



# Personal Health Information Act

## Disclosures Without Express Consent

Office of the Information and Privacy Commissioner for Nova Scotia

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## INTRODUCTION

Health custodians are entrusted with some of our most private and sensitive personal information. Traditionally, health custodians have carefully guarded that personal health information. But from time to time, other organizations request that health custodians disclose personal health information to them for some other purpose. For example, police may be investigating a crime and believe that their suspect suffered an injury for which he or she is likely to seek treatment at the local emergency department. They may seek information from the local emergency department in hopes of capturing their suspect. Is the identity of an individual at an emergency department personal health information? Can the health custodian disclose the information without the consent of the individual?

Another example is when a young adult seeks mental health treatment. If the young adult is at risk of harm to herself can the health custodian disclose personal health information to the young adult's parents? If so, under what circumstances?

These guidelines are designed to walk health custodians in Nova Scotia through a four-step process when they are faced with a request for disclosure of personal health information without consent. The four-step approach will help ensure that any disclosure takes into account the rules in the *Personal Health Information Act (PHIA)*.

To assist readers, each rule described below includes a reference to the relevant section of *PHIA*. Health custodians should always take the time to read the exact section of *PHIA* they are relying on to authorize a disclosure to ensure that the circumstances fit the rule.

## GENERAL RULE

Under *PHIA*, a custodian must have the individual's consent to collect, use or disclose personal health information, or the collection, use or disclosure must be permitted or required by law (s. 11).

Express consent is required for the disclosure of personal health information by a custodian to a non-custodian unless required or authorized by law (s. 43). *PHIA* and other statutes provide authority for non-consensual disclosures in limited circumstances.

## APPROACH

The analysis of whether or not a disclosure of personal health information is authorized under *PHIA* involves a four-step process:

1. Is the information in question “personal health information” within the meaning of *PHIA*?
2. Does *PHIA* permit the disclosure without the consent of the individual?
3. Even if authorized, should the health custodian disclose the information?
4. Has the authorized disclosure been properly documented?

*PHIA* defines disclosure as making the information available or releasing it to another person. Keep in mind that even if *PHIA* permits disclosure without consent, best practice is to get consent whenever possible (s. 41(1)). Where express consent is required, it can be given orally or in writing (s. 16).

Also note that providing information to an “agent” is not a disclosure under *PHIA* (s. 29(2)). An “agent” is defined in *PHIA* (s. 3(a)) and includes a person who, 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 purposes. Agents can include employees of a custodian, volunteers, insurer, lawyers retained by the custodian and liability protection providers. At the end of this document there is a discussion that explains the seven essential rules about sharing personal health information with agents.

Use the following table to determine if a disclosure of personal health information without consent is authorized.

**PHIA DISCLOSURE DECISION TABLE**

**Step 1: Is the information “personal health information” (both recorded & unrecorded)?**

If one or more of the following statements apply, the requested information is personal health information (phi) and so the *PHIA* disclosure rules also apply.

- |   |  |
|---|--|
| 1. The information relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family.  |  |
| 2. The information relates to the application, assessment, eligibility and provision of health care to the individual, including the identification of a person as a provider of health care to the individual. |  |
| 3. The information relates to payments or eligibility for health care in respect of the individual.   |  |
| 4. The information 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.    |  |
| 5. The information is the individual's registration information, including the individual's health card number.   |  |
| 6. The information identifies an individual's substitute decision-maker.  |  |

If one or more of the following statements apply, the *PHIA* disclosure rules do not apply.

- |  |                 |
|--|-----------------|
| 1. <b>Employee information:</b> PHI does not include the identifying information contained in the record if the record relates primarily to an employee or agent of the custodian and the record is created or maintained primarily for a purpose other than the provision of health care or assistance in providing health care to the employee or agent. | Not phi         |
| 2. <b>Aggregate information:</b> <i>PHIA</i> does not apply to statistical, aggregate or de-identified health information.   | Not <i>PHIA</i> |
| 3. <b>Age of records:</b> <i>PHIA</i> does not apply to records that are 120 years old or 50 years after the death of an individual (whichever is earlier).  | Not <i>PHIA</i> |

## Step 2: Is the disclosure authorized?

If the information in question is personal health information within the meaning of *PHIA* (step 1), you must next determine whether the disclosure is authorized either because there is implied consent to the disclosure or because consent is not required.

Using the table below, identify all potential authorities for the proposed disclosure. It is very important to read each authority carefully and ensure that all of the requirements of the authority are met.

### *Implied consent*

Health custodians may disclose personal health information based on implied consent in two circumstances:

1. **Provision of health care:** A custodian may disclose personal health information about an individual to a custodian involved in the individual's health care if the disclosure is reasonably necessary for the provision of health care to the individual (ss. 36 and 25(2)(b)).
2. **Family or close personal relationship:** A custodian may disclose personal health information to family or an individual in a close personal relationship if the information is given in general terms and concerns the presence, location and general condition of the individual on the day on which the information is disclosed and the disclosure is not contrary to the express request of the individual (s. 37).

### *Consent not required*

A custodian may disclose personal health information without consent in limited circumstances as follows:

#### **To another custodian:**

1. If the custodian disclosing the information has a reasonable expectation that the disclosure will prevent or assist an investigation of fraud or prevent the commission of an offence under an enactment of a province or Canada (s. 38(1)(a)).
2. For the purpose of ensuring quality or standards of care within a quality review program (s. 38(1)(f)). Note in May 2015 this authority was repeated in the *Quality Improvement & Information Protection Act*, SNS 2015, c. 8.
3. For the purpose of determining or verifying an individual's eligibility for insured services (s. 38(1)(m)).

#### **Safety and treatment-related disclosures:**

4. To any person if the custodian believes the disclosure will avert or minimize an imminent and significant danger to health or safety of any person or class of persons (s. 38(1)(d)).
5. For the purpose of risk management or patient safety within the custodian's organization (s. 38(1)(t)).
6. To a non-custodian for the purpose of facilitating assessment, care or treatment services for the individual and with authorization of the Minister (s. 39)<sup>1</sup> (see further discussion below on disclosures for the purpose of facilitating assessments).

<sup>1</sup> Exchange of phi under this section may involve police and mental health service providers for example. Exchanges may include information necessary to adequately assess the situation, engage identified individuals within the formal mental health system, assist them in avoiding unnecessary utilization of emergency and inpatient services, determine obstacles to engagement with outpatient and/or community based services, and jointly plan an appropriate intervention.

**Step 2: Is disclosure authorized?**

***Consent not required (cont'd)***

**Correctional facilities:**

7. To an official of a correctional facility in which the individual is being lawfully detained if the purpose is to allow the provision of health care (s. 38(1)(e)) (Health Information Transfer Form).

**To a representative of an individual or following death:**

8. To a person legally entitled to make health care decisions on behalf of the individual, such as a legal guardian or administrator of the estate (for the purpose of the estate) (s. 38(1)(b)).
9. To a proposed litigation guardian or legal representative of the individual for the purpose of having the person appointed as such (s. 38(1)(o)).
10. To a litigation guardian or legal representative who is authorized under the Civil Procedure Rules or by a court order (s. 38(1)(p)).
11. Custodians may disclose personal health information of an individual who is deceased in limited circumstances (identification, reasonable notification, organ donation (s. 40(1)).

**In relation to regulation, administration and planning of health care:**

12. To a regulated health profession body that requires the information for the purpose of carrying out its duties under an enactment (s. 38(1)(c)).
13. To the Nova Scotia Prescription Monitoring Board for monitoring prescriptions pursuant to the *Prescription Monitoring Act* (s. 38(1)(h)).
14. Where disclosure is reasonably necessary for the administration of payments in connection with the provision of health care or for contractual or legal requirements in that connection (s. 38(1)(r)).
15. To the Canadian Institute for Health Information to assist in the planning and management of the health system (s. 38(1)(i)).
16. To a prescribed entity (none have been prescribed) for the planning and management of the health system (s. 38(1)(j)).
17. To the Minister for the purpose of planning and management of the health system (s. 38(1)(g)).
18. From the Province to another provincial or territorial government or the Government of Canada to assist in the planning or management of the health system (s. 38(1)(k))
19. To the Minister for the purpose of creating or maintaining an electronic health record (s. 38(1)(u)).

**Step 2: Is disclosure authorized?**

***Consent not required (cont'd)***

**Legal proceedings, law and investigations:**

20. For the purpose of complying with a summons, order or procedural rule that relates to the production of information in a proceeding (s. 38(1)(q)).
21. For the purpose of a proceeding or a contemplated proceeding in which the custodian or an agent is expected to be a party or witness (s. 38(1)(s)).
22. The disclosure is required or permitted by law or a treaty, agreement or arrangement made pursuant to this Act or another Act of the Province or the Parliament (s. 38(1)(l)). Examples include the *Children and Family Services Act*, *Gunshot Wounds Mandatory Reporting Act*, *Adult Protection Act*, and *Health Protection Act*.
23. To a person carrying out an inspection, investigation or similar procedure that is (s. 38(1)(n)):
  - (i) Authorized
    - by a warrant; or
    - by or under this Act or another Act of the Province or Parliament (for example the *Fatality Investigations Act*).
  - (ii) For the purpose of
    - complying with the warrant; or
    - facilitating the inspection, investigation or similar procedure.
  - (iii) Subject to the requirements and restrictions, if any, that are prescribed (none have been prescribed).
24. An agent or former agent who receives personal health information for the purpose of a proceeding or contemplated proceeding may disclose the information to a professional advisor if the advisor is under a professional duty of confidentiality. (s. 38(7)).



### Step 3: Should you disclose the information?

If you have identified one or more authorities that permit disclosure of the personal health information (step 2), you must next ensure that you follow best privacy practices and further, that if you have discretion as to whether or not to disclose the phi, you properly exercise your discretion. The table below will assist you in identifying the relevant questions that must be addressed.

1. If the disclosure is authorized, identify the minimum amount of phi necessary to meet the authorized needs of the requester.

2. Is the disclosure authority such that the disclosure is mandatory (reasons 20, 21, 22 above)? For example:

- Is there another statute that requires the disclosure?
- Is there a court order?
- Is there a warrant or subpoena?

If so, you can skip the next step on exercise of discretion because you must comply with any mandatory requirement. Read the statutory provision, court order, warrant or subpoena carefully and ensure that only information clearly captured by the mandatory authority is disclosed.

3. Except as noted above, disclosures without express consent under *PHIA* are discretionary. The law says that health custodians “may” disclose personal health information, not that they must disclose it. Review the proposed disclosure and determine whether or not you should exercise discretion in favour of disclosure. You may want to consider such things as:

- Your organization’s policy regarding disclosures without consent. The policy may limit the circumstances under which disclosure may occur and may also limit who is authorized to disclose the phi.
- Professional code of ethics requirements.
- Age of the records.
- Original purpose for collection versus purpose for disclosure.
- Expectations of the patient.
- Sensitivity of the information.
- Past practice of your organization.

### Step 4: Complete documentation requirements

1. Disclosures without consent must be documented (s. 42(1)).

2. The documentation must include:

- A description or copy of the phi disclosed;
- The name of the person or organization to whom the phi was disclosed;
- The date of disclosure; and
- The authority for the disclosure (s. 42(2)).

## NON-CUSTODIANS

### **Note on further use or disclosure of personal health information by non-custodians**

*PHIA* has rules for the further use and disclosure of phi by non-custodians. The key points are:

- A non-custodian does not become a custodian merely by virtue of its collection of phi (s. 45(1)).
- A non-custodian shall not use or disclose phi for any purpose other than the purpose for which it was disclosed or for the purpose of carrying out a legal duty (s. 45(2)).
- A non-custodian shall not use or disclose more of the information than is reasonably necessary to meet the purpose of the use or disclosure unless required by law (s. 45(3)).

## AGENTS

Health custodians may provide personal health information to their agents in limited circumstances under *PHIA*. “Agent” means a person who, with the authorization of a custodian, acts for or on behalf of the custodian in respect of phi for the purposes of the custodian and not the agent’s purposes – whether or not paid. Agents include employees, volunteers, the custodian’s lawyer and insurer (s. 3(a)).

A regulated health professional is not a custodian in respect of phi that the person collects, uses or discloses while performing the person’s powers or duties as an agent of a custodian (s. 6(2)).

Seven essential rules about sharing phi with agents are:

1. Providing phi between a custodian and an agent is a use and not a disclosure (s. 29(2)).
2. Agents are permitted to collect, use or disclose phi only in the same circumstances that the custodian is permitted or required to collect, use or disclose phi (s. 28).
  - a. Custodians shall not collect, use or disclose phi if other information will serve the purpose (s. 24).
  - b. Collection, use or disclosure of phi must be limited to the minimum amount of phi necessary to achieve the purpose (s. 25(1)).
3. Custodians shall limit the use of phi to those of its agents who need to know the information to carry out the purpose for which the information was collected (s. 25(2)(a)).
4. Custodians may use phi for educating agents to provide health care (33(c)).
5. If a custodian is authorized to use phi for a purpose, the custodian may provide the information to an agent to use for that purpose (29(1)).
6. Where the custodian is permitted to use without consent, the custodian can provide the information to an agent for that same purpose (s. 35(2)).
7. The agent shall notify the custodian if phi is lost or accessed by unauthorized persons (28(3)).

## QUESTIONS

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