Personal Health Information Act Review:
Responsive Submission

March 08, 2017

Personal Health Information Act Review, 2017
Submissions of the Canadian Nurses Protective Society

Concerning section I, part (a) General considerations; the Canadian Nurses Protective Society [CNPS] stated, "[Custodian] policies represent not only a code of conduct within that facility, but are also conferred the status of legal obligation [by section 14(2)(b)] of the *PHIA*, which makes it *a legal requirement* for all agents to comply with the information policies and procedures of the custodian, provided that they do not conflict with the *Act* or its regulations." Section 14(2) of the *Act* states as follows:

> *14(2) A custodian's employees, agents, contractors and volunteers, and those health care professionals who have the right to treat persons at a health care facility operated by the custodian shall comply with*
>
> *(a) this Act and the regulations; and*
>
> *(b) the information policies and procedures referred to in subsection 13(1).*

Accordingly, the CNPS has proposed the *Act* fails to recognize that regulated health care professionals [HCP] must comply with professional and legal obligations of their regulatory bodies and other authorities. Hence, the CNPS has recommended that "…the *PHIA* should be amended to eliminate the requirement at paragraph 14(2)(b), that agents of custodians comply with any and all information policies and procedures, but preserve the requirement at paragraph 14(2)(a) to collect, use and disclose [personal health information] in accordance with the requirements and principles set out in the Act and the regulations."

Repeal of subsection 14(2)(b) of the *Act*, as suggested, will have the effect of eliminating the legal requirement for any employees or affiliated individuals of a custodian to comply with its policies. Essentially, custodian policies will be demoted and will no longer have legal standing, significantly impacting the authority of custodians to compel compliance. Further, such action will relegate authority for compliance for non-regulated employees solely to limited human resources of the custodian. As well, the custodian will be relieved of its legal authority to compel compliance for affiliated individuals, not employed by the custodian. This action will effectively remove the force for implementation of the *Act* by custodians. Given the current voluntary compliance model of the *Act*, repeal of this section will further reduce the custodian's ability to implement and govern local compliance with the provisions of the *Act*.

Further, the proposed repeal of section 14(2)(b) of the *Act* would create a two-tiered system of accountability between regulated HCPs and other non-regulated employees or affiliated individuals of the custodian. This may result in weakening of internal mechanisms for enforcement of policies and consequent disregard of custodian's obligations under the Act. With the myriad of HCPs currently falling under or affiliated with custodians, such as Regional Health Authorities [RHAs), a diffusion of accountability and cumbersome process of enforcement would be heralded such that the custodian's ability to enforce its policy

framework would be partially relegated to external professional regulatory bodies and other legal mechanisms to enforce client's rights for protection of personal health information. This may, in fact, impose a burden on professional regulatory bodies for education and enforcement of professional practice standards to ensure the protection of personal health information.

Finally, the proposal assumes all HCPs are aware of the complex interface and have integrated the legal context, including legislative statutes, regulations and case law rulings, into their practice to complement professional practice standards. This is much too great a burden to place on employees of custodians, since a custodian's policies, as required by law, create a safety net for HCPs and clients alike to ensure compliance with fair information practices, professional practice standards, and the law.

Concerning mandatory reporting obligations required under law, the specific provisions and authority exist outside the *PHIA* and demand knowledge of a number of separate statutes as well as proficiency in interpretation of applicable statutes. However, pursuant to section 43 of the *Act*, authority currently exists where disclosure is required by law and states as follows:

> *A custodian shall disclose personal health information without the consent of the individual who is the subject of the information where the disclosure is required by another Act or an Act of Canada or by a treaty, agreement or arrangement made under another Act or an Act of Canada.*

Specific legislation dictates accountability for mandatory reporting depending on the statute, such that recognition of a HCP's obligation to report is inherent in the law. Custodians may provide policy direction, as in the case of Central Health's Duty to Report or Warn Policy, to support authorized disclosure of personal health information, consistent with professional practice standards and the law. It is an unreasonable expectation that all HCPs will attain such proficiency, hence policies of the custodian provide safeguards for authorized collection, use and disclosure of personal health information. Removing the force of custodian policies, as is suggested, may weaken the policy framework currently in place to ensure authorized disclosure of personal health information.

According to Part II of the *Act*, a custodian's obligations are prescribed for protection of personal health information. An important component of the custodian's obligations is implementation of a policy framework, consistent with its legal and professional practice context. It is not arduous for custodians to comply with its obligations under the Act. Rather, its policy framework compliments its professional practice knowledge base and supports informed decision-making by HCPs, concerning authorized collection, use and disclosure of personal health information.

An alternative recommendation is offered concerning revision of section 14(2)(b) such that the phase, *"in accordance with accepted professional practice,"* as currently appears within

section 37 of the *Act*, be included as a qualifying statement within subsection 14(2)(b) of the *Act*, to support alignment between custodian polices and professional practice standards. It is agreed, alignment must exist between custodian policies, professional practice standards, and the legal context in which health care exists. To strike the subsection completely, however, would have the effect of removing the sanction and authority of the custodian and the *Act* to compel compliance for protection of personal health information and to ensure the protection of privacy of individuals involved.

Personal Health Information Act Review, 2017
Submission of the Office of the Information and Privacy Commissioner

- ***Elimination of Fees for Disclosure of Personal Health Information***

The OIPC has proposed an amendment to section 57 of the *Act* such that "a fee can only be charged for a record containing over a certain number of pages, [greater than] 50 or 100." Contrary to this recommendation, Eastern Health has proposed fair remuneration of a custodian due to its incurred costs to process disclosure requests. The current provincial fee schedule represents a significant cost reduction and cap on fees for disclosure of personal health information. As well, there is an inherent ability to waive disclosure fees where financial hardship exists. Further, informal access channels are encouraged for access to personal health information, such that no cost is incurred by the requestor. The current volume of formal disclosure requests for auxiliary health care purposes, however, is substantial and asserts a financial burden on custodians, to be carried almost exclusively by custodians, based on the proposed benchmark.

Currently, Central Health processes an average of 597 formal disclosure requests monthly, with the vast majority falling under the proposed benchmark for fee eligibility. The incurred costs for disclosure of personal health information include significant tangible expenses such as material and human resource inputs. The current funding model existing within Central Health recoups a portion of the expenditures only, and based on the proposed recommendation, the existing level of service, including dedicated resources, will not be financially feasible for custodians to maintain.

Eastern Health has proposed a cost-shared model and has suggested, "It would be fair to expect the person requesting the information to pay an appropriate fee for it, and it would be fair to expect the custodian to recoup some of the costs associated with processing a request." Based on current access processes and infrastructure, including lack of availability of a client portal for access to client records, Central Health agrees with this statement. Further, given provincial financial realities and recent efforts to restructure disclosure services within some RHAs to offer an improved and quality service to its clients, its current partial funding

model is essential to sustain current service levels. Amendment of the *Act,* as proposed, may result in cost prohibitive services for RHAs specifically, due to the sheer volume of disclosure requests currently processed and the nature of client datasets.

- ***Reduction of Timelines for Disclosure from 60 to 30 Days***

As proposed by the OIPC, "the 60 day time limit for a response to an access request is longer than necessary." In principle, this is an agreeable statement. The consequent recommendation for an across-the-board reduction of mandatory timelines from 60 to 30 days, however, is unachievable for custodians such as RHAs, given the volume and scope of auxiliary disclosure requests currently processed. If section 55 of the *Act* is amended as proposed, this will create significant capacity and compliance issues for RHAs.

Central Health currently processes an average of 597 formal disclosure requests monthly and is consistently meeting the maximum timeline of 60 calendar days, based on existing and delegated resources. Likewise, Eastern Health has proposed a current volume of requests greater than 25,000, annually. Data analysis concerning the volume of processed requests, within Central Health, indicates a consistent upward trend. It is conceivable, based on limited resources and projected volume of disclosure requests, the current 60 day standard may present a challenge for compliance into the future. A reduction of the timelines to 30 days will surely impact quality and compliance with this provision of the *Act*.

The required distinction of disclosure type is also relevant to the discussion of reduction of timelines. Disclosure requests must be prioritized based on safety and risk to the client to whom the information relates, including continuity of care, eligibility for services and benefits, and other time sensitive factors. Noteworthy, informal access to personal health information, pursuant to section 59 of the *Act,* occurs regularly within the clinical relationship and is excluded from formal disclosure processes for access to records, for auxiliary health care purposes. In the case of informal access to records, there is no anticipated time delay; therefore a reduction in the legislated time period is not expected to impact access to personal health information within the clinical relationship.

As well, the complexity of disclosure requests must be considered. Given the current hybrid record format, dispersed service area, and scope of disclosure requests currently received, significant time and resources are required to complete a comprehensive record search to support full disclosure of requested records. An across-the-board reduction of disclosure timelines, as proposed, may have the unintended impact of limiting disclosure quality and compliance for custodians.

An alternative recommendation involves consideration of the definition of days as business versus calendar days, as recently proposed in the ATIPPA, 2015. Currently, the term "*days*" is not defined in the *PHIA*, and is therefore open to interpretation. Central Health has adopted a calendar day definition as it is the shorter of the two. Consistent with the *ATIPPA, 2015*, however, adoption of business days as the unit of measure and consequent reasonable reduction of the processing period to reflect this unit is advisable. Although the principle of timely access to personal health information is applauded and necessary to ensure quality services, there is no advantage to an unrealistic standard that negatively impacts service quality and limits custodian compliance under the *Act*. Copied below is the original submission by Central Health concerning proposed amendment of section 55 of the *Act*.

Definitions under Personal Health Information Act			
Legislative provision	Detail	Identified issue	Action Requested
Section 55 of *PHIA*, time of response	**55.** (1) A custodian shall respond to a request under subsection 53(1) without delay and in any event not more than 60 days after receiving the request.	Currently the language of the *Act* does not define measurement of days as calendar or business days. *ATIPP, 2015* has defined applicable time limits according to business days, and has reduced the stated time period for processing a request according to this unit of measurement.	Consider revision to qualify days as calendar or business days.

- ***Mandatory Reporting of Client Notifications to the OIPC***

As indicated in its submission, "the OIPC is of the view that all breaches which attain the level of requiring notification to affected individuals should also be reported to the Commissioner." Accordingly, the OIPC has proposed "the additional effort on the part of custodians in doing so would be relatively minimal [as] the processes and forms are already in place because of the breach reporting standards in *ATIPPA, 2015*."

It is Central Health's contention, however, that such a mandatory requirement will unduly burden limited resources of custodians. Currently, a verbal and written notification process exists within Central Health, including standard provision of the contact information for the oversight body, for all incidents where an individual's personal health information is disclosed in an unauthorized manner. The current workload demands are significant to maintain this

existing standard. The additional obligation of custodians to report all notifications to the OIPC would further tax existing and diminished resources of the custodian. Rather, the right of notification is currently conferred upon the individual to contact the OIPC to further discuss any privacy matter, including any complaint process the individual wishes to pursue.

Consistent with this, Eastern Health has proposed an argument against mandatory reporting of non-material breaches due to workload and capacity issues for custodians. Specifically, Eastern Health has recommended the current requirement for notification in the event of a material breach be maintained. Further, Central Health concurs with the additional recommendation by Eastern Health that the Committee consider "an expanded and more detailed definition of material [breach]" to support standardization for reporting to the OIPC.

Of further note, Central Health respects the good judgment and proposed language of the OIPC concerning its additional recommendation "for a provision allowing the custodian to refrain from notifying an affected individual of a breach who would have otherwise been required to be notified where doing so "could reasonably be expected to result in a risk of serious harm to the mental or physical health or safety of the individual who is the subject of the information or another individual."

- ***Home Care***

Concerning the OIPC submission regarding home care, it is implied that home support agencies meet the definition of custodian and therefore are accountability under the *Act*. This is consistent with Central Health's position and recommendation that home support agencies be included under the regulations and designated as custodians for the purpose of paragraph 4(1)(p) of the *Act*:

> *In this Act, "custodian" means a person described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with the performance of the person's powers or duties or the work described in that paragraph:*
>
> *(p) a person designated as a custodian in the regulations.*

The initial Central Health submission is noted below for ease of reference.

Definitions under Personal Health Information Act			
Legislative provision	Detail	Identified issue	Action Requested
Definition of Custodian, section 4 of the *PHIA*	Home support agencies interface with	Section 8 of *PHIA*, application, applies to custodians and impacts accountabilities for information management under the *Act*.	Consider role and implications of inclusion of home support agencies under

Definitions under Personal Health Information Act			
Legislative provision	Detail	Identified issue	Action Requested
	RHAs, often serving a shared client population, and providing health care services regulated by RHAs in the province.	Currently, home support/care agencies are not specifically included under the definition of custodian though they maintain health care records and are engaged in the provision of health services under the standards and license of the Department of Health, as regulated by RHAs in the province.	definition of custodian for regulation of PHI in the custody and control of these private enterprises, or specific exclusion under subsection 4(2) of the *PHIA*.

As referenced by the OIPC submission, section 4(1)(f) of the *PHIA* designates a health care provider as a custodian and "depending on whether the care being provided meets the definition of health care, home support agencies would fall under this definition." Recognition of home care agencies as custodians would have the effect of clarification of role and obligations for protection of personal health information under the *Act*. As stated by the OIPC submission, "generally speaking these agencies should have the capacity to develop policies and procedures and to ensure that their employees are appropriately trained."

A further review of the current provisions of the *Act* is provided to support the recommendation for designation of home care agencies as custodians. Of specific relevance, section 4(1)(f) appears applicable though does not specifically delegate these agencies as custodians:

> *In this Act, "custodian" means a person described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with the performance of the person's powers or duties or the work described in that paragraph:*
>
> *(f) A health care provider; where "health care provider" is defined as a person, other than a health care professional, who is paid by MCP, another insurer or person, whether directly or indirectly or in whole or in part, to provide health care services to an individual;*

According to this analysis, two components are required for home support agencies to meet the definition of custodian as defined by the *Act*:

- Custody or control of personal health information; and
- Provision of health care services to an individual.

Review of the Provincial Home Support Operational Standards (2005, November) indicates an extensive home support assessment is completed for all clients of the program including physical, mental and social indicators of health. These assessments, including Advance Healthcare Directives, if applicable, as well as other information required by "Standard 8.130 Required Documentation," compose individual records of personal health information retained for clients by home support agencies. Likewise, personal health information including health status, service needs, care providers, medications, etc., may be regularly disclosed to home support agencies within the circle of care by implied consent pursuant to section 24(2) of the *Act*. This custody or control of personal health information implies home support agencies function as custodians and as such are accountable under the *PHIA*.

Concerning the second component, provision of health care services, section 2(1)(h) of the *Act* defines health care as follows:

> *"Health care" means an observation, examination, assessment, care, service or procedure in relation to an individual that is carried out, provided or undertaken for one of the following health-related purposes:*
>
> *(i) The diagnosis, treatment or maintenance of an individual's physical or mental condition;*

The Provincial Home Support Program Operational Standards references home support agencies as providing care, service management and planning services to clients. Furthermore, the standards refer to delegation of nursing function to home support workers "to perform selected nursing tasks for individuals who require regular assistance related to their activities of daily living." This implies the potential for provision of health care services to individuals by home support agencies, and based on this interpretation may satisfy the requirement for provision of health care by home support agencies.

Concerning application of the *PHIA*, section 8 refers to custodians who collect, use, and disclosure personal health information and prescribes accountabilities for secure management of information in the custody or control of custodians. Currently, home care agencies are not specifically included under the definition of custodian though they maintain personal health information and are engaged in the provision of health services, as regulated by RHAs in the province. Designation of home care agencies as custodians for the purpose of paragraph 4(1)(p) of the *Act* is recommended to support clarification of role and obligations for protection of personal health information under the *PHIA*.

- ***OIPC Recommendation to Amend Section 42(2) of the PHIA***

The recommendation to amend section 42(2) of the *Act*, as proposed by the OIPC, is applauded and is consistent with Central Health's proposal regarding disclosure by a custodian to law enforcement for fraud detection and/or prevention. If amended as proposed, this will provide legal authority for disclosure to law enforcement to detect or prevent fraud. Currently, the provision specifically notes discretionary disclosure to another *custodian* for the purposes of fraud detection or prevention, though excludes disclosure to someone other than a custodian for this specific purpose. Though the provision currently implies disclosure for enforcement purposes, the language of the provision as it currently exits, may restrict disclosure to law enforcement for this specific purpose. Section 42(2) states as follows:

> *(2) A custodian may disclose personal health information, including information relating to a person providing health care, without the consent of the individual who is the subject of the information to another custodian where the custodian disclosing the information has a reasonable expectation that disclosure will detect or prevent fraud, limit abuse in the use of health care or prevent the commission of an offence under an Act of the province or of Canada.*

It is uncertain whether this is the specific intention of the provision, or merely an oversight, as disclosure to another custodian would not have the likely effect of investigation of an offence under the Criminal Code of Canada, for example, as the current provision appears to suggest. As the provision currently exists, it may have the effect of limiting or restricting disclosure to law enforcement for this specific purpose. Noteworthy, section 42 requires mandatory disclosure…*"to a person carrying out an inspection, investigation or similar procedure that is authorized by or under…another Act or an Act of Canada,"* though this section may not apply where an investigation is not occurring and may not specifically authorize disclosure for enforcement purposes.

It is the contention of Central Health that amendment of the provision to include an individual, in addition to a custodian, would have the intended effect of detection or prevention of fraud, and limit abuse in the use of health care or prevent the commission of an offence under an Act of the province or of Canada.