforcement develops.
- The Toolkit refers to information available from other organizations and their websites. Any such reference does not imply that the College endorses the information.
- The Toolkit should not be relied upon as a substitute for the Personal Health Information Protection Act, 2004 or its regulations. Provisions of the legislation have been simplified for the purpose of identifying issues for consideration.
- Social workers and social service workers concerned about the applicability of privacy legislation to their activities or the interpretation of the legislation are advised to seek legal or professional advice based on their particular circumstances.

Acknowledgement

The Ontario College of Social Workers and Social Service Workers would like to thank the Ministry of Health and Long-Term Care for contributing to the funding of this Toolkit and reviewing its contents.

Foreword

This Toolkit has been prepared by Anzen Consulting Ltd. in collaboration with staff of the Ontario College of Social Workers and Social Service Workers and has been reviewed by WeirFoulds LLP. The Toolkit is designed as a general guide to assist social workers and social service workers in understanding the *Personal Health Information Protection Act, 2004* (“the Act”) and the changing privacy expectations of clients and the public. The Toolkit is organized into five chapters.

Chapter 1 of the Toolkit provides important background information on the Act’s purposes, its definition of “personal health information”, how social workers and social service workers should determine if and how the Act may apply to them, rules for recipients of personal health information, rules for collecting, using and disclosing a health number and describes when social workers and social service workers may wish to seek legal or professional advice.

Chapter 2 outlines the responsibilities for health information custodians and their agents. Responsibilities for health information custodians are summarized in six general rules with examples to illustrate what these rules mean and how they might be followed in the practices of social work and social service work. Rules for agents in their handling of personal health information are also presented in this chapter with examples to illustrate their meaning.

Chapter 3 outlines the rules for consent and for specific information handling practices. The chapter also describes the “circle of care” and “lockbox” concepts and outlines the rules for the disclosures of personal health information to the Ontario College of Social Workers and Social Service Workers as well as the rules for providing access and correcting records of personal health information.

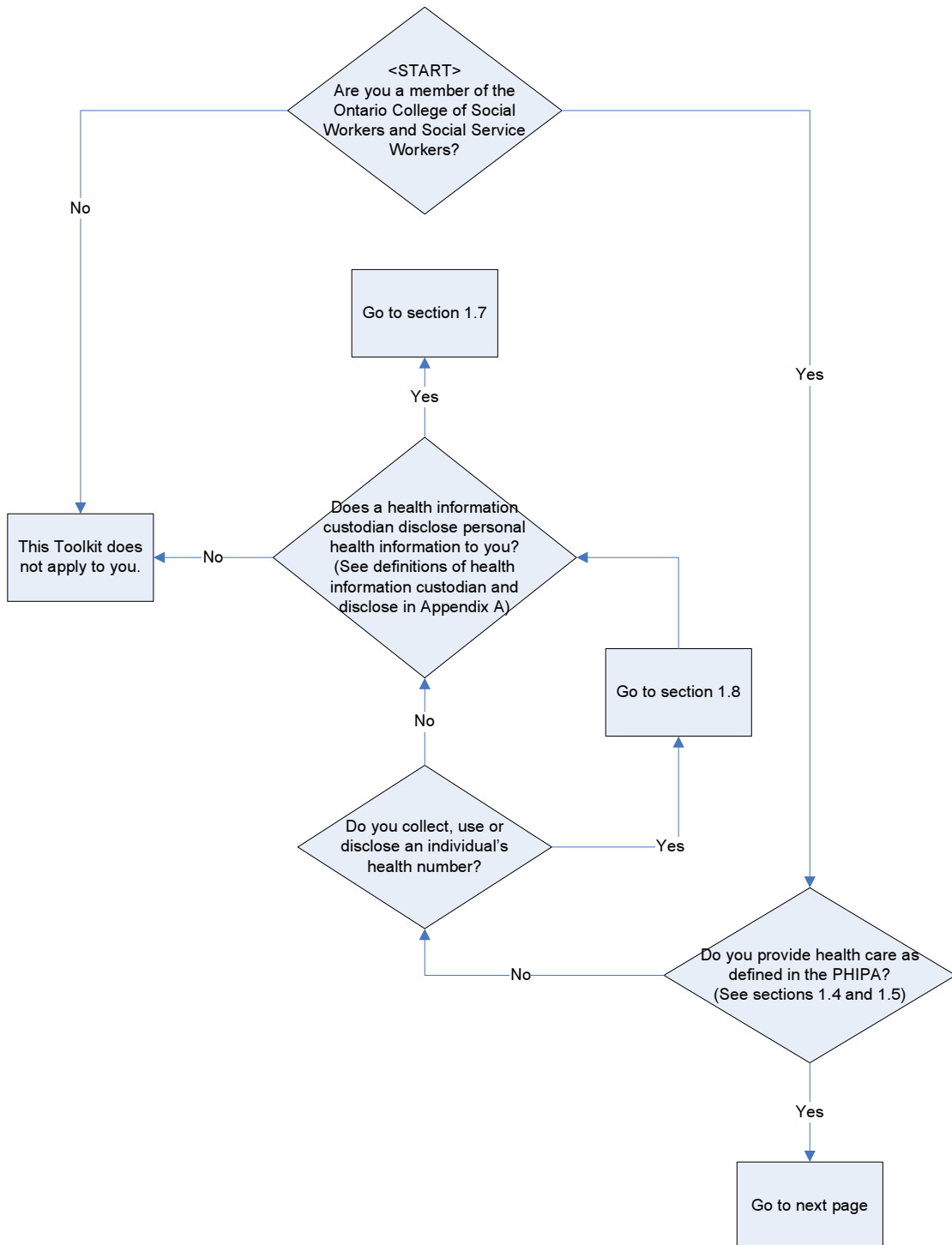
Chapter 4 identifies the rules for substitute decision-makers and also comments on the relationship between these rules and those contained in other legislation.

Finally, **Chapter 5** discusses the role of the Office of the Information and Privacy Commissioner/Ontario (“the Commissioner”), who oversees compliance with the Act.

Each chapter begins with a **summary of key questions** that the chapter addresses, with references to the appropriate section number of the chapter. The Toolkit also contains four appendices intended to provide readers with additional information. These include an appendix with select excerpts from the *Personal Health Information Protection Act, 2004* for readers who want additional information about relevant sections of the Act (Appendix A), a list of policy resources for readers who need to make publicly available a written statement relating to their policies and procedures relating to the collection, use and disclosure of personal health information under section 16(1) of the Act (Appendix B), and a brochure for clients on their privacy rights under the Act produced by the Commissioner (Appendix C). Several health information custodians have placed copies of this brochure in their waiting rooms or offices as a means of supporting their own written public statements. Finally, Appendix D contains a list of web sites with resources on the Act.

Each chapter in the Toolkit is designed to “stand-alone”, meaning that a reader who has already considered his or her role under the Act (this is outlined in Chapter 1) could easily flip to other chapters or sections of the Toolkit for information about specific topics. At the same time, however, the College also recognizes that the *Personal Health Information Protection Act, 2004* is still a relatively new law and that many members may be unsure of its applicability to their day-to-day information handling activities or how to understand some of the Act’s provisions. For this reason, the Toolkit can also be read cover-to-cover as a “complete whole”. The College encourages readers to approach the Toolkit in whichever manner best meets their needs.

Decision Tree for Using this Toolkit



Decision Tree for Using this Toolkit

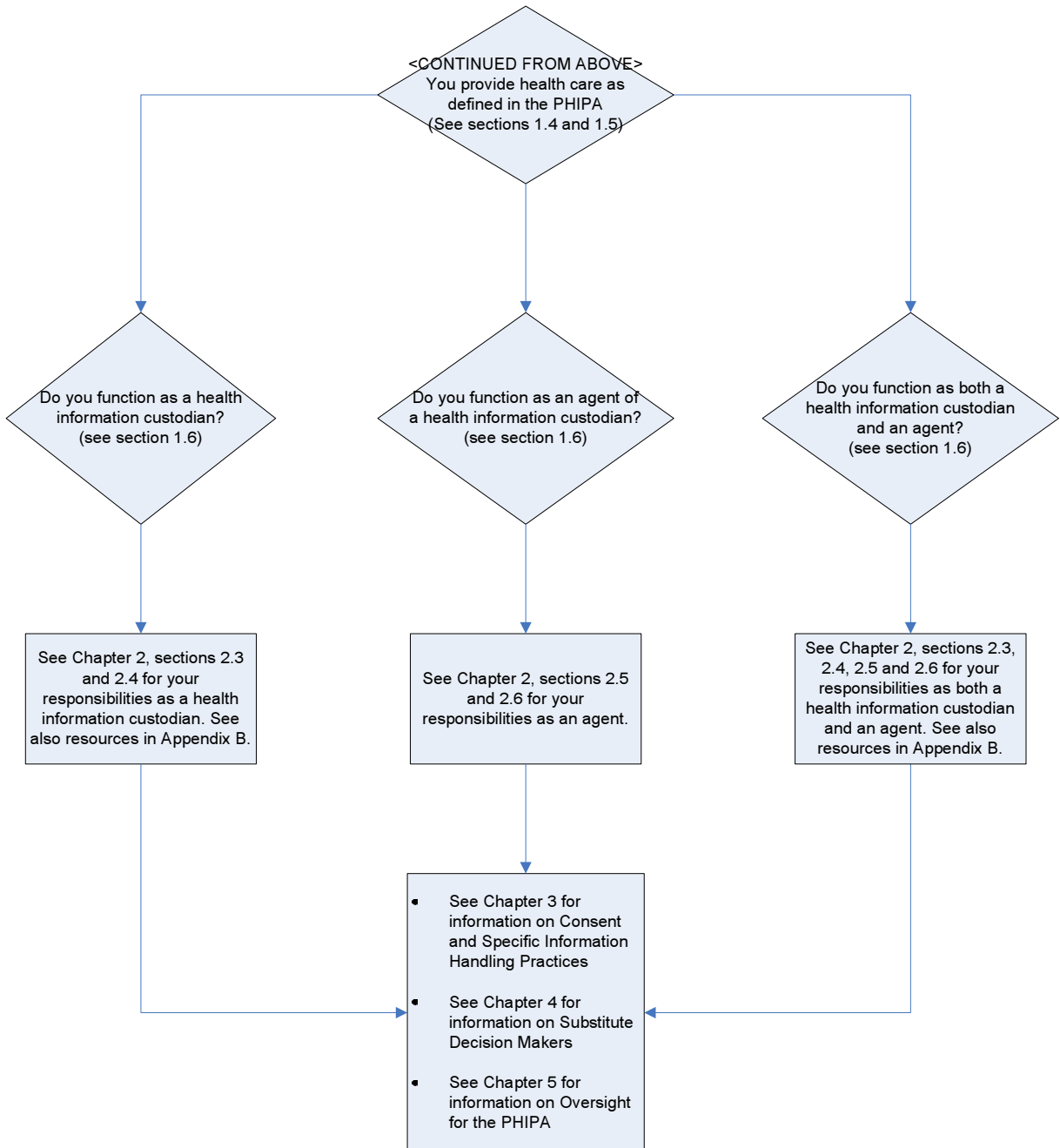


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1. Introduction and Overview

1.1 Summary of key questions covered in this chapter

- What is the *Personal Health Information Protection Act, 2004* (“the Act”)? (See section 1.2).
- What is “personal health information”? (See section 1.3).
- To whom does the Act apply? (See section 1.4).
- What is “health care” and “health-related purposes” under the Act? (See section 1.5).
- How do I know if the Act applies to me? (See section 1.6).
- What is a “recipient of personal health information” and what are the rules for recipients? (See section 1.7).
- What are the rules for collecting, using and disclosing a **health number**? (See section 1.8).
- What are some tips for knowing when to seek legal or professional advice? (See section 1.9).

1.2 What is the *Personal Health Information Protection Act, 2004*?

The Ontario government has enacted the *Personal Health Information Protection Act, 2004* – a recent provincial law that will help keep the personal health information of individuals who interact with the Ontario health care system private, confidential and secure by imposing rules relating to its collection, use and disclosure. This privacy law came into effect on November 1, 2004.

The Act has a number of purposes, including the establishment of specific rules for the collection, use and disclosure of personal health information while facilitating the provision of health care, providing individuals with a right to access and request corrections to their personal health information (with limited exceptions outlined in

the Act), and providing effective remedies for violations of the Act.

The Act also allows for the independent review and resolution of complaints regarding the handling of personal health information and designates the Office of the Information and Privacy Commissioner/Ontario as the body responsible for overseeing compliance with the Act’s provisions. Additional information about each of these topics is found in later chapters of the Toolkit.

1.3 What is personal health information?

The Act concerns the handling of “**personal health information**” by “health information custodians” and their “agents”. It also concerns the handling of “**personal health information**” by a person who has received personal health information from a “health information custodian” and the handling of the health number by any person. Under the Act, “personal health information” is defined as certain information about an individual, whether living or deceased and whether in oral or recorded form. Personal health information is information that can identify an individual and relates to matters such as the individual’s physical or mental health, the providing of health care to the individual, the identity of a health care provider or a substitute decision-maker for the individual, payments or eligibility for health care or eligibility for coverage under an insurance arrangement for health care in respect of the individual, the donation by the individual of a body part or bodily substance, and the individual’s health number. The Act does not apply to recorded information about an individual if the record was created more than 120 years ago or if 50 years or more have passed since the death of the individual. The Act also does not apply to information in anonymous or de-identified form. For social workers and social service workers, records of personal health information may contain references to more than one individual. For example, in their goal to achieve optimum

social functioning for their clients, social workers and social service workers may be given personal health information about a client's family members, such as a history of physical or mental illness, past uses of prescription medications or past histories of physical or emotional abuse, etc. Clause (a) of section 4(1) defines personal health information about an individual as including the "health history of the individual's family." For information about access to records of personal health information containing references to more than one individual or client, see section 3.15.

1.4 To whom does the *Personal Health Information Protection Act, 2004* apply?

The Act applies directly to "health care practitioners". Under section 2 of the Act, a "health care practitioner" is defined to include "a person who is a member of the Ontario College of Social Workers and Social Service Workers and who provides health care" (emphasis added). See section 1.5 to learn more about whether the services you provide to clients may be defined as "health care".

The types of legal obligations you have under the *Personal Health Information Protection Act, 2004* will depend on whether you are classified as: (1) a "health information custodian"; (2) an "agent" of a health information custodian; or (3) both a "health information custodian" and an "agent" of a health information custodian. See section 1.6 for more information. The Act also may apply to you if you are not a "health information custodian" or an "agent" but receive personal health information from a custodian or if you collect, use or disclose the health card number. See sections 1.7 and 1.8 for more information.

1.5 Scope of "health care" and "health-related purposes" under the *Personal Health Information Protection Act, 2004*

Unlike physicians, nurses and many other health care professionals, the breadth and scope of

social work practice and social service work practice may include roles and duties that are not related to the provision of health care. For example, if you work for an income support program, depending on the nature of your duties or practice, you may not provide health care within the meaning of the *Personal Health Information Protection Act, 2004*. (You will, however, obviously still collect private and potentially sensitive information about your clients whose confidentiality you will need to protect, but the information in this Toolkit may not apply to you).

Section 2 of the *Personal Health Information Protection Act, 2004* defines "health care" as "any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that:

- (a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition;
- (b) is carried out or provided to prevent disease or injury or to promote health; or
- (c) is carried out or provided as part of palliative care, and includes,
- (d) the compounding, dispensing or selling of a drug, a device, equipment or any other item to an individual, or for use of an individual, pursuant to a prescription; and
- (e) a community service that is described in subsection 2(3) of the *Long-Term Care Act, 1994* and provided by a service provider within the meaning of that Act."

The above definition suggests that you need to consider whether the services you provide are performed for a "health-related purpose". For example, a social service worker could be seen as providing health care in accordance with the above definition in circumstances where he or she is providing services to a client in crisis. This is because the social service worker might apply skills (e.g. "care" or "service") that re-establish immediate coping and give support (e.g. "treat an individual's mental condition"), and reduce

lethality (e.g. “prevent disease or injury”) and is done for a health-related purpose. If a social worker were involved in this case, he or she may also be seen as providing health care in accordance with the above definition since he or she might attempt to deal with a situation resulting from a past trauma, such as post-traumatic stress, which requires a higher level of knowledge and skill (e.g. carrying out an assessment to “diagnose” and/or “treat” an “individual’s physical or mental condition”) and is done for a health-related purpose.

Note that you may provide health care to a client without actually being an employee of or under contract with a health care organization – for example, if you volunteer your services to a hospital, community care access centre, long-term care centre or other health care facility. These are known as **health information custodians** and are described in section 1.6. Also note that whether or not you provide health care to a client can change over time, depending on the client’s circumstances.

EXAMPLE OF A SOCIAL WORKER OR SOCIAL SERVICE WORKER WHO IS *NOT* PROVIDING HEALTH CARE:

“All children in the primary school years will receive education about the health benefits of eating a minimum of 4-5 servings of fruits and vegetables per day. The school sees this educational program as an important health promotion effort. John Doe will take this information home in a family nutrition kit, which also includes online information. I [the social worker or social service worker] will visit the school next week to give a short presentation and to answer questions from John Doe’s class.”

EXAMPLE OF A SOCIAL WORKER OR SOCIAL SERVICE WORKER WHO IS PROVIDING HEALTH CARE:

“All children in the primary school years will receive education about the health benefits of eating a minimum of 4-5 servings of fruits and vegetables per day. John Doe will take this information home in a family nutrition kit, which also includes online information. He has told a former professional athlete who visited the school today for ‘Nutrition Month’ that he is bothered by his peers’ comments about his weight and that his parents want him to improve his physical fitness level and confidence in social situations. His family and teacher have asked me [the social worker or social service worker] to work with him on these issues”.

As seen in the second example above, a child that once received general information on the benefits of healthy food choices is now receiving health care from his social worker or social service worker since the social worker or social service worker is now making “observations” and “assessments” about a specific child for a “health-related purpose” that is “carried out to diagnose¹, treat or maintain the child’s physical or mental condition”.

1.6 Deciding how the Act may apply to you

Under the *Personal Health Information Protection Act, 2004*, you may function as:

1. A **health information custodian (HIC)**;
2. An **agent** of a health information custodian; or

¹ Only social workers may provide a social work diagnosis. Diagnosis is not included in the scope of practice of social service work as set out in the Standards of Practice published by the Ontario College of Social Workers and Social Service Workers.

3. A **health information custodian** and an **agent** of a health information custodian.

Health information custodians and their agents share some of the same privacy responsibilities under the Act, but they also have some privacy responsibilities that are unique. Read this section to determine if you are: (1) a health information custodian; (2) an agent of a health information custodian; or (3) both a health information custodian and an agent. Responsibilities for health information custodians and their agents are described in Chapter 2.

You are a HIC if . . .

- You provide health care AND:
- You are a social worker or social service worker in independent practice; or
- You operate a group practice of social workers or social service workers or other health care practitioners who provide health care; or
- You are a social worker or social service worker that provides health care as part of your duties for an organization that is not a health information custodian; or
- You are an evaluator under the *Health Care Consent Act, 1996* or an assessor under the *Substitute Decisions Act, 1992* and do not provide these services as an agent of a health information custodian.

EXAMPLE:

You are a HIC if you run your own independent social work or social service work practice and provide health care. You may specialize in a particular area such as individual, couple, family or group therapy. You may rent or own a small office space that you use for your business activities (e.g. for client meetings). In business terms, you are probably the sole proprietor of your practice.

You are also a HIC if you operate a *group practice*² of social workers, social service workers or other health care practitioners (such as psychologists or occupational therapists) that provide health care. You have likely rented or own office space out of which you operate your group practice. Your group practice may specialize in a particular area, such as individual, couple, family or group therapy. You may employ other individuals such as a receptionist. The individuals who provide health care on behalf of your group practice are agents and are described below.

Finally, you are also a HIC if you provide health care as part of your duties for an organization that is not a HIC, such as an Employee Assistance Program, a school board or a Children’s Aid Society. For a list of organizations that are health information custodians, see the information in Appendix A.

You are an agent of a HIC if . . .

- You are employed by or perform services or activities *for or on behalf* of a HIC, and not for your own purposes. You may be an employee of a health information custodian, such as a hospital or nursing home, but you do not have to be employed by or remunerated by the custodian to still be classified as an agent of a health information custodian. For example, you may perform services on a volunteer basis to a hospital.

² A “group practice” is different from a “professional corporation”. In a group practice, members do not have to be part of the same profession.

EXAMPLE:

You are an agent of a HIC if you are employed by or perform services or activities for or on behalf of that HIC. Examples of HICs include: hospitals, psychiatric facilities, walk-in clinics or medical centres that offer other health care services (e.g. family physicians, nurses or nurse practitioners, physiotherapists), nursing homes, long-term care centres, community care access centres or community health or mental health centres, programs or services.

You should also know that there are other types of HICs under the Act, but social workers and social service workers are less likely to be employed by or perform services or activities for or on their behalf. These include pharmacies, laboratories and ambulance services. Appendix A contains the full list of individuals and organizations that are classified as a HIC under the *Personal Health Information Protection Act, 2004*.

Finally, you are both a HIC and an agent of a HIC if, for example...

- You are a social worker or social service worker in independent practice who provides health care AND
- You also perform services or activities for or on behalf of a health information custodian.

EXAMPLE:

You run an independent practice that provides health care on a part-time basis (you are a HIC) and you are also employed by a community care access centre to provide health care to its clients on a part-time basis (you are an agent of a HIC).

You work full time at a hospital during which time you provide services to hospital patients (you are an agent of a HIC) and you also provide health care to your own clients in independent practice (you are a HIC). In this situation, you may rent office space from the hospital, you may fund the purchase or leasing of office equipment at the hospital from your independent practice, and you may also store client records from your independent practice separately from the records of your hospital patients.

1.7 Recipient of personal health information from a health information custodian

Section 49(1) of the *Personal Health Information Protection Act, 2004* places restrictions on a person who is not a health information custodian and to whom a health information custodian discloses personal health information (referred to here as a “recipient”; see section 1.3 for the definition of “personal health information”). This rule provides that, subject to certain exceptions, a recipient shall not use or disclose the information for any purpose other than:

- the purpose for which the health information custodian was authorized to disclose the information under the Act, or
- the purpose of carrying out a statutory or legal duty.

There is also a general rule under section 49(2) which states that, subject to prescribed exceptions, a recipient shall not use or disclose more of the information than is reasonably necessary to meet the purpose of the use or disclosure unless the use or disclosure is required by law.

1.8 Collection, use or disclosure of a health number

The health number means the number, the version code or both of them assigned to an insured person within the meaning of the *Health Insurance Act* by the General Manager within the meaning of that Act. Under the *Personal Health Information Protection Act, 2004*, “personal health information” includes an individual's health number. If you are a health information custodian (HIC) or an agent of a HIC, the rules for collection, use or disclosure of personal health information apply to the health number. However, the *Personal Health Information Protection Act, 2004* imposes specific restrictions with respect to the collection, use or disclosure of a health number by a person who is not a HIC.

Under the Act, a person who is not a HIC shall not collect or use another person's health number except:

- For purposes related to the provision of provincially funded health resources to that person;
- For the purposes for which a HIC has disclosed the number to the person;
- If the person is the governing body of health care practitioners who provide provincially funded health resources and is collecting or using health numbers for purposes related to its duties or powers; or
- If the person is prescribed and is collecting or using the health number, as the case may be, for purposes related to health administration, health planning, health research, or epidemiological studies. (Note that “prescribed” means a regulation has been made under the Act for that purpose.)

Under the Act, a person who is not a HIC may not disclose a health number except as required by law or except as prescribed in the regulations.

These restrictions do not apply to an agent of a HIC who is using or disclosing the health number

on behalf of the custodian in accordance with the Act.

1.9 When to seek legal or professional advice

Depending on how the Act applies to you, circumstances under which you may wish to seek legal or professional advice include:

- If you are concerned about the applicability of the *Personal Health Information Protection Act, 2004* to your activities or the meaning of any provisions of the Act;
- If you receive a question or complaint about the handling of personal health information under the Act and you are not sure how to respond; or
- Since the *Personal Health Information Protection Act, 2004* is still a relatively new law, not all organizations may be aware that they are a health information custodian. The Act states that a centre, program or service for community health or mental health whose primary purpose is the provision of health care is a health information custodian (see Appendix A). If you provide health care as part of your duties for an organization and you are unsure whether the organization may be a health information custodian, then you are advised to encourage the organization to seek legal or professional advice.
- Note that if you are an agent of a health information custodian, you may also contact the custodian's privacy contact person for assistance.

2. Responsibilities of Health Information Custodians and their Agents

2.1 Summary of key questions covered in this chapter

- Are responsibilities for handling personal health information the same for a HIC as for its agents? (See section 2.2).
- What must I **know** about my responsibilities for handling personal health information if I am a **HIC**? (See section 2.3).
- What must I do to handle personal health information in accordance with the Act if I am a **HIC**? (See section 2.4).
- Where can I find **resources for written public statements and information practices** required under the Act? (See section 2.4).
- Where can I find **resources for clients** about the Act? (See section 2.4).
- What must I **know** about my responsibilities for handling personal health information if I am an **agent of a HIC**? (See section 2.5).
- What must I **do** to handle personal health information in accordance with the Act if I am an **agent of a HIC**? (See section 2.6).

2.2 Responsibilities of a HIC versus responsibilities of agents of a HIC

If you have determined from section 1.6 of the Toolkit that you are a health information custodian (HIC), then you have several obligations with respect to personal health information. These are summarized below in **six rules** in section 2.3. The information in section 2.4 describes these rules in more detail and shows how health information custodians might fulfill these responsibilities using examples from the practices of social work and social service work.

If you are an *agent* of a HIC, your obligations under the Act are different from those of a HIC,

although you still have a responsibility to protect the privacy and security of any personal health information you handle for or on behalf of a HIC. The information in sections 2.5 and 2.6 describes responsibilities for agents of a HIC and provides examples of how you might fulfill these responsibilities as a social worker or social service worker.

2.3 What you must know if you are a HIC

You must know the following six rules if you are a HIC:

1. **You are responsible for any personal health information in your custody or control;**
2. You must have in place **policies and procedures** with respect to your **collection, use, modification, disclosure, retention and disposal of personal health information;**
3. You must have in place **policies and procedures** with respect to the **administrative, technical and physical safeguards** that you have implemented to protect personal health information (the policies and procedures referred to in rules 2 and 3 are defined as “information practices” under the Act);
4. You must take reasonable steps to ensure that your clients’ personal health information is as **accurate**, complete and up-to-date as needed for its use or disclosure;
5. You must **protect personal health information against theft, loss, and unauthorized use or disclosure** and, if **personal health information about an individual is stolen, lost or accessed by any unauthorized persons, you must notify the subject at the first reasonable opportunity;** and
6. You must make available to the public a **written statement that describes your policies and procedures** with respect to the handling of personal health information, how to contact the custodian’s privacy contact person, how an individual can obtain access or request a correction to a record of his or

her personal health information, and how to make a complaint concerning your handling of personal health information to the Office of the Information and Privacy Commissioner/Ontario.

The ways in which you meet the responsibilities outlined above will depend on your circumstances. **For example, in connection with your obligation for making a written statement available to the public (that is, rule #6), section 16(1) of the Act requires that a HIC must do so in a manner that is “practical in the circumstances”.** If you are a social worker or social service worker in independent practice, it may be sufficient for your written public statement to be available only in hard copy. This is because it may not be practical for you to post your written public statement on a web site (e.g. since you may not have a web site for your practice) and it may also not be practical for you to incur costs to professionally produce client brochures that contain your written public statement.

On the other hand, if you run a group practice, it may be practical for you to pay to have brochures professionally produced that contain your written public statement and, if you have a web site for your practice, for you to post your written public statement there.

Another example relates to your responsibility to protect personal health information against theft, loss and unauthorized use or disclosure (that is, rule #5). **Section 12(1) of the Act requires that you “take steps that are reasonable in the circumstances” to protect personal health information.** One would expect that the steps that are reasonable in the circumstances will vary.

2.4 What you must do if you are a HIC

Rule #1 – You are responsible for personal health information in your custody or control.

What the Rule Means:

- Personal health information in your “custody or control” means personal health information that you control or manage, regardless of where it is stored.
- You may have personal health information in your custody that includes information you collect directly from clients as well as information you may collect or receive indirectly about your clients.
- You may permit your agents to collect, use, disclose, retain or dispose of personal health information on your behalf, but only if certain conditions are met. (See section 17(1) of the Act in Appendix A).

EXAMPLE:

You are a social worker that provides health care and you are employed by an agency that provides employee assistance services. You collect personal health information directly from your client with her consent about her possible anxiety attacks and sleep problems. You are responsible for handling this information in accordance with the rules outlined in the *Personal Health Information Protection Act, 2004*.

Rule #2 – You must have in place policies and procedures with respect to your collection, use, modification, disclosure, retention and disposal of personal health information.

What the Rule Means:

- This rule relates to the actions you take with respect to personal health information.
- **“Collect”** means to gather, acquire, receive or obtain personal health information.
- **“Use”** means to handle personal health information that is in your custody or control as a HIC, but does not mean to disclose personal health information. The providing of personal health information between a HIC and an agent of a HIC is a use by the HIC and not a disclosure by the person providing the information or a collection by the person to whom the information is provided.
- **“Disclose”** means to make personal health information available or to release it to another HIC, person or organization; it does not mean to use personal health information.
- In your policies and procedures, you must explain when, how and the purposes for which you routinely **collect, use, modify, disclose, retain and dispose of personal health information.**
- Your policies and procedures should be written in terms that are understandable to your clients. If you use professional terms or acronyms, you should define these, or provide your clients with a user-friendly glossary. You may also want to consider developing answers to a list of frequently asked questions about your policies and procedures for your clients.

EXAMPLE:

You operate a group practice of social workers, social service workers or other health care practitioners and in order to deliver health care to a client, you need to share personal health information about a client’s health history with another member of the practice; this would be considered a *use* of personal health information (and not a disclosure of it). In your policies and procedures, you must identify the purposes for which you use personal health information. Also see Chapter 3 regarding consent.

You are a social worker or social service worker in independent practice and you have been requested to share personal health information about your client’s tension, headaches and feelings of hopelessness with the client’s family physician or a hospital; this would be considered a disclosure of personal health information. In your policies and procedures, you must identify the purposes for which you *disclose* personal health information. Also see Chapter 3 regarding consent.

Rule #3: You must have in place policies and procedures with respect to the administrative, technical and physical safeguards that you have implemented to protect personal health information.

What the Rule Means:

- **Administrative** safeguards mean the rules you have in place to protect personal health information.
- **Technical** safeguards mean the things or processes related to technology you have in place to protect personal health information.
- **Physical** safeguards mean the observable aspects or features of your environment you have in place to protect personal health information.

EXAMPLE:

Examples of *administrative* safeguards include mandatory confidentiality agreements, privacy training for any of your agents, and policies which give access only to people who “need to know” the personal health information in question to perform their work.

Technical safeguards do not have to be “high-tech”; they can be everything from shredders to dispose of personal health information securely, to individual user names and passwords for information systems (e.g. no generic accounts), to anti-viral software and encryption programs for your software.

Examples of *physical* safeguards include locked doors and filing cabinets.

Rule # 4 – You must take reasonable steps to ensure that your clients’ personal health information is accurate, complete and up-to-date as needed for its use or disclosure.

What the Rule Means:

- The “reasonable steps” that are necessary may vary, depending on the circumstances.

EXAMPLE:

It is reasonable for you to contact an individual or organization from which you have received personal health information and ask any questions you have regarding the accuracy of the information you have received (e.g. you want to confirm a client’s address, substitute decision-maker or diagnosis). It may not be reasonable, however, for you to routinely call all organizations and individuals from which you receive personal health information to verify the accuracy of the information they are disclosing to you.

It is reasonable for you to ask a client to confirm certain information on a regular basis, especially information which may change regularly depending on your client’s circumstances. This could include your client’s address, your client’s medications, or your client’s feelings about his health or the health care he is receiving. It is probably not reasonable to ask your clients to verify the accuracy of their personal health information each time you meet.

Rule #5 – You must protect personal health information against theft, loss and unauthorized access or disclosure and, if personal health information about an individual is stolen, lost or accessed by unauthorized persons, you must notify the subject at the first reasonable opportunity.

What the Rule Means:

- You will probably use the administrative, technical and physical safeguards described under Rule #3 to help you meet this obligation.
- This rule also requires a HIC to inform clients at the first reasonable opportunity when a privacy breach concerning their personal health information has occurred (that is, a “duty to notify”).

EXAMPLE:

As a HIC, you must decide in accordance with the Act who is permitted to access personal health information under what circumstances. For example, if you operate a group practice, you might decide that it is appropriate for all social workers, social service workers or other health care practitioners in the practice to access personal health information on clients of the group practice for purposes of providing health care to clients, but you probably wouldn't allow your receptionist to access personal health information, other than information needed for billing purposes or to book client appointments.

You may notify individuals whose personal health information has been stolen, lost or accessed by unauthorized persons in a variety of ways (e.g. by letter, telephone or in person at the client's next appointment). You might also choose to inform the police in this situation (e.g. if your practice is broken into). How you notify individuals will depend on the nature and sensitivity of the personal health information and the number of people involved. For example, if you are a HIC whose stolen laptop contains hundreds or thousands of client records, it may not be practical for you to meet in person or phone every client affected by the theft. Consideration should also be given to the timing of notification; that is, when is the first reasonable opportunity. The Office of the Information and Privacy Commissioner/Ontario has provided guidance to organisations about the timing and manner of notification.

Rule #6 – You must make available to the public a written statement that describes your policies and procedures, how to contact the custodian's privacy contact person, how an individual can obtain access or request a correction to a record of his or her personal health information, and how to make a complaint concerning your handling of personal health information to the Office of the Information and Privacy Commissioner/Ontario.

What the Rule Means:

- The Act requires a HIC to follow this rule in order to foster openness and accountability for its information handling practices.
- Most social workers, social service workers and other health care practitioners are comfortable with the idea that a client should know the purposes for which a HIC will collect, use and disclose personal health information and the idea that a client might want to access or request changes to a record of his or her personal health information. However, the idea that a client or another individual may complain about how you protect the privacy of his or her personal health information to an external oversight body (that is, the Commissioner) is a new concept for some social workers, social service workers and other health care practitioners. See Chapter 5 for more information on the role of the Commissioner.
- To see samples of the written public statement that health information custodians are required to have under section 16(1) of the *Personal Health Information Protection Act, 2004*, consult the resources found in Appendix B.

EXAMPLE:

If you are a HIC that is an individual person, you must make available a written public statement that describes your policies and procedures, but you do *not* need to designate a privacy **contact person** as listed under section 15(3) of the Act. However, you then assume the responsibilities of the contact person yourself. Therefore, you must inform your agents of their duties under the Act, respond to inquiries from the public about your policies and procedures, respond to requests from your clients or other individuals to access or request corrections to their records of personal health information, and receive complaints from the public about any alleged contraventions of the Act.

If you operate a group practice, you must comply with the above requirements and you must designate a privacy contact person who performs the functions described above and who also facilitates your compliance with the Act as a HIC. This person will be an agent of your practice. You may choose a manager for your group practice or a specific social worker, social service worker or other health care practitioner to serve as your contact person. You may also designate a receptionist who has regular contact with the public to serve as your privacy contact person.

If you are a HIC and the organization which employs you is a non-HIC, you must meet all of the obligations of a HIC, including the obligations outlined in this rule. In order to meet the obligations outlined in this rule, you may wish to co-operate with the non-HIC in this regard.

For example, the non-HIC may have already made available to the public a written statement about its policies and procedures, including the process an individual must follow if he or she wishes to access information in his or her record. These documents might be appropriate for you to use, provided that they comply with the requirements of the *Personal Health Information Protection Act, 2004*. If not, then you will need to write your own statement for the public or work with the non-HIC to amend its documents to comply with the *Personal Health Information Protection Act, 2004*.

If you wish to provide your clients with additional information about their rights under the Act, the Commissioner has published a free brochure for the public, which can assist you in this regard. See Appendix C for a copy of the brochure; extra copies of this brochure are available through the Commissioner at www.ipc.on.ca. Although this brochure does not directly refer to social workers or social service workers, it may still be a useful resource for members of the College.

2.5 What you must know if you are an agent of a HIC

If you are an agent of a HIC (see section 1.6 of the Toolkit), section 17(1) of the *Personal Health Information Protection Act, 2004* gives a HIC the right to permit you to collect, use, disclose, retain or dispose of personal health information on the HIC's behalf under certain conditions. These include:

- The HIC must be permitted or required to collect, use, disclose, retain or dispose of the personal health information, as the case may be;
- The collection, use, disclosure, retention or disposition of the personal health information, as the case may be, must be in the course of your duties as an agent and not contrary to any limits imposed by the HIC, the *Personal Health Information Protection Act, 2004* or another law; and
- You and the HIC must meet any prescribed requirements.

Except if you are permitted or required by law or there is an exception prescribed in a regulation made under the Act, section 17(2) of the Act restricts you, as an agent, from collecting, using, disclosing, retaining or disposing of personal health information on the HIC's behalf unless the HIC permits you to do so.

In accordance with an exception prescribed in the regulation made under the Act, if you are an agent of a HIC, you are permitted to disclose personal health information about a client without the HIC's permission under the following circumstances:

- If you believe on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or a group of persons.
- To the Ontario College of Social Workers and Social Service Workers for the purpose of the administration or enforcement of the *Social Work and Social Service Work Act, 1998*.
- To the Public Guardian and Trustee or a Children's Aid Society so that they can carry out their statutory functions.
- To a College within the meaning of the *Regulated Health Professions Act, 1991* for the purpose of the administration or enforcement of the *Regulated Health Professions Act, 1991* or a health profession Act listed in that Act.

2.6 What you must do if you are an agent of a HIC

- You probably assume that the HIC who employs you or for whom you perform services or activities is permitted or required to collect, use, disclose, retain or dispose of any personal health information to which you have access and which the HIC asks you to handle on its behalf. If you have any questions about the authority of the HIC, you should contact the HIC immediately and/or seek legal or professional advice.
- You will want to ensure that the collection, use, disclosure, retention or disposition of personal health information, as the case may be, is in the course of your duties and understand and comply with any limits imposed by the HIC, the *Personal Health Information Protection Act, 2004* or another law.
- As an agent, you may only collect, use, disclose, retain or dispose of personal health information for or on behalf of a HIC with the authorization of the HIC, unless you are permitted or required by law to do otherwise or an exception has been prescribed under a regulation made under the Act. For example, you are legally required to report suspected child abuse cases even though a HIC may not have collected personal health information about your client for this purpose or authorized you to use or disclose this information for reporting purposes.
- You are also permitted to disclose personal health information you handle for or on behalf of a HIC under the circumstances described in section 2.5.
- **You are required to notify the HIC at the first reasonable opportunity if personal health information you handle on behalf of the HIC is stolen, lost or accessed by unauthorized persons.** This means, for example, that if you store client records containing personal health information in a laptop or a briefcase which is stolen from your office, then you need to notify the HIC at the first reasonable opportunity about the incident. The HIC is then obligated to inform the individuals whose personal health information was stolen at the first reasonable opportunity (e.g. the clients whose records were stolen).
- You are responsible for complying with the policies and procedures of the HIC in order to protect the privacy and security of any personal health information you handle for or on behalf of a HIC.
- As an agent, you are *not* required to make available to the public a written statement as

required under section 16(1) of the Act. This responsibility should be handled directly by the HIC who employs you or for whom you perform services or activities. However, it may make “good business sense” to have copies of the HIC’s public statement readily available to your clients (e.g. in your office or waiting room).

- If you function as both an agent of a HIC and a HIC (e.g. a social worker or social service worker in independent practice who provides health care to your “own” clients as well as to patients of a HIC – see section 1.6 for more information), then you are obligated to make a written statement available under section 16(1) of the Act as a HIC and comply with the other obligations of a HIC. With respect to the services or activities you perform as an agent of a HIC, you must comply with the obligations of an agent with respect to those functions.

3. Consent and Specific Information Handling Practices

3.1 Summary of key questions covered in this chapter

- What is **informational consent**? (See section 3.2).
- What is the difference between **implied** and **express consent**? (See section 3.2).
- What are the conditions for a **valid consent**? (See section 3.3).
- How do I know if a client is **capable** of giving consent? (See section 3.4).
- When can I rely on **implied consent**? (See section 3.5).
- When must I obtain **express consent**? (See section 3.6).
- What are some examples of situations when I do **not need consent** from clients? (See section 3.7).
- What if a client wants to **withdraw consent**? (See section 3.8).
- What is the **“circle of care”**? (See section 3.9).
- What is the **“lockbox”**? (See section 3.10).
- What are the rules for **psychiatric facilities**? (See section 3.11).
- What are the rules for **consent and children and youth**? (See section 3.12)
- What are the rules when a **client is deceased**? (See section 3.13)
- What are the rules for disclosing personal health information to the **College**? (See section 3.14).
- What are the rules for providing **access to records of personal health information**? (See section 3.15)
- What are the rules for **correcting records of personal health information**? (See section 3.16).

3.2 What you must know about consent

In this Toolkit, consent refers to the permission an individual gives for the collection, use or

disclosure of his or her personal health information. This is known as **informational consent**. It is different from **consent to treatment**. The *Personal Health Information Protection Act, 2004* has not changed the rules for consent to treatment; these rules are found in the *Health Care Consent Act, 1996*. There may, however, be circumstances where the relationship between the *Personal Health Information Act, 2004* and the *Health Care Consent Act, 1996* needs to be considered. For more information on substitute decision-makers, the *Personal Health Information Protection Act, 2004* and the *Health Care Consent Act, 1996*, see Chapter 4.

In this chapter, the term "you" is generally used to refer to a health information custodian (HIC). If you are an agent of a HIC, you should also understand the obligations of a HIC described in this chapter because, as an agent, you are generally only permitted to collect, use, disclose, retain or dispose of personal health information on behalf of a HIC if the HIC is permitted or required by law to do so. (For information on the obligations of an agent, see sections 2.5 and 2.6.)

Under the *Personal Health Information Protection Act, 2004*, there are some situations when you do not need consent to collect, use or disclose personal health information. These are described in section 3.7. If these circumstances are not applicable or any other provincial law that specifically prevails over the Act requires consent, you will need either **express** or **implied consent** before you may collect, use or disclose personal health information:

- **Implied consent** is generally understood as being a consent that, from an individual's action or inaction in particular circumstances, one concludes has been given.
- For example, if you ask a client for personal health information in order to open a record on that client and the client answers your questions, you can infer consent to the collection of his or her personal health information since you can conclude that the

client understands the purpose of the collection.

- There are certain circumstances under which you can rely on implied consent to collect, use or disclose personal health information. These are described in section 3.5.
- **Express consent** is generally understood as a consent that has been explicitly provided by the individual.
- For example, if you want to disclose personal health information to a client's insurer or employer, you must obtain the client's express permission first. Express consent may be given orally or in writing.
- The circumstances under which you must obtain express consent are described in section 3.6.
- There are also other specific circumstances when you may collect, use or disclose personal health information **without consent**. These are described in section 3.7.
- The *Mental Health Act* has specific rules on permitted collection, use or disclosure of personal health information without consent that are applicable to psychiatric facilities and other matters governed by the *Mental Health Act*. These are described in section 3.11.
- Finally, the *Personal Health Information Protection Act, 2004* has rules that deal with the consent of children and youth and consent when an individual is deceased. These are described in sections 3.12 and 3.13.

3.3 Making sure consent is valid

Whether it is an implied or express consent, the consent must meet certain conditions in order for it to be valid. These conditions are:

- The person giving consent must have the **capacity** to do so (see section 3.4);
- You must obtain consent directly from your client or from someone who has the legal authority to consent for the client (that is, a **substitute decision-maker** - see section 3.12, section 3.13 and Chapter 4 for information on substitute decision-makers);

- The consent must not be obtained through deception or coercion;
- The consent must be related to the personal health information in question; and
- The consent must be knowledgeable, meaning it must be reasonable to believe that your client understands:
 - why you are collecting, using or disclosing the information; and
 - that the client has the right to withhold or withdraw his or her consent.

A health information custodian who has obtained an individual's consent to a collection, use or disclosure of personal health information about an individual or who has received a copy of a document purporting to record the individual's consent is entitled to assume that the consent fulfils the requirements of the Act unless it is not reasonable to assume so.

Finally, two general principles need to be considered in connection with the rules for consent in the *Personal Health Information Protection Act, 2004*. These principles are:

1. You are required not to collect, use or disclose personal health information if other information will serve the purpose, and
2. You are required not to collect, use or disclose more personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure.

3.4 Consent and capacity

Unless you have reasonable grounds to believe otherwise, you may assume that your client is **capable** of consenting to the collection, use or disclosure of his or her personal health information. Under the Act, an individual is capable of consenting to the collection, use or disclosure of personal health information if:

- The individual is able to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure; and

- The individual is able to appreciate the reasonably foreseeable consequences of giving, withholding or withdrawing consent.

If you determine that a client does not have the capacity to consent and the client has not applied for a review by the Consent and Capacity Board, you must get consent from the client's **substitute decision-maker** instead. Substitute decision-makers are discussed in Chapter 4.

3.5 When can you rely on implied consent?

- **If you are a health information custodian (HIC), you may generally rely on implied consent when you collect or use a client's personal health information (some exceptions apply) or when you disclose a client's personal health information to another HIC to provide health care.** If you are a HIC and wish to disclose a client's personal health information to a person that is not a HIC or to another HIC for a purpose other than the provision of health care, you must generally obtain express consent (see section 3.6 below).
- If you are a HIC whose core functions are the provision of health care (as described in paragraph 1, 2, 3 or 4 of the definition of "health information custodian" or as prescribed by regulation³) and you receive a client's personal health information from the client, a substitute decision-maker, or another HIC for the purpose of providing or assisting in providing health care to the client, then you may **assume** that you have the client's implied consent to collect, use or disclose the information for the purpose of providing or assisting in providing health care, unless you are aware that the client has expressly withheld or withdrawn consent. (See section 3.10 on the **lockbox** for more information on a client's right to expressly withhold or

withdraw consent for the use or disclosure of his or her personal health information).

- If you wish to rely on implied consent, **you need to make sure your clients have the information they need in order to understand why you are collecting their personal health information and how you may use or disclose it. You also need to make sure that your clients are informed that they may withhold or withdraw their consent and that they have information on how they can do so.**
- You may do this by posting notices or placing brochures in your office or waiting room or in other areas where clients are likely to see them or by providing your individual clients with such notices or brochures. If you are a HIC, you are responsible for developing these notices or brochures; if you are an agent of a HIC, the HIC is responsible for developing the notices or brochures.
- Remember that consent may never be implied if a client specifically states that you may not collect, use or disclose his or her personal health information.
- Lastly, there may be situations where, based on your professional opinion or experience, you may want to obtain an individual's express consent to collect, use and/or disclose his or her personal health information. Nothing in the Act prevents you from doing so.

³ See Appendix A for the definition of "health information custodian".

EXAMPLE OF A PERMITTED “COLLECTION” OF PERSONAL HEALTH INFORMATION WITH IMPLIED CONSENT:

You are a social worker or social service worker who works for a home support agency for seniors and collects personal health information for the purpose of providing health care to seniors (e.g. you are a HIC working for a non-HIC). You may assume that you have the individual's implied consent to collect personal health information about your client directly from your client or his or her substitute decision-maker in order to provide health care to your client, unless the client or his or her substitute decision-maker has expressly withheld or withdrawn consent.

EXAMPLE OF A PERMITTED “USE” OF PERSONAL HEALTH INFORMATION WITH IMPLIED CONSENT:

You are a social worker or a social service worker who provides counselling to women with HIV/AIDS for the purpose of providing health care at a hospital (e.g. you are an agent of a HIC). You want to share some of the personal health information you have collected from a client with one of the hospital's physiotherapists who you believe may be able to help the client improve her mobility and relieve some of her joint and muscular aches (e.g. you want to share personal health information with another agent of the same HIC for the purpose of providing health care to that client). You may assume that you have the individual's implied consent when you share this information, unless the client expressly instructs you not to share her personal health information with others.

EXAMPLE OF A PERMITTED “DISCLOSURE” OF PERSONAL HEALTH INFORMATION WITH IMPLIED CONSENT:

You are a social worker or social service worker in independent practice. Your client has advised you about his feelings of hopelessness and addiction to prescription pain killers and you are providing counselling services to your client for the purpose of providing health care (e.g. you are a HIC). You have serious concerns about the potential adverse effects of your client's feelings of hopelessness and addiction on his mental and physical health and you have told your client that he needs to discuss these issues with his family doctor. You may assume that you have the individual's implied consent to share the client's personal health information with his family doctor, unless the client expressly instructs you not to share this information with his doctor.

3.6 When must you obtain express consent?

- You must obtain a client's express consent **if you want to disclose any of his or her personal health information to someone other than a health information custodian (HIC)**, unless the Act permits the disclosure without consent.
- You must obtain a client's express consent **if you want to disclose any of his or her personal health information to another HIC if the purpose of the disclosure is *not* for providing health care or assisting in providing health care**, unless the Act permits the disclosure without consent. (See section 3.7 for information on when consent is not required.)

EXAMPLE OF A “DISCLOSURE” REQUIRING EXPRESS CONSENT:

You are a social worker or social service worker who provides counselling to troubled youth for a school board (e.g. you are a HIC working for a non-HIC). You want to disclose personal health information about one of your clients to a local community club (e.g. a non-HIC) that is offering a free guest lecture series on youth motivation and team-building. You must obtain express consent from the client (see section 3.12 for information on children, youth and consent).

You are a social worker or social service worker who provides health care at a hospital (e.g. you are an agent of a HIC) and you want to disclose personal health information about several clients to colleagues at another hospital (e.g. a separate HIC) for educational purposes. You must obtain express consent from your clients and permission from the hospital to do so.

3.7 When is consent not required?

There are situations when you do not need consent from your client to collect, use or disclose his or her personal health information. Only some of these are described below. For a comprehensive list of these situations, you must refer to the Act.

Unless you are required to do so by the Act or another law, then you are permitted - rather than required - to disclose personal health information in the situations described below. There may be situations where, based on your professional opinion, you may nonetheless wish to obtain consent for the disclosure. Nothing in the Act prevents you from doing so.

Collection:

If you are a health information custodian (HIC), you do not need a client’s consent to **collect** his or her personal health information directly from the client (even if the client is incapable of consenting) (e.g. “**direct collection**”) if:

- You need the information to provide health care to the client; and
- There is no time for you to obtain consent.

You do not need a client’s consent to **collect** personal health information about a client from someone *other* than the client or his or her substitute decision-maker (e.g. “**indirect collection**”) if:

- the personal health information is necessary for providing health care or assisting in providing health care to the individual and
 - it is not possible to collect information from the individual that can be relied on as accurate, or
 - it is not possible to collect information from the individual in a timely manner.
- The Information and Privacy Commissioner/Ontario (“the Commissioner”) specifically authorizes the collection;
- You collect the information from a person who is permitted or required by law to disclose it to you; or
- You are permitted or required by law to collect the information indirectly.

Use:

If you are a HIC, you do not need a client's consent to **use** his or her personal health information for:

- Complying with a legal requirement or participating in legal or administrative proceedings or contemplated proceedings in which you are involved or are expected to be involved;

EXAMPLE:

You need to review client charts in preparation for a legal or administrative proceeding in which the information in the chart is relevant to the proceeding.

- Planning, delivering or monitoring health-related programs or services you provide;

EXAMPLE:

You do not need a client's consent to use information from client satisfaction surveys to plan a future health-related program for your clients.

- Educating agents to provide health care to your clients;

EXAMPLE:

You do not need a client's consent to have social work or social service work students sit in on client interviews or meetings for educational purposes.

- Managing risks or errors or improving or maintaining the quality of care or the quality of any related programs or services you provide;

EXAMPLE:

You do not need a client's consent to use information he or she has provided on a communicable illness to disinfect a client meeting room, thereby managing risks associated with the spread of infectious diseases.

- Disposing or altering information to ensure that others cannot link the information to a specific individual;

EXAMPLE:

You do not need a client's consent to shred records or to remove personal identifiers from the record so that the client cannot be identified.

- Seeking consent for additional collections, uses, and disclosures when only the client's name and contact information is used; or

EXAMPLE:

You do not need a client's consent to call him or her to ask if you may use the client's name and contact information to send the client a monthly newsletter from your practice.

- Collecting payments for health care services you have provided.

EXAMPLE:

You do not need a client's consent to collect payments for counselling sessions you provided to the client for a health-related purpose or hiring a debt collector as an agent to do so on your behalf.

If you are a HIC, you may also use personal health information without consent for research provided that certain conditions and restrictions are met. For more information, see Appendix A.

Disclosure:

If you are a HIC, you do not need a client's consent to **disclose** his or her personal health information provided that:

- **The information is reasonably necessary to provide health care;**
- **You cannot obtain consent in a timely manner; and**
- **The client has not expressly instructed you not to disclose the information;**

AND the disclosure is to:

- Another health care practitioner or person who operates a group practice of health care practitioners;
- A service provider as defined in the *Long-Term Care Act, 1994* who provides a community service;
- A community care access corporation;
- A public or private hospital;
- A psychiatric facility;
- An independent health facility;
- A home for the aged, rest home, nursing home, or care home;
- A pharmacy;
- A laboratory;
- An ambulance service;
- A home for special care; or
- A centre, program or service for community or mental health whose primary purpose is providing health care

If you are a HIC, you also do not need a client's consent to **disclose** his or her personal health information to the following people or organizations or for the following purposes:

- For the purpose of determining, assessing or confirming capacity under the *Health Care Consent Act, 1996*, the *Substitute Decisions Act, 1992* or the Act;

- The Ontario College of Social Workers and Social Service Workers for the purpose of the administration or enforcement of the *Social Work and Social Service Work Act, 1998*.
- A regulated health profession College for the purpose of the administration or enforcement of the *Drug and Pharmacies Regulation Act, the Regulated Health Professions Act, 1991* or an Act named in Schedule 1 to that Act;
- The Public Guardian and Trustee, the Children’s Lawyer, a Children’s Aid Society, a Residential Placement Advisory Committee established under the *Child and Family Services Act*, or the Registrar of Adoption Information appointed under that Act so they can carry out their statutory functions;
- A person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by or under the Act or any other Act of Ontario or an Act of Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection, investigation or similar procedure;
- A researcher provided that certain conditions and restrictions are met. For more information, see Appendix A;
- The Chief Medical Officer of Health or a medical officer of health for purposes set out in the *Health Protection and Promotion Act*; and
- The head of a penal (or similar) institution or the officer in charge of a psychiatric facility within the meaning of the *Mental Health Act*, where the client is being lawfully detained in order to assist the institution or facility in making a decision concerning arrangements for the provision of health care or regarding where the client should be placed.

Finally, if you are a HIC, you also do not need a client’s consent to **disclose** personal health information if:

- You are permitted or required by law to disclose the information;

EXAMPLE:

You do not need a client’s consent to disclose information in order to report a child in need of protection to a Children’s Aid Society.

- You need to contact a relative, friend or potential substitute decision-maker of a client who is injured, incapacitated, or ill and unable to give consent personally;

EXAMPLE:

You do not need a client’s consent to contact your client’s spouse or partner if your client is unconscious.

- The information is needed to determine eligibility for health care or related goods, services or benefits provided under legislation and funded by the government;

EXAMPLE:

You do not need a client’s consent to disclose information to the Ontario Health Insurance Plan in order to determine whether the client qualifies for coverage.

- You believe on reasonable grounds the information is needed to eliminate or reduce a significant risk of serious bodily harm to the client, another individual or a group of persons;

EXAMPLE:

You are aware that your client has recently been diagnosed as HIV positive, your client refuses to disclose the risk of HIV infection to his/her sexual partner(s), and is continuing to have unprotected sexual intercourse. You do not need the client's consent to disclose this information.

- You disclose personal health information to a potential purchaser of your practice to assess and evaluate your operations, provided that the potential purchaser agrees in writing to keep the information confidential and secure and to keep the information no longer than necessary to reach a conclusion;

EXAMPLE:

You are a social worker or social service worker in independent practice who is considering selling your practice. You do not need consent from your clients to disclose information the potential purchaser requires to assess and evaluate your operations provided that he or she agrees in writing to keep your client information confidential and secure and to keep the information no longer than is necessary for the purchaser to reach a conclusion about buying your practice.

- You disclose personal health information for the purpose of a proceeding or a contemplated proceeding in which you, your agent or a former agent is a party or a witness, if the information is relevant to the proceeding.

EXAMPLE:

A former client has commenced a legal action in which he or she is claiming he or she has suffered damages as a result of your professional negligence. You do not need your client's permission to disclose information about the client that is relevant to the proceeding.

3.8 Withdrawal of consent

Where express or implied consent is required, clients may withdraw their consent for the collection, use or disclosure of their personal health information at any time. A client who wants to withdraw his or her consent must notify you that he or she no longer consents to your collection, use and disclosure of personal health information. **If a client withdraws his or her consent, it has no effect on information you have already collected, used or disclosed before the client withdrew consent, but it has effect from the time you receive it.** A client's substitute decision-maker who consented on a client's behalf may also withdraw consent at any time by notifying you if the substitute decision-maker still has authority to act for the client; for example, the client is still not capable.

If the withdrawal of consent will compromise the care you deliver to a client, you should discuss the effect of the client's withdrawal with the client and document the withdrawal and these discussions in the client's record.

3.9 The implications of the “circle of care”

The “**circle of care**” is actually not defined in the *Personal Health Information Protection Act, 2004* or its regulations, although it is discussed by the Office of the Information and Privacy Commissioner/Ontario in its frequently asked questions about the law (www.ipc.on.ca).

The circle of care commonly refers to the individuals who are involved in the provision of health care to a specific individual. For example, a social worker or social service worker who provides health care to a patient at a hospital would be in that patient’s circle of care, but not all social workers or social service workers employed at the hospital would be in the patient’s circle of care unless they were all providing health care, or assisting in providing health care, to that patient.

Because the *Personal Health Information Protection Act, 2004* generally allows those health information custodians whose core functions are the provision of health care (as described in paragraph 1, 2, 3 or 4 of the definition of “health information custodian” or as prescribed by regulation⁴) to collect, use or disclose an individual’s personal health information to provide health care on the assumption of having the client’s implied consent, the concept of the circle of care is very important to health care practitioners. As a social worker or social service worker who provides health care, **you must be providing, or assisting in providing, health care to an individual to be part of that individual’s circle of care.**

EXAMPLE:

You may be part of an individual’s circle of care if you are asked for your professional opinion on the delivery of health care to a particular patient or client, even though you may not actually deliver health care directly to that patient or client. This may happen during rounds at a hospital or you may be part of a group practice of social workers, social service workers or other health care practitioners and are asked for your professional opinion on the delivery of health care to a particular patient or client.

Note from the above example that whether you are part of an individual’s circle of care is determined on a case-by-case basis by the *needs of the individual patient or client* (e.g. whether or not you are providing, or assisting in providing, health care to that patient or client). Whether or not you are part of the circle of care and can rely on the assumption of having the client’s implied consent is NOT determined by the fact that your *role is a health care practitioner* (as defined under the Act) or an agent of a health information custodian. As such, social workers or social service workers should not assume that they are “automatically” part of – or not part of – the circle of care at their facility, just as physicians or other health care practitioners should not assume that they are “automatically” part of – or not part of – the circle of care at their facility. Being part of the circle of care will depend on whether you provide or assist in providing health care to that patient or client.

As a social worker or social service worker, you may still be permitted to collect, use or disclose personal health information even if you are *not* in an individual’s circle of care if you have the client’s consent (implied or express) or the collection, use or disclosure is permitted without consent. See section 3.5 for information on permitted collections, uses and disclosures of personal health information on the basis of implied consent or

³ See Appendix A for the definition of “health information custodian”...

section 3.7 for information on permitted collections, uses and disclosures of personal health information without consent.

3.10 The lockbox provision

Individuals are permitted to make express instructions concerning allowable uses and disclosures of their personal health information under sections 19, 37(1)(a), 38(1)(a), and 50(1)(e) of the *Personal Health Information Protection Act, 2004*. This means that **your clients may request that you not use or disclose their personal health information for the purposes described in sections 37 (1)(a), 38(1)(a) or 50(1)(e) of the Act**. These sections generally relate to the provision of health care.

For example, a client may request that none of the other social workers, social service workers or other health care practitioners in your group practice be able to access his or her personal health information; this would be a restriction on the use of the client's personal health information. Or a client could request that you not share his or her personal health information with his or her family doctor or with individuals or organizations outside of the group practice; this would be a restriction on the *disclosure* of the client's personal health information. Note that an individual can impose restrictions on all of his or her personal health information, or just components of his or her information, such as a particular prescription drug the individual is taking or a specific diagnosis.

The right of an individual to restrict the use or disclosure of his or her personal health information under the Act is known as a "lockbox", although this term – like the "circle of care" – is actually not used in the Act. Personal health information for which a client has restricted uses or disclosures may be considered "locked". You may "unlock" personal health information if you obtain the consent of the client to "unlock" the information.

There are also circumstances where the client's

express instructions not to use or disclose personal health information may be overridden by other provisions of the Act. For example, you may disclose "locked" personal health information where another law requires you to disclose the information or you believe on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons – see section 40(1) of the *Personal Health Information Protection Act, 2004* in Appendix A.

A client can only "lock" information that requires his or her consent for you to collect, use or disclose in the first place or that is subject to the express instruction ("lockbox") provisions (sections 37(1)(a), 38(1)(a) or 50(1)(e) of the Act. For example, a client may instruct you to "lock" personal health information about abusive behaviour towards a child from disclosure to a Children's Aid Society, but you would not be able to comply with a lockbox request in this circumstance because you are required to disclose such information to the Children's Aid Society under the *Child and Family Services Act*. A client's request to "lock" personal health information also cannot stop you from recording personal health information as required by law or established standards of professional practice or institutional practice.

Finally, as a disclosing custodian, you have a duty to notify the receiving custodian that you have not disclosed all of the personal health information if you consider that information reasonably necessary for the provision of health care. Section 20(3) of the *Personal Health Information Protection Act, 2004* states that "if the disclosing custodian does not have the consent of the individual to disclose all the personal health information about the individual that it considers reasonably necessary for that purpose" [that is, for providing health care to the individual], you must notify the receiving custodian of that fact. Section 38(2) of the Act states that "if an instruction of the individual

made under that clause [38(1)(a)] prevents the custodian from disclosing all the personal health information that the custodian considers reasonably necessary to disclose for the provision of health care or assisting in the provision of health care to the individual, the custodian shall notify the person to whom it makes the disclosure of that fact”.

There is thus a legal requirement for health information custodians disclosing an individual’s personal health information in cases where they believe information in the lockbox is relevant to providing health care to inform the receiving custodian that the individual has not consented to the disclosure of all of his or her relevant personal health information.

3.11 Psychiatric Facilities and the Personal Health Information Protection Act, 2004

The *Mental Health Act*, which applies to psychiatric facilities, has certain special rules related to the collection, use and disclosure of personal health information. These rules govern where there is a conflict between that Act and the *Personal Health Information Protection Act, 2004*. The following describes some of the special rules.

Under the *Mental Health Act*, the officer in charge of a psychiatric facility is permitted to collect, use or disclose personal health information with or without consent to:

- Assess, observe, examine or detain a client in accordance with the *Mental Health Act*; or
- Comply with Part XX.1 (Mental Disorder) of the Criminal Code (Canada) or an order or disposition under that Part.

If you are a social worker or social service worker named in a community treatment order as participating in the treatment or care and supervision of a person subject to the order, you may share personal health information with any other person named in the community treatment

plan to treat, care for and supervise the person in accordance with the plan. Disclosure is also permitted for consultation between a physician and regulated health care professionals, social workers or others where a physician is considering issuing or renewing a community treatment order.

However, with respect to the use of Form 14 as a consent to the disclosure of personal health information, Form 14 no longer exists as a form approved by the Minister of Health and Long-Term Care under the *Mental Health Act*. Therefore, Form 14 should no longer be used by health information custodians after November 1, 2004 to obtain the express consent of an individual to the collection, use or disclosure of his or her personal health information. You should now obtain consent from a client as outlined in the *Personal Health Information Protection Act, 2004*, unless there is a lawful basis not to obtain consent (for example, your client’s case falls under one of the *Mental Health Act* exceptions). Where express consent is required for the disclosure of personal health information under the *Personal Health Information Protection Act, 2004* or the *Mental Health Act* and no exception to obtaining the required consent applies, you may look to the sample consent form that the Ministry of Health and Long-Term Care has developed; the sample consent form is available at: http://www.health.gov.on.ca/english/providers/legislation/priv_legislation/sample_consent.html. If you wish to rely on a consent that was obtained prior to the *Personal Health Information Protection Act, 2004* coming into force, you must ensure that the previously obtained consent meets the consent requirements in the Act.

For further information, you may wish to refer to a Fact Sheet titled “Consent and Form 14” published by the Information and Privacy Commissioner/Ontario which is available at www.ipc.on.ca.

3.12 Children, youth and consent

Many social workers and social service workers have clients who are children and/or youth. Where a child is capable, the child may consent to the collection, use or disclosure of the child's personal health information. (See section 3.4 to determine whether an individual is capable). You are entitled to rely on a presumption that an individual, including a child, is capable unless it is unreasonable to do so.

EXAMPLE:

You have a client who is a toddler and is not yet speaking. It would be unreasonable to presume the child has the capacity to consent in these circumstances.

For children under sixteen years of age, a parent (but not a parent who has only a right of access to the child) or a Children's Aid Society or other person who is lawfully entitled to give or refuse consent in the place of the parent, may also consent to the collection, use or disclosure of a child's personal health information even if the child has the capacity to consent, unless the information relates to:

- Treatment within the meaning of the *Health Care Consent Act, 1996* about which the child has made his or her own treatment decision; or
- Counselling in which the child has participated on his or her own under the *Child and Family Services Act*.

In the event of a conflict between a decision of a child under sixteen who is capable of consenting and a decision of a person who is entitled to consent on behalf of the child, the capable child's decision prevails.

EXAMPLE:

You are a social worker or social service worker who provides health care to a youth under the age of sixteen. The youth has just informed you that she has obtained a prescription for the birth control pill from a local family planning clinic (e.g. she has made a decision on her own about treatment within the meaning of the *Health Care Consent Act, 1996*). Unless it is not reasonable in the circumstances, you may presume that your client has the capacity to consent to the collection, use and disclosure of any personal health information associated with this treatment decision. In addition, so long as the client is capable, the youth's consent would be needed in order to disclose the personal health information related to her treatment, even to her parent(s) or other lawful custodian.

3.13 Client who is deceased

In cases where a client is deceased, the deceased estate's trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee, may give consent for the collection, use or disclosure of personal health information.

3.14 The disclosure of personal health information to the Ontario College of Social Workers and Social Service Workers

Section 42 of the *Personal Health Information Protection Act, 2004* allows health information custodians (HICs) to disclose personal health information without consent to the Ontario College of Social Workers and

Social Service Workers for the purpose of the administration or enforcement of the *Social Work and Social Service Work Act, 1998*. An agent of a HIC is also permitted to disclose personal health information without consent to the Ontario College of Social Workers and Social Service Workers for the same purpose. (See section 7 of O. Reg. 329/04.) The Act provides that nothing in the Act shall be construed to interfere with the regulatory activities of the Ontario College of Social Workers and Social Service Workers. (See section 9(2)(e) of the Act.)

3.15 Access to Records of Personal Health Information

Under the *Personal Health Information Protection Act, 2004*, an individual has a right of access to a record of personal health information about himself or herself that is in the custody or control of a health information custodian (HIC) unless one of the exceptions or exclusions in the Act applies. Examples of a record, or part of a record, to which a requestor does not have a right of access include a record containing information that is subject to a legal privilege, such as solicitor-client privilege, or information that is prohibited by law from being disclosed to the requestor, or where granting access could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person. See sections 51(1) and 52 (1) of the Act for more information on exceptions and exclusions to an individual's right of access to a record of personal health information about the individual.

As a social worker or social service worker, if you are a HIC, then you must comply with the Act's access provisions:

- An access request can be made by an individual or his or her substitute decision-maker under the Act.
- As a HIC, you must take "reasonable steps" to satisfy yourself of the requestor's identity

before providing access to a record of personal health information, such as asking the requestor for photo identification.

- You may charge a fee for making the record available, or for providing a copy to the requestor, but you must first give the requestor a fee estimate. The amount of the fee cannot exceed the amount prescribed in regulation or, if no amount is prescribed, the amount of "reasonable cost recovery." (At the time of publication, there were no fees prescribed in the regulations). As a HIC, you may also waive the fee if, in your opinion, it is "fair and equitable" to do so. For example, several hospitals have chosen to waive access fees for the homeless, for patients on social assistance and for assault victims.
- You must respond to an access request within 30 days of receiving the request, but you can extend the time limit for up to a maximum of an additional 30 days, as long as it is done within the initial 30-day limit. In such cases, you must give the requestor written notice of the extension and set out its length (not to exceed 30 days) and the reason for the extension. Extensions are possible only if meeting the time limit would "unreasonably interfere" with your operations as a HIC because the records are numerous or a lengthy search is required to locate them or consultations are necessary which make the 30-day time limit not "reasonably practical".
- If you fail to respond to an access request within the 30-day limit, or before an extension expires, you are deemed to have refused the request.
- The Act sets out requirements for how to reply to an access request, depending on whether you are granting or refusing the request. (For more information on how to reply to an access request, you may wish to refer to the resources referred to in Appendix D.)

Individuals can also request a shorter response time. As a HIC, you are required to comply with a request for a shortened response time if the

requestor provides you with “satisfactory evidence” that the requestor needs the record on an “urgent basis” within the shorter time period and you are “reasonably able” to provide the response within the shortened time period.

If you are a HIC and the organization which employs you is a non-HIC and is covered by public sector privacy legislation, the access rules under the Act do not apply.

- Where a record is held by a HIC in the course of acting as an agent/employee of an institution under the *Freedom of Information and Protection of Privacy Act* (FIPPA) or the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA), **where the institution itself is not a HIC** (e.g. a social worker or social service worker who provides health care as part of your duties for a school board, community college or provincial correctional facility), the *Personal Health Information Protection Act, 2004* does not apply to access to a record of personal health information in the HIC's custody or control. Access to the record is instead provided by the institution in accordance with the applicable public sector privacy act (that is, either FIPPA or MFIPPA).

If you are an agent of a HIC, the HIC (that is, the organization which employs you or for or on whose behalf you perform services or activities) is responsible to handle requests for access. More specifically, one of the duties of a HIC's privacy contact person is to respond to requests of an individual for access to a record of personal health information. If you are an agent of a HIC, you are responsible for complying with the HIC's policies and procedures for handling access requests. For example, if you are a social worker or social service worker who is employed by a hospital, the hospital may have established specific access policies and procedures under the Act which might require requestors to file access requests through the hospital's Health Records Department. You should follow the HIC's

policies and procedures respecting access requests.

Finally, social workers and social service workers may deal with records of personal health information which contain information about more than one individual. If you are a HIC, consideration will need to be given to various factors before you respond to an access request for a record of personal health information that contain references to more than one individual. These factors include whether the record is a record of personal health information about the individual requesting access, whether the record is dedicated primarily to the personal health information about the individual requesting access, whether any part of the information should be severed from the record before providing access and whether any of the exceptions or exclusions under the Act apply.

For example, you are a social worker or social service worker in independent practice who provides individual counselling for a health-related purpose to a woman and she provides information to you about her spouse's health problems. The client requests access to her client record which may contain personal health information about her spouse. The Ministry of Health and Long-Term Care notes that where the record in question is "a record dedicated primarily to personal health information about the individual requesting access", such as a patient chart, the individual has a right of access to the entire record, subject to the exceptions and exclusions listed in the Act, including personal health information about third persons. (See page 26 of the *Personal Health Information Protection Act, 2004: Overview for Health Information Custodians, August 2004*)

This same example could give rise to a request for access to the record of personal health information by the client's spouse. The regulation made under the Act (O.Reg. 329/04) provides that a person does not have a right of access to information about the person that is

contained in a record that is dedicated primarily to the personal health information of another person. The Ministry of Health and Long-Term Care notes that a person does not have a right of access to personal health information that is contained in the record of another individual (apart from the substitute-decision making provisions, where applicable) even if that person is referred to in that record, for example, as part of the client's family medical history or in counselling notes (see page 27 of the *Personal Health Information Protection Act, 2004: Overview for Health Information Custodians, August 2004*).

If you are a social worker or social service worker in independent practice with records that contain personal health information about more than one client to whom you are providing health care (e.g. couples counselling or family counselling), the clients to whom you are providing health care may each have a right of access to the record of personal health information, or part of it, about him or her, subject to the exceptions and exclusions outlined in the Act. Consideration should be given to section 52(3) of the Act that provides that, if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

If you are a HIC and you receive an access request(s) for a record of personal health information where the record contains information on more than one individual, you should consult the Act and regulation before responding to the access request and, where appropriate, seek legal or professional advice.

3.16 Corrections to Records of Personal Health Information

Under the *Personal Health Information Protection Act, 2004*, an individual has the right to request that a health information custodian (HIC) correct a record of an individual's personal health information if the individual believes the record is "inaccurate or incomplete for the purposes" for which the HIC collected or used the information. The right of correction applies only to records of personal health information to which an individual has been granted a right of access. As with access requests, a HIC has 30 days, or the expiry of an extended time limit, for responding to individuals who have filed a correction request. Failure to respond in time is considered a "deemed refusal".

If you are a HIC, you are not required to correct a record if you did not originally create the record and if you do not have sufficient "knowledge, expertise or authority" to correct the record. You are also not required to correct a record if the information requested to be corrected is a "professional opinion or observation" that you have made in good faith about the individual, or if you believe on reasonable grounds that a correction request is frivolous, vexatious or made in bad faith. Apart from these exceptions, however, you are obligated to correct a record if the individual demonstrates to you that the record is "inaccurate or incomplete for the purposes" for which you use it.

EXAMPLE:

You observe that your client is not coping well after his wife has died, that he needs emotional support from other family members and friends, and that he would benefit from grief counselling. You are not obligated to correct this observation if your client disagrees with it, provided you have made a professional observation in good faith.

If you are a HIC and you grant a request for correction, the Act sets out your duties with respect to making the correction including how the requested correction is to be made.

If you are a HIC and you refuse to correct a record, you must provide a notice to the requestor explaining your reasons for refusing the correction request. Further information on requirements for refusing correction, such as the obligation to attach a statement of disagreement if requested to do so, is outlined in the Act. (For more information on how to reply to a request for correction, you may wish to refer to the resources referred to in Appendix D.)

If you are an agent of a HIC, the HIC (that is, the organization which employs you or for or on whose behalf you perform services or activities), is responsible for responding to correction requests. For example, if you are a social worker or social service worker who is employed by a hospital, you should follow the custodian's policies and procedures for responding to correction requests.

4. Substitute Decision-Makers

4.1 Summary of key questions covered in this chapter

- What is a **substitute decision-maker** under the *Personal Health Information Protection Act, 2004*? (See section 4.2).
- **Who can be a substitute decision-maker?** (See section 4.3).
- What is the **role of a substitute decision-maker** under the *Health Care Consent Act, 1996*? (See section 4.4).
- What are the **responsibilities of substitute decision-makers?** (See section 4.5).
- What is the **relationship between consent under the *Personal Health Information Protection Act, 2004* and consent under the *Health Care Consent Act, 1996***? (See section 4.6).

4.2 What is a substitute decision-maker under the *Personal Health Information Protection Act, 2004*?

Under the *Personal Health Information Protection Act, 2004*, a **substitute decision-maker** is a person who is authorized under the Act to consent on behalf of the individual to the collection, use or disclosure of personal health information about the individual. The Act sets out rules for when a substitute decision-maker can act on behalf of a capable individual, a deceased individual and an incapable individual. This chapter focuses on a substitute decision-maker when the client is incapable. (Also see section 3.12 for information on children, youth and consent and section 3.13 for information on a client who is deceased).

Many social workers and social service workers deal with clients who are *incapable* of consenting to the collection, use or disclosure of their personal health information. In such cases, a substitute decision-maker may give consent for the collection, use or disclosure of personal health

information about the individual. The **substitute decision-maker** may also withhold or withdraw consent for the collection, use or disclosure of personal health information about the individual or take a step under the Act, such as expressing an instruction or making an access request.

A client's need for a substitute decision-maker may change over time, depending on his or her circumstances. For example, your client may be capable of consenting to the collection, use or disclosure of some parts of his or her personal health information, but incapable of consenting with respect to other parts. Or your client may be capable of consenting to the collection, use or disclosure of personal health information at one time, but incapable of consenting at another time.

Unless you have reasonable grounds to believe otherwise, you may presume that your client is capable of consenting to the collection, use or disclosure of his or her personal health information.

EXAMPLE:

You are a social worker or social service worker who provides health care to a client that has a specific mental health condition. The client is capable of consenting to the collection, use or disclosure of his or her personal health information some of the time, but not others.

You are a social worker or social service worker who provides health care to a client that is “in and out of consciousness” at a hospital and who may not be capable of consenting to the collection, use or disclosure of his or her personal health information at all times.

In these circumstances, you would consider your client’s capacity every time you seek consent.

4.3 Who can be a substitute decision-maker?

When a client is not capable of providing consent for the collection, use or disclosure of his or her personal health information, you may obtain consent from the following individuals, ranked in the order in which they are listed:

- The client’s guardian of the person or guardian of property, if the guardian has the authority to make a decision on behalf of the client;
- The client’s attorney for personal care or attorney for property, if the attorney has the authority to make such decisions;
- A representative appointed by the Consent and Capacity Board constituted under the *Health Care Consent Act, 1996*, if the representative has the authority to give consent;
- The client’s spouse or partner;
- The client’s child, parent (excluding a parent who only has a right of access), or a Children’s Aid Society or other person legally entitled to give or withhold consent in place of a parent;
- The client’s parent who only has access rights;
- The client’s brother or sister; or
- Any other relative of the client (related by blood, marriage or adoption).

Note that a child’s parent cannot consent on behalf of a child in situations where there is a Children’s Aid Society or other person that is legally entitled to give or withhold consent in place of a parent.

A person listed above may only serve as a substitute decision-maker if he or she:

- Is capable of consenting to the collection, use or disclosure of personal health information by a health information custodian;
- Is at least 16 years of age or is the parent of the individual to whom the personal health information relates;
- Is not prohibited by court order or separation agreement from having access to the individual to whom the personal health information relates or from giving or refusing consent on the individual’s behalf;
- Is available to give consent on behalf of the individual; and
- Is willing to assume the responsibility of making a decision about whether or not to consent.

If you cannot find anyone who meets these requirements and is willing to take on the role of a substitute decision-maker, the Public Guardian and Trustee can give consent on behalf of your client. The Public

Guardian and Trustee can also give consent if two or more equally ranked substitute decision-makers disagree about whether to consent – e.g. the Public Guardian and Trustee would break the “deadlock” between the disputing parties.

4.4 What is the role of a substitute decision-maker under the Health Care Consent Act, 1996

If a person functions as a substitute decision-maker for your client under the *Health Care Consent Act, 1996*, then he or she will also function as the client’s substitute decision-maker with respect to informational consent issues under the *Personal Health Information Protection Act, 2004* if the purpose of the collection, use or disclosure of personal health information is related to a decision under the *Health Care Consent Act, 1996*. **This means that if a person is serving as an authorized substitute decision-maker for your client with respect to a decision about the client’s treatment, personal assistance service, or admission to a long-term care facility under the *Health Care Consent Act, 1996*, then that same person will also function as the substitute decision-maker for the collection, use and disclosure of your client’s personal health information in connection with the decision to be made under that Act. In these circumstances, a substitute decision-maker under the *Health Care Consent Act, 1996* has priority over a substitute decision-maker from the list referred to above.**

4.5 Responsibilities of substitute decision-makers

All substitute decision-makers are responsible for considering specific factors when making decisions about the collection, use or disclosure of personal health information on behalf of an incapable client or making decisions about the withholding or withdrawal of consent for the collection, use or disclosure of personal health information or about providing an express instruction on behalf of an incapable client.

For example, substitute decision-makers must consider:

- The wishes, values and beliefs of the incapable individual that the person knows the individual held when capable and that he or she would have wanted reflected in decisions concerning his or her personal health information;
- Whether the benefits expected from the collection, use or disclosure of personal health information outweigh the risks of negative consequences occurring as a result of the collection, use or disclosure;
- Whether the purpose for the collection, use or disclosure sought can be accomplished without the collection, use or disclosure; and
- Whether the collection, use or disclosure is necessary to satisfy any legal obligation.

If your client requires a substitute decision-maker, you should always make sure that the substitute decision-maker understands and is willing to assume consent responsibilities by discussing these responsibilities with him or her.

If you do not believe that a substitute decision-maker has properly considered the above factors with respect to your client, you may apply to the Consent and Capacity Board to determine whether the substitute decision-maker has met the requirements.

4.6 Relationship between consent under the Personal Health Information Protection Act, 2004 and consent under the Health Care Consent Act, 1996

The *Personal Health Information Protection Act, 2004* has not changed the rules for consent to treatment; these rules are found in the *Health Care Consent Act, 1996*. However, there are some differences between the requirements for “consent to treatment” and the requirements for “informational consent”. You will remember from Chapter 3 (section 3.3) that “informational

consent” must be “**knowledgeable**”, meaning that it must be reasonable for you to believe that your client understands:

- why you are collecting, using or disclosing the information; and
- that the client has the right to withhold or withdraw his or her consent.

By contrast, “consent to treatment” must be “**informed**”. Section 11(2) of the *Health Care Consent Act, 1996* states that a consent to treatment is informed if, before giving it:

- (a) The person received the information about the matters set out in subsection 3 that a reasonable person in the same circumstances would require in order to make a decision about the treatment; and
- (b) The person received responses to his or her requests for additional information about those matters.

Subsection 3 provides that the matters referred to subsection 2 are:

1. The nature of the treatment;
2. The expected benefit of the treatment;
3. The material risks of the treatment;
4. The material side effects of the treatment;
5. Alternative courses of action; and
6. The likely consequences of not having the treatment.

In addition to being “informed”, the following are also required for consent to treatment under section 11(1) of the *Health Care Consent Act, 1996*:

1. The consent must relate to the treatment;
2. The consent must be given voluntarily; and
3. The consent must not be obtained through misrepresentation or fraud.

These three requirements are similar to the requirements under the *Personal Health*

Information Protection Act, 2004 for “informational consent”. (See section 3.3.)

Finally, **consent to treatment may be express or implied** under section 11(4) of the *Health Care Consent Act, 1996*. By contrast, as the Toolkit outlined in Chapter 3, there are certain circumstances when informational consent may be implied or not required, as well as circumstances when you must obtain express consent from the client or his or her substitute decision-maker.

5. Oversight

5.1 Summary of key questions covered in this chapter

- **What is the role of the Ontario Information and Privacy Commissioner?** (See section 5.2).

5.2 The role of the Ontario Information and Privacy Commissioner

The *Personal Health Information Protection Act, 2004* allows for the independent review and resolution of complaints regarding the handling of personal health information and designates the Office of the Information and Privacy Commissioner/Ontario (“the Commissioner”) as the body responsible for overseeing compliance with the provisions of the Act and regulations.

The Commissioner may **investigate** where:

- A complaint has been received; or
- The Commissioner has reasonable grounds to believe that a person has contravened or is about to contravene the Act.

The Commissioner has the power to enter and inspect premises, require access to personal health information and compel testimony.

Prior to investigating a complaint, the Commissioner may:

- Inquire as to what means, other than the complaint, the complainant is using or has used to resolve the complaint;
- Require the complainant to explore a settlement; or
- Authorize a mediator to review the complaint and try and settle the complaint.

The Commissioner may also decide **not to investigate** a complaint where:

- An adequate response has been provided to the complainant;
- The complaint has been or could be dealt with

- through another procedure;
- The complainant does not have sufficient personal interest in the issue; or
- The complaint is frivolous, vexatious or made in bad faith.

After conducting an investigation, the Commissioner may issue an order. The orders include:

- To provide access to, or correction of, a record of personal health information;
- To cease collecting, using or disclosing personal health information in contravention of the Act;
- To dispose of records collected in contravention of the Act (but only if the disposal is not reasonably expected to adversely affect the provision of health care to an individual); or
- To change, cease or implement an information practice.

An individual affected by an order of the Commissioner may bring an action for damages for actual harm suffered as a result of a contravention of the Act or its regulations:

- Where the harm suffered was caused by a wilful or reckless breach of the Act or regulations, the compensation may include an award not exceeding \$10,000 for mental anguish.

No action for damages may be instituted against a health information custodian or any other person for

- anything done in good faith and that was reasonable in the circumstances, in the exercise or intended exercise of any powers or duties under the Act, or
- any alleged neglect or default that was reasonable in the circumstances in the exercise in good faith of any powers or duties under the Act.

For more information on the role of the Commissioner under the Act, see www.ipc.on.ca

Appendix A – Select Excerpts from the Personal Health Information Protection Act, 2004

Relevant excerpts from the Act for Chapter 1 of the Toolkit:

Note: references are listed in the order in which they appear in the Act.

Agent – Section 2

“agent”, in relation to a health information custodian, means a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent’s own purposes, whether or not the agent has the authority to bind the custodian, whether or not the agent is employed by the custodian and whether or not the agent is being remunerated;

Collect – Section 2

“collect”, in relation to personal health information, means to gather, acquire, receive or obtain the information by any means from any source, and “collection” has a corresponding meaning;

Disclose – Section 2

“disclose”, in relation to personal health information in the custody or under the control of a health information custodian or a person, means to make the information available or to release it to another health information custodian or to another person, but does not include to use the information, and “disclosure” has a corresponding meaning;

Use – Section 2

“use”, in relation to personal health information in the custody or under the control of a health information custodian or a person, means to handle or deal with the information, subject to subsection 6 (1), but does not include to disclose

the information, and “use”, as a noun, has a corresponding meaning.

Health information custodian – Section 3(1)

In this Act,

“health information custodian”, subject to subsections (3) to (11), means a person or organization described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person’s or organization’s powers or duties or the work described in the paragraph, if any:

1. A health care practitioner or a person who operates a group practice of health care practitioners.
2. A service provider within the meaning of the *Long-Term Care Act, 1994* who provides a community service to which that Act applies.
3. A community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*.
4. A person who operates one of the following facilities, programs or services:
 - i. A hospital within the meaning of the *Public Hospitals Act*, a private hospital within the meaning of the *Private Hospitals Act*, a psychiatric facility within the meaning of the *Mental Health Act*, an institution within the meaning of the *Mental Hospitals Act*, or an independent health facility within the meaning of the *Independent Health Facilities Act*.
 - ii. An approved charitable home for the aged within the meaning of the *Charitable Institutions Act*, a placement co-ordinator described in subsection 9.6 (2) of that Act, a home or joint home within the meaning of the *Homes for the Aged and Rest Homes Act*, a placement co-ordinator described in subsection 18(2) of that Act, a nursing home within the meaning of the *Nursing Homes Act*, a placement co-ordinator described in subsection 20.1 (2)

- of that Act or a care home within the meaning of the *Tenant Protection Act, 1997*.
- iii. A pharmacy within the meaning of Part VI of the *Drug and Pharmacies Regulation Act*.
 - iv. A laboratory or a specimen collection centre as defined in section 5 of the *Laboratory and Specimen Collection Centre Licensing Act*.
 - v. An ambulance service within the meaning of the *Ambulance Act*.
 - vi. A home for special care within the meaning of the *Homes for Special Care Act*.
 - vii. A centre, program or service for community health or mental health whose primary purpose is the provision of health care.
5. An evaluator within the meaning of the *Health Care Consent Act, 1996* or an assessor within the meaning of the *Substitute Decisions Act, 1992*.
 6. A medical officer of health or a board of health within the meaning of the *Health Protection and Promotion Act*.
 7. The Minister, together with the Ministry of the Minister if the context so requires.
 8. Any other person prescribed as a health information custodian if the person has custody or control of personal health information as a result of or in connection with performing prescribed powers, duties or work or any prescribed class of such persons.

Personal health information – Section 4(1)

In this Act,

“personal health information”, subject to subsections (3) and (4), means identifying information about an individual in oral or recorded form, if the information,

- (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual’s family,

- (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,
- (c) is a plan of service within the meaning of the *Long-Term Care Act, 1994* for the individual,
- (d) relates to payments or eligibility for health care in respect of the individual,
- (e) 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 such body part or bodily substance,
- (f) is the individual’s health number, or
- (g) identifies an individual’s substitute decision-maker.

Identifying information – Section 4(2)

In this section,

“identifying information” means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.

Mixed records – Section 4(3)

Personal health information about an individual includes identifying information about the individual that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection about the individual.

Relevant excerpts from the Act for Chapter 2 of the Toolkit:

Note: references are listed in the order in which they appear in the Act.

Information practices – Section 2

“information practices”, in relation to a health information custodian, means the policy of the custodian for actions in relation to personal health information, including,

- (a) when, how and the purposes for which the custodian routinely collects, uses, modifies, discloses, retains or disposes of personal health information, and
- (b) the administrative, technical and physical safeguards and practices that the custodian maintains with respect to the information;

Accuracy – Section 11

- (1) A health information custodian that uses personal health information about an individual shall take reasonable steps to ensure that the information is as accurate, complete and up-to-date as is necessary for the purposes for which it uses the information.
- (2) A health information custodian that discloses personal health information about an individual shall,
 - (a) take reasonable steps to ensure that the information is as accurate, complete and up-to-date as is necessary for the purposes of the disclosure that are known to the custodian at the time of the disclosure; or
 - (b) clearly set out for the recipient of the disclosure the limitations, if any, on the accuracy, completeness or up-to-date character of the information.

Security – Section 12(1)

A health information custodian shall take steps that are reasonable in the circumstances to ensure that personal health information in the custodian’s custody or control is protected against theft, loss and unauthorized use or disclosure and to ensure that the records containing the information are protected against unauthorized copying, modification or disposal.

Notice of loss – Section 12(2)

Subject to subsection (3) and subject to the exceptions and additional requirements, if any, that are prescribed, a health information custodian that has custody or control of personal health information about an individual shall notify the individual at the first reasonable opportunity if the information is stolen, lost, or accessed by unauthorized persons.

Contact person – Section 15

- (1) A health information custodian that is a natural person may designate a contact person described in subsection (3).
- (2) A health information custodian that is not a natural person shall designate a contact person described in subsection (3).
- (3) A contact person is an agent of the health information custodian and is authorized on behalf of the custodian to,
 - (a) facilitate the custodian’s compliance with this Act;
 - (b) ensure that all agents of the custodian are appropriately informed of their duties under this Act;
 - (c) respond to inquiries from the public about the custodian’s information practices;
 - (d) respond to requests of an individual for access to or correction of a record of personal health information about the individual that is in the custody or under the control of the custodian; and
 - (e) receive complaints from the public about the custodian’s alleged contravention of this Act or its regulations.
- (4) A health information custodian that is a natural person and that does not designate a contact person under subsection (1) shall perform on his or her own the functions described in clauses 3(b), (c), (d) and (e).

Written public statement – Section 16(1)

A health information custodian shall, in a manner that is practical in the circumstances, make available to the public a written statement that,

- (a) provides a general description of the custodian's information practices;
- (b) describes how to contact,
 - (ii) the contact person described in subsection 15(3), if the custodian has one, or
 - (iii) the custodian, if the custodian does not have that contact person;
- (c) describes how an individual may obtain access to or request correction of a record of personal health information about the individual that is in the custody or control of the custodian; and
- (d) describes how to make a complaint to the custodian and to the Commissioner under this Act.

Agents and information – Section 17(1)

A health information custodian is responsible for personal health information in the custody or control of the health information custodian and may permit the custodian's agents to collect, use, disclose, retain or dispose of personal health information on the custodian's behalf only if,

- (a) the custodian is permitted or required to collect, use, disclose, retain or dispose of the information, as the case may be;
- (b) the collection, use, disclosure, retention or disposition of the information, as the case may be, is in the course of the agent's duties and not contrary to the limits imposed by the custodian, this Act or an other law; and
- (c) the prescribed requirements, if any, are met.

Restriction on agents – Section 17(2)

Except as permitted or required by law and subject to the exceptions and additional

requirements, if any, that are prescribed, an agent of a health information custodian shall not collect, use, disclose, retain or dispose of personal health information on the custodian's behalf unless the custodian permits the agent to do so in accordance with subsection (1).

Responsibility of agent – Section 17(3)

An agent of a health information custodian shall notify the custodian at the first reasonable opportunity if personal health information handled by the agent on behalf of the custodian is stolen, lost or accessed by unauthorized persons.

Relevant excerpts from the Act for Chapter 3 of the Toolkit:

Note: references are listed in the order in which they appear in the Act.

Elements of consent – Section 18(1)

If this Act or any other Act requires the consent of an individual for the collection, use or disclosure of personal health information by a health information custodian, the consent,

- (a) must be a consent of the individual;
- (b) must be knowledgeable;
- (c) must relate to the information; and
- (d) must not be obtained through deception or coercion.

Knowledgeable consent – Section 18(5)

A consent to the collection, use or disclosure of personal health information about an individual is knowledgeable if it is reasonable in the circumstances to believe that the individual knows,

- (a) the purposes of the collection, use or

disclosure, as the case may be; and
(b) that the individual may give or withhold consent.

Notice of purposes – Section 18(6)

Unless it is not reasonable in the circumstances, it is reasonable to believe that an individual knows the purposes of the collection, use or disclosure of personal health information about the individual by a health information custodian if the custodian posts or makes readily available a notice describing the purposes where it is likely to come to the individual's attention or provides the individual with such a notice.

Withdrawal of consent – Section 19(1)

If an individual consents to have a health information custodian collect, use or disclose personal health information about the individual, the individual may withdraw the consent, whether the consent is express or implied, by providing notice to the health information custodian, but the withdrawal of the consent shall not have retroactive effect.

Conditional consent – Section 19(2)

If an individual places a condition on his or her consent to have a health information custodian collect, use or disclose personal health information about the individual, the condition is not effective to the extent that it purports to prohibit or restrict any recording of personal health information by a health information custodian that is required by law or by established standards of professional practice or institutional practice.

Implied consent – Section 20(2)

A health information custodian described in paragraph 1, 2, 3 or 4 of the definition of “health information custodian” in subsection 3 (1), that receives personal health information about an individual from the individual, the individual's substitute decision-maker or another health information custodian for the purpose of providing health care or assisting in the provision of health care to the individual, is entitled to assume that it has the individual's implied consent to collect, use or disclose the information for the purposes of providing health care or assisting in providing health care to the individual, unless the custodian that receives the information is aware that the individual has expressly withheld or withdrawn the consent.

Permitted use – Section 37(1)(a) and 37(1)(j)

A health information custodian may use personal health information about an individual,
(a) for the purpose for which the information was collected or created and for all the functions reasonably necessary for carrying out that purpose, but not if the information was collected with the consent of the individual or under clause 36 (1) (b) and the individual expressly instructs otherwise;
(j) for research conducted by the custodian, subject to subsection (3), unless another clause of this subsection applies;

Permitted use for research – Section 37(3)

Under clause (1)(j), a health information custodian may use personal health information about an individual only if the custodian prepares a research plan and has a research ethics board approve it and for that purpose sections 44 (2) to (4) and clauses 44 (6) (a) to (f) apply to the use as if it were a disclosure. (see below)

Permitted disclosure related to providing health care – Section 38(1)(a)

A health information custodian may disclose personal health information about an individual,

- (a) to a person described in paragraph 1, 2, 3 or 4 of the definition of “health information custodian” in subsection 3(1), if the disclosure is reasonably necessary for the provision of health care and it is not reasonably possible to obtain the individual’s consent in a timely manner, but not if the individual has expressly instructed the custodian not to make the disclosure;

Disclosures related to risks – Section 40(1)

A health information custodian may disclose personal health information about an individual if the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons.

Disclosure for research – Section 44(1)

A health information custodian may disclose personal health information about an individual to a researcher if the researcher,

- (a) submits to the custodian,
 - (i) an application in writing,
 - (ii) a research plan that meets the requirements of subsection (2), and
 - (iii) a copy of the decision of a research ethics board that approves the research plan; and
- (b) enters into the agreement required by subsection (5).

Research plan – Section 44(2)

A research plan must be in writing and must set out,

- (a) the affiliation of each person involved in the research;
- (b) the nature and objectives of the research and the public or scientific benefit of the research that the researcher anticipates; and
- (c) all other prescribed matters related to the research.

Agreement respecting disclosure – Section 44(5)

Before a health information custodian discloses personal health information to a researcher under subsection (1), the researcher shall enter into an agreement with the custodian in which the researcher agrees to comply with the conditions and restrictions, if any, that the custodian imposes relating to the use, security, disclosure, return or disposal of the information.

Compliance by researcher – Section 44(6)

A researcher who receives personal health information about an individual from a health information custodian under subsection (1) shall,

- (a) comply with the conditions, if any, specified by the research ethics board in respect of the research plan;
- (b) use the information only for the purposes set out in the research plan as approved by the research ethics board;
- (c) not publish the information in a form that could reasonably enable a person to ascertain the identity of the individual;
- (d) despite subsection 49(1), not disclose the information except as required by law and subject to the exceptions and additional requirements, if any, that are prescribed;
- (e) not make contact or attempt to make contact with the individual, directly or indirectly, unless the custodian first obtains the individual’s consent to being contacted;
- (f) notify the custodian immediately in writing if the researcher becomes aware of any breach of this subsection or the agreement described

- in subsection (5); and
- (g) comply with the agreement described in subsection (5).

Disclosure outside Ontario – Section 50(1)(e)

A health information custodian may disclose personal health information about an individual collected in Ontario to a person outside Ontario only if,

- (e) the disclosure is reasonably necessary for the provision of health care to the individual, but not if the individual has expressly instructed the custodian not to make the disclosure;

Individual's right of access – Section 52(1)

Subject to this Part, an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

- (a) the record or the information in the record is subject to a legal privilege that restricts disclosure of the record or the information, as the case may be, to the individual;
- (b) another Act, an Act of Canada or a court order prohibits disclosure to the individual of the record or the information in the record in the circumstances;
- (c) the information in the record was collected or created primarily in anticipation of or use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded;
- (d) the following conditions are met:
 - (i) the information was collected or created in the course of an inspection, investigation or similar procedure authorized by law, or undertaken for the purpose of the detection, monitoring or prevention of a person's receiving or attempting to receive a service or benefit, to which the person is

- not entitled under an Act or a program operated by the Minister, or a payment for such a service or benefit, and
- (ii) the inspection, investigation, or similar procedure, together with all proceedings, appeals or processes resulting from them, have not been concluded;
- (e) granting the access could reasonably be expected to,
 - (i) result in a risk of serious harm to the treatment or recovery of the individual or a risk of serious bodily harm to the individual or another person,
 - (ii) lead to the identification of a person who was required by law to provide information in the record to the custodian, or
 - (iii) lead to the identification of a person who provided information in the record to the custodian explicitly or implicitly in confidence if the custodian considers it appropriate in the circumstances that the name of the person be kept confidential; or
- (f) the following conditions are met:
 - (i) the custodian is an institution within the meaning of the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act or is acting as part of such an institution, and
 - (ii) the custodian would refuse to grant access to the part of the record,
 - (A) under clause 49 (a), (c) or (e) of the Freedom of Information and Protection of Privacy Act, if the request were made under that Act and that Act applied to the record, or
 - (B) under clause 38 (a) or (c) of the Municipal Freedom of Information and Protection of Privacy Act, if the request were made under that Act and that Act applied to the record. 2004, c. 3, Sched. A, s. 52 (1).

Severable record – Section 52(2)

Despite subsection (1), an individual has a right of access to that part of a record of personal health information about the individual that can reasonably be severed from the part of the record to which the individual does not have a right of access as a result of clauses (1) (a) to (f).

Severable record – Section 52(3)

Despite subsection (1), if a record is not a record dedicated primarily to personal health information about the individual requesting access, the individual has a right of access only to the portion of personal health information about the individual in the record that can reasonably be severed from the record for the purpose of providing access.

Relevant excerpts from the Act for Chapter 4 of the Toolkit:

Note: references are listed in the order in which they appear in the Act.

Substitute decision-maker – Section 5(1)

In this Act,
“substitute decision-maker”, in relation to an individual, means, unless the context requires otherwise, a person who is authorized under this Act to consent on behalf of the individual to the collection, use or disclosure of personal health information about the individual.

Decision about treatment – Section 5(2)

A substitute decision-maker of an individual within the meaning of section 9 of the *Health Care Consent Act, 1996* shall be deemed to be a substitute decision-maker of the individual in respect of the collection, use or disclosure of

personal health information about the individual if the purpose of the collection, use or disclosure is necessary for, or ancillary to, a decision about a treatment under Part II of that Act.

Capacity to consent – Section 21(1)

An individual is capable of consenting to the collection, use or disclosure of personal health information if the individual is able,

- (a) to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure, as the case may be; and
- (b) to appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing the consent.

Persons who may consent – Section 23

(1) If this Act or any other Act refers to a consent required of an individual to a collection, use or disclosure of personal health information about the individual, a person described in one of the following paragraphs may give, withhold or withdraw the consent:

1. If the individual is capable of consenting to the collection, use or disclosure of the information,
 - i. the individual, or
 - ii. if the individual is at least 16 years of age, any person who is capable of consenting, whom the individual has authorized in writing to act on his or her behalf and who, if a natural person, is at least 16 years of age.
2. If the individual is a child who is less than 16 years of age, a parent of the child or a children’s aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent unless the information relates to,
 - i. treatment within the meaning of the *Health Care Consent Act, 1996*, about

- which the child has made a decision on his or her own in accordance with that Act, or
- ii. counselling in which the child has participated on his or her own under the Child and Family Services Act.
- 3. If the individual is incapable of consenting to the collection, use or disclosure of the information, a person who is authorized under subsection 5 (2), (3) or (4) or section 26 to consent on behalf of the individual.
- 4. If the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee.
- 5. A person whom an Act of Ontario or Canada authorizes or requires to act on behalf of the individual.

(2) In subsection (1), “parent” does not include a parent who has only a right of access to the child.

(3) If the individual is a child who is less than 16 years of age and who is capable of consenting to the collection, use or disclosure of the information and if there is a person who is entitled to act as the substitute decision-maker of the child under paragraph 2 of subsection (1), a decision of the child to give, withhold or withdraw the consent or to provide the information prevails over a conflicting decision of that person.

Factors to consider for consent – Section 24(1)

A person who consents under this Act or any other Act on behalf of or in the place of an individual to a collection, use or disclosure of personal health information by a health information custodian, who withholds or withdraws such a consent or who provides an express instruction under clause 37(1)(a), 38(1)(a) or 50(1)(e) shall take into consideration,

- (a) the wishes, values and beliefs that,
 - (i) if the individual is capable, the person knows the individual holds and believes the individual would want reflected in decisions made concerning the individual's personal health information, or
 - (ii) if the individual is incapable or deceased, the person knows the individual held when capable or alive and believes the individual would have wanted reflected in decisions made concerning the individual's personal health information;
- (b) whether the benefits that the person expects from the collection, use or disclosure of the information outweigh the risk of negative consequences occurring as a result of the collection, use or disclosure;
- (c) whether the purpose for which the collection, use or disclosure is sought can be accomplished without the collection, use or disclosure; and
- (d) whether the collection, use or disclosure is necessary to satisfy any legal obligation.

Incapable individual: persons who may consent – Section 26(1)

If an individual is determined to be incapable of consenting to the collection, use or disclosure of personal health information by a health information custodian, a person described in one of the following paragraphs may, on the individual's behalf and in the place of the individual, give, withhold or withdraw the consent:

1. The individual's guardian of the person or guardian of property, if the consent relates to the guardian's authority to make a decision on behalf of the individual.
2. The individual's attorney for personal care or attorney for property, if the consent relates to the attorney's authority to make a decision on behalf of the individual.
3. The individual's representative appointed by the Board under section 27, if the representative has authority to give the consent.

4. The individual's spouse or partner.
5. A child or parent of the individual, or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent. This paragraph does not include a parent who has only a right of access to the individual. If a children's aid society or other person is lawfully entitled to consent in the place of the parent, this paragraph does not include the parent.
6. A parent of the individual with only a right of access to the individual.
7. A brother or sister of the individual.
8. Any other relative of the individual.

Requirements for persons who may consent for an incapable individual – Section 26(2)

A person described in subsection (1) may consent only if the person,

- (a) is capable of consenting to the collection, use or disclosure of personal health information by a health information custodian;
- (b) in the case of an individual, is at least 16 years old or is the parent of the individual to whom the personal health information relates;
- (c) is not prohibited by court order or separation agreement from having access to the individual to whom the personal health information relates or from giving or refusing consent on the individual's behalf;
- (d) is available; and
- (e) is willing to assume the responsibility of making a decision on whether or not to consent.

Relevant excerpts from the Act for Chapter 5 of the Toolkit:

Note: references are listed in the order in which they appear in the Act.

Complaint to Commissioner – Section 56(1)

A person who has reasonable grounds to believe that another person has contravened or is about to contravene a provision of this Act or its regulations may make a complaint to the Commissioner.

Time for complaint – Section 56(2)

A complaint that a person makes under subsection (1) must be in writing and must be filed within,

- (a) one year after the subject-matter of the complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant, whichever is the shorter; or
- (b) whatever longer period of time that the Commissioner permits if the Commissioner is satisfied that it does not result in any prejudice to any person.

Time for complaint, refusal of request – Section 56(3)

A complaint that an individual makes under subsection 54 (8) or 55 (7) or (12) shall be in writing and shall be filed within six months from the time at which the health information custodian refuses or is deemed to have refused the individual's request mentioned in the applicable subsection.

Commissioner's self-initiated review – Section 58(1)

The Commissioner may, on his or her own initiative, conduct a review of any matter if the Commissioner has reasonable grounds to believe that a person has contravened or is about to contravene a provision of this Act or its regulations and that the subject-matter of the review relates to the contravention.

Appendix B – Resources for Health Information Custodians on the Written Public Statement required under section 16(1)

Sample Written Public Statements on Website

- Children’s Hospital of Eastern Ontario (Ottawa) written public statement is available at: <http://www.cheo.on.ca/english/1300.html>
- Hamilton Health Sciences' (Hamilton) “Statement of Information Practices” is available at: http://www.hamiltonhealthsciences.ca/print.cfm?site_id=2&org_id=1&morg_id=0&gsec_id=0&item_id=7121
- Markham Stouffville Hospital’s (Markham Stouffville) written public statement is available at: http://www.msh.on.ca/main/Poster_PrivacyLegislation.pdf
- Peel Region’s (Region of Peel) “Notice of Privacy Information Practices” webpage contains links to additional information about the organization’s information practices and is available at: <http://www.region.peel.on.ca/corpserv/hipa/index.htm>
- St. Joseph’s Healthcare’s (Hamilton) “Statement of Information Practices” is available at: <http://www.stjosham.on.ca/sjhh/pdf/Information%20Practices.pdf>
- St. Michael’s Hospital’s (Toronto) “Information Practices” are available at: http://www.stmichaelshospital.com/Content/Patients/patients_privacy.asp
- York Region Health Services Department’s (Region of York) “Notice of Privacy and Information Practices” is available at: <http://www.region.york.on.ca/NR/rdonlyres/5z4wmhoxaoz52z5tzcgwwi7g3elth7e7keoa6f4uscdezefqgv5f7xmvango6m77rqlf32suu75xmehp4e3mroh3g/Written+Public+Statement+.pdf>

Sample Pamphlet/Brochure Written Public Statements

- Cambridge Memorial Hospital’s (Cambridge) “A Guide to Understanding Cambridge Memorial Hospital’s Privacy Program” is available at: <http://www.cmh.org/documents/programs/7-1900-110.pdf>
- Canadian Mental Health Association’s Thunder Bay Branch’s (Thunder Bay) Privacy Policy brochure is available at: <http://www.cmha-tb.on.ca/PrivacyPolicy.pdf>
- Mt. Sinai Hospital’s (Toronto), “Privacy: A Guide for Patients” is available at: <http://www.mtsinai.on.ca/HealthRecords/resources/Privacy20041222.pdf>
- Providence Healthcare’s (Toronto), “Your Personal Health Information: Our Commitment to You” is available at: http://www.providence.on.ca/uploadedFiles/Information/Privacy_Brochure.pdf
- Sunnybrook and Women’s (Toronto) “Protecting Your Personal Health Information” is available at: http://www.sunnybrookandwomens.on.ca/files/Privacy_Brochure.pdf
- York Region Health Services Department’s (Region of York) “Notice of Privacy and Information Practices” is available at: http://www.region.york.on.ca/NR/rdonlyres/4hsxzea3urswzrkooghaoirqbil35evbgzoyu7y5iepp2j2j3nahdl4zyb3ktrwqap3aahizhn2ary3xmo6xya6h7f/1146_noticeweb.pdf

Appendix C – Brochure for Clients on their Health Information Rights from the Information and Privacy Commissioner/Ontario

3. Correcting Your Health Records

Under PHIPA, you have the right to have information in your personal health records corrected.

If you believe that the information in your personal health record is not accurate or complete, you may make a request to have it corrected. You should make your request to the contact person designated by the health information custodian.

If your request is in writing, a health information custodian has 30 days to respond but, in certain situations, may require an extension of up to 30 days.

Health information custodians must correct an incomplete or inaccurate record, but they are not required to change professional opinions or correct records that they did not create.

Health information custodians who refuse to make a correction must explain why they refused. You have the right to attach a statement conveying your disagreement to your record and to complain to the Information and Privacy Commissioner of Ontario.

What Does the Information and Privacy Commissioner Do?

The Information and Privacy Commissioner of Ontario (IPC) is appointed by the Ontario Legislature and is independent of the government. The commissioner is responsible for ensuring that health information custodians comply with the law.

Under PHIPA, the IPC has the power to investigate and make rulings about complaints. If you believe that a health information custodian or anyone else is not following PHIPA, you may file a complaint with the IPC.

The following table lists the reasons and time periods for filing a complaint.

Reason to Complain to Commissioner	Time to File a Complaint
A health information custodian or other person has collected, used or shared your personal health information contrary to PHIPA.	Within 1 year of the time that you became aware of the problem of the problem (The commissioner can extend this deadline.)
Your request to see your personal health record or part of that record has been denied.	Within 6 months of the health information custodian's decision.
Your request to have your personal health information corrected has been denied.	Within 6 months of the health information custodian's decision.

When the commissioner receives a complaint, a mediator may be appointed to try to solve the problem. The IPC has various powers to resolve complaints, including the power to order a health information custodian to:

- change or stop the way your information is collected, used or shared
- provide you with access to your record of personal health information
- correct your record of personal health information.

For more information about the role of the IPC or to submit a written complaint, please contact:

The Information and Privacy Commissioner of Ontario

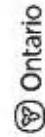
2 Bloor Street East, Suite 1400
Toronto, ON M4W 1A8
Telephone: 416-325-3333 or 1-800-387-0073
Fax: 416-325-9105
TTY: 416-325-7539
Website: www.ipc.on.ca

To find out more about PHIPA, visit www.health.gov.on.ca or call our INFOline at 1-800-461-2036 or TTY 1-800-387-0559

Version française disponible en communiquant avec le 1 800 461-2036
ATS : 1 800 387-5559

Your Health Information: Your Rights

Your Guide to the Personal Health Information Protection Act, 2004



English: 1-800-387-0073 / 416-325-3333 / 416-325-9105
French: 1-800-387-0559 / 416-325-7539 / 416-325-3333

Appendix C – Brochure for Clients on their Health Information Rights from the Information and Privacy Commissioner/Ontario

Each time you visit a healthcare provider, have a test done or receive care in your home, the hospital or any other healthcare setting, information about your health is recorded in a personal health record.

On November 1, 2004, the Personal Health Information Protection Act, 2004 (PHIPA) came into force. This new law:

- sets out the rules that healthcare providers (or, "health information custodians") must follow when collecting, using and sharing your personal health information
- gives you the right to see your health records and correct any mistakes.

To whom does PHIPA apply?

PHIPA applies to individuals and organizations involved in the delivery of healthcare services. Under the act, they are referred to as "health information custodians". They include:

- healthcare providers such as doctors, nurses, dentists, psychologists, optometrists, physiotherapists, chiropractors, massage therapists, dietitians, naturopaths and acupuncturists
- hospitals
- long-term care homes and homes for special care
- Community Care Access Centres
- pharmacies
- medical laboratories
- local medical officers of health
- ambulance services
- community mental health programs
- the Ministry of Health and Long-Term Care.

What Are Health Information Custodians Required to Do?

Under PHIPA, health information custodians are required to:

- collect only the information they need to do their job
- take steps to safeguard your personal health information
- take reasonable steps to ensure your health records are accurate and complete for the work they do
- provide a written description of the practices they use to protect your information, and the name of the person to contact if you have any questions or concerns about your personal health records.

What Are Your Rights Under PHIPA?

PHIPA gives you the right to:

- give permission (consent) to how your personal health information is collected, used and shared
- request access to your health records
- make corrections to your records.

1. Giving Consent

Under PHIPA, you have the right to consent to how your information will be collected, used and shared – except in specific circumstances where the law authorizes healthcare providers to collect, use or share a person's information without consent, such as reporting for public health safety.

The act allows for two types of consent:

- **implied consent.** In general, your healthcare provider will assume that you give consent for the sharing of your health information to provide healthcare to you without directly asking you or requiring you to sign a consent form. For example, when your family physician refers you to a specialist, he or she will assume that you give permission to share your health information with the specialist – unless you specifically refuse.

In practice, PHIPA permits your healthcare provider to assume your implied consent to collect, use or disclose your health information with other healthcare providers who are involved in your care unless you state otherwise.

- **express consent.** In certain situations, your healthcare provider is required to request your consent – either orally, in writing or electronically – before sharing your health information. This is called "express consent." For example, if your healthcare provider is asked to disclose your personal health information to someone who is not a health information custodian under PHIPA, like your employer, he or she must obtain your express consent.

2. Accessing Your Health Records

Under PHIPA, you have the right to access your personal health records.

If you want to see your records, you may make a request to the person identified by the health information custodian.

If your request is in writing, a health information custodian has 30 days to respond to your request but, in certain situations, may require an extension of up to 30 days. You can request faster access where you can show that you urgently need the information. When giving you access or providing a copy of your personal health record, your healthcare provider may charge a reasonable fee to cover costs.

Under PHIPA, health information custodians can only deny you access to your record of personal health information in certain situations, such as when health information was collected as part of an investigation. Generally, health information custodians who deny you access to your record or a part of your record must give you an explanation. If you are not satisfied with a custodian's decision, you may complain to the Information and Privacy Commissioner of Ontario.

Appendix D – Other Personal Health Information Protection Act, 2004 Resources

Information and Privacy Commissioner/Ontario: <http://www.ipc.on.ca/>

Ministry of Health and Long-Term Care:

http://www.health.gov.on.ca/english/providers/legislation/priv_legislation/priv_legislation.html

Ontario Hospital Association's Hospital Privacy Toolkit:

http://www.oha.com/Client/OHA/OHA_LP4W_LND_WebStation.nsf/page/Bill+31+Toolkit

Ontario Medical Association's Physician Privacy Toolkit: <http://www.oma.org/phealth/privacymain.htm>



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