

PHIA Review Input from the Adult Protection Program of CSSD

The **Adult Protection Act** protects the adults of Newfoundland and Labrador who are at risk of abuse and neglect, and who do not understand and appreciate that risk. A five-year statutory review of the Act was completed in 2020, which led to the development and proclamation of the **Adult Protection Act, 2021** on December 16, 2022.

The Act is primarily operationalized by the four regional health authorities (“RHAs”), who conduct evaluation and investigation of reports that adults are “in need of protective intervention” and have a mandate to apply for warrants to remove adults as well as temporary orders from the court to intervene with the adult. The RHAs also recommend to the Provincial Director when they believe a more permanent order is needed to ensure the safety of the affected adult. CSSD oversees the legislation, and appoints the Provincial Director. In that regard, CSSD staff establish the policies and procedures to be used by RHA staff and conduct litigation in which the Provincial Director is the applicant. Where the Provincial Director has been named the decision maker for a particular adult, CSSD is engaged in operational decisions for those adults.

By virtue of the process, the vast majority of information collected through the processes of the APA is stored and secured within the regional health authorities. This includes but is not limited to: adult protection reports, capacity evaluations, investigations, clinical notes and court documents. The APA policies established have always sought to have information collected under the APA housed separately from the day to day work of clinicians in the RHAs, however this practice has not been followed consistently. The recent amendments to the APA effected this requirement in regulations as an effort to ensure compliance. However, to date, much information about adult protection is still being documented by staff on a patient’s health record and is commingled with other types of information and historical files remain commingled.

Most staff of the RHAs are familiar with and follow procedures that support the application of PHIA. Their systems and information management policies are geared toward that legislation. In the adult protection practice, it has been apparent that there is a singular view that PHIA must be applied and that the provisions of the APA are subjugated to the provisions of PHIA where they differ.

CSSD’s understanding of PHIA is that in order to be governed by PHIA, two criteria need to be established: the information is collected or held by a “custodian”; and the information is “personal health information” in accordance with PHIA. In many cases, CSSD believes that neither criteria are met through the work undertaken in adult protection. And that while some collection and holding of information may occur by “custodians” within the meaning of PHIA – this information is collected for the purpose of the APA is distinct from and not meet the definition of being “personal health information”.

In current practice, RHA staff are very resistant to this view, and in particular, are of the view that all information documented in the health record must be governed by PHIA, and cites s.11 that to the extent that the APA conflicts with PHIA, that PHIA is to be applied. CSSD is concerned that not only is s.11 being applied broadly, not taking into account the provisions of s.11(3), but that since staff of RHAs are operationalizing the APA, that the current interplay between the regimes is unnecessarily confusing for those trying to administer it.

The new APA and associated regulations and policies also include new provisions for the review of information request denials, as well as updated provisions and forms to guide the request and disclosure of adult protection information in general. This includes the following steps:

- A person can make a request for APA information to the applicable RHA, as this is where the vast majority of APA information is held. A form has been developed for this process. In the event the requested information concerns an adult under the care and custody of the provincial director (in CSSD), the RHA will also send the request to CSSD.
- The RHA will vet the request in accordance to Section 33 of the Act and the policies and procedures.
- The RHA will provide a written response to the applicant and include the provisions of the Act that apply to the information not disclosed.

In the event a person is denied information, the regulations have created a new review process for such denials. This includes:

- Where a person is denied the information, the person may request CSSD review the denial. A form has been developed for this process.
- The regulations outline timelines on this process, including: a five day timeline for the RHA to send pertinent documentation to CSSD and a 90 day timeframe for CSSD to complete the review.
- The results of the review will be provided by CSSD to the person in writing. If the review determines that additional documents should have been disclosed, they will be provided by the Department within 90 days of the receipt of the written application.

CSSD has met resistance in applying these provisions as well, with RHA staff citing the provision of PHIA as the only regime applicable to information held on the patient's health record.

Possible Resolutions

The purpose of the new provisions in the APA are to support the protection and confidentiality of adult protection information, ensure that the sensitive information gathered there about adults is kept as confidential as possible and appropriate, as well as standardize information

request processes under the Act. **More importantly, these updates have been developed on the premise that personal information collected for the purposes of an adult protection file is governed by the provisions of the Act, except where the information is properly governed by another Act.**

While the developed updates and clarity were welcomed by the RHAs, it has become apparent that the scope of PHIA in relation to APA information has not been clarified and pertinent stakeholders have been reluctant to implement the above updates due to same. Given PHIA is currently under review, CSSD sees this as an opportunity to clarify this relationship to ensure that adult protection information is appropriately protected moving forward. Specifically, CSSD would seek to have the APA noted in s.9 of the current PHIA or another measure that would ensure that there is clarity around how information created, collected and held in relation to an adult protection matter, is governed, even where it is held by an RHA. We are available to discuss these concerns and possible solutions further, at your convenience.