

The Personal Health Information Act

A Brief Summary for HEALTH CARE FACILITIES

INTRODUCTION

The Personal Health Information Act will affect nearly every person or organization that maintains health information in Manitoba, including all health information networks. This brief summary gives a general idea of your health care facility's responsibilities under the Act. For further detail, please review the legislation itself, including the regulations. Copies are available from Statutory Publications, 200 Vaughan St., Winnipeg, MB R3C 1T5, phone 945-3101.

What is "personal health information"?

Personal health information is any information that:

- is recorded in any form;
- can be linked to an identifiable individual; and
- relates to an individual's health, health history, genetic makeup, health care, personal health identification number (PHIN) or other identifying information collected in the course of providing health care. *See s. 1(1) of the Act.*

What is a "trustee"?

For the most part, the Act focuses on the obligations of trustees in dealing with personal health information. The Act divides trustees into four categories:

- health care facilities
- some health professionals
- health services agencies (organizations which provide health care under an agreement with another trustee—the Victorian Order of Nurses and We Care are two examples)

- public bodies (such as provincial government departments and agencies, municipal governments, educational institutions and regional health authorities) *See s. 1(1) of the Act.*

The Act also imposes duties on information managers (who are hired by trustees to process, store or destroy personal health information, or to manage or service information systems) as well as employees of trustees. *See s. 1(1), 25, 63(2) and (3) of the Act.*

How do I know if my facility is defined as a health care facility under the Act?

The Act defines "health care facility" as:

- a hospital
- a personal care home
- a psychiatric facility
- a medical clinic
- a laboratory
- The Manitoba Cancer Treatment and Research Foundation
- a community health centre or other facility that provides health care and which is listed in the regulations. *See s. 1(1) of the Act.*

What are the obligations of a trustee?

A trustee's obligations fall into two main categories.

1. A duty to assist individuals in gaining access to their own personal health information.
2. A duty to protect the privacy of individuals in the collection, use, disclosure, security, retention and destruction of their personal health information.



I. ACCESS

What does “access” mean?

The Act puts in statutory form the common-law right of an individual to access his or her own personal health information. There are three elements to this right:

1. A right to examine personal health information.
2. A right to obtain a copy of personal health information.
3. A right to seek a correction of personal health information.

What are my facility’s obligations to someone wanting to examine his or her own personal health information?

The Act imposes on trustees an obligation to assist an individual in gaining access to his or her personal health information. Trustees are to respond to access requests “without delay, openly, accurately and completely.” Upon request, trustees must provide an explanation of any terms, codes or abbreviations that the individual does not understand. *See s. 6(2), 7(2) of the Act.*

Is an individual entitled to examine all his or her personal health information?

The Act permits trustees to withhold personal health information that falls into certain restricted categories. For example, access to personal health information may be refused if:

- revealing it would disclose confidential information about a third party
- there is a reasonable expectation that it would result in harm to the individual or someone else
- it has been compiled for litigation purposes.

For a complete list of reasons for refusing access, *see s. 11(1) of the Act.*

Even when trustees are allowed to refuse access to portions of an individual’s personal health information, they still have an obligation to allow

access to those portions of the individual’s personal health information that are not exempted by the Act. *See s. 11(2) of the Act.*

How much time does my facility have to respond to a request to examine personal health information?

The Act requires trustees to respond to an access request as promptly as possible and, in any event, within 30 days of the request. A failure to respond within 30 days will be considered a refusal to permit access. *See s. 6(1) of the Act.*

Is an individual entitled to copies of his or her personal health information?

Yes. The Act gives an individual the right to obtain a copy of any personal health information he or she is entitled to examine. *See s. 5(1) of the Act.*

Can an individual alter his or her personal health information without my facility’s consent?

No. An individual has a right to point out information he or she believes is incorrect and to ask the trustee to correct it. It is up to the trustee to decide whether a correction is needed. A trustee has 30 days to investigate the issue and make a decision about the request for a correction.

See s. 12(3) of the Act.

If the trustee agrees to the correction, the mistaken information should be stroked out (not erased) and the correct information added or cross-referenced in a way that anyone reading the record would be aware of it. *See s. 12(3)(a) of the Act.*

If the individual and the trustee disagree about a correction, the individual has a right to file a statement of disagreement, which must be attached to and form part of his or her health record. *See s. 12(4) of the Act.*

A trustee must pass on the correction or the statement of disagreement to anyone to whom the personal health information has been disclosed over the previous year. *See s. 12(5) of the Act.*

Besides the individual the information is about, who has a right to access personal health information?

All rights of an individual may be exercised by a representative of that individual. The Act identifies several representatives, including:

- a person with a written authorization to act on behalf of the individual
- the individual's proxy appointed in a health care directive
- the individual's committee appointed under *The Mental Health Act*
- the individual's parent or guardian if the individual is a child who is too young to make his or her own health care decisions.

For a complete list of representatives, *see s. 60 of the Act*.

No one other than the individual the personal health information is about or that individual's representative has a right to access his or her personal health information. A request for access to personal health information by anyone other than the individual or the individual's representative must be assessed under the provisions of the Act dealing with use and disclosure of personal health information.

II. PROTECTION OF PRIVACY

What are my facility's obligations concerning the protection of an individual's privacy with respect to personal health information?

A trustee's obligations, as set out in the Act, affect the:

- collection
- use
- disclosure
- security
- retention and
- destruction

of personal health information.

A. COLLECTION OF PERSONAL HEALTH INFORMATION

What are my facility's obligations when collecting personal health information?

A trustee has three main duties when collecting personal health information:

1. To notify the individual of the purpose for the collection of personal health information.
2. To collect only necessary personal health information—that is, the minimum amount required for the stated purpose.
3. To collect personal health information from the individual whenever possible.

How is the purpose for the collection of personal health information determined?

Determining the purpose for collecting personal health information is a critical requirement of the Act. The Act requires trustees to notify the individual of this purpose at the time the information is collected. Besides meeting this statutory obligation, identifying the purpose for the collection will help determine what information can be collected and how it can later be used.

The purpose for collecting personal health information will depend on the function of the particular facility as well as the circumstances in which the collection takes place. For example, a psychiatric facility is likely to collect personal health information for a different purpose than the emergency ward of a hospital. The personal health information needed when an individual comes to a clinic for an inoculation will likely be different from what is needed when someone enters a personal care home.

Why should trustees have to notify the individual of the purpose for the collection of personal health information?

This requirement is based on the principle that an individual has a right to make decisions about his or her own health care. Informing the individual as fully as possible about the reasons for collecting personal health information will allow him or her to make an informed decision about providing personal health information.

This principle is so important that the Act requires that, when personal health information is collected by someone who is not a health professional, he or she must advise the individual about someone who can be contacted to gain more information about the purposes for collecting the information. *See s. 15(1) of the Act.*

Must the individual always be notified of the purpose for the collection of personal health information?

Yes, except when identical or similar information is being collected for an identical or similar purpose as a recent collection. *See s. 15(2) of the Act.*

In what situations does the Act prohibit the collection of personal health information?

Stressing the need to respect individual privacy, the Act generally permits the collection from individuals of only as much information as is needed for specific purposes. What a trustee needs to know will largely depend on his or her purpose in collecting personal health information. The Act prohibits the collection of personal health information for:

- illegal purposes;
- purposes unrelated to the function or activity of the trustee; and
- purposes other than those disclosed to the individual as the reasons for the collection of the personal health information. *See s. 13 of the Act.*

Must personal health information be collected only from the individual directly?

The Act requires that, whenever possible, trustees must collect personal health information directly from the individual the information is about. *See s. 14(1) of the Act.*

This rule serves at least three important purposes:

1. It helps ensure the accuracy of the information.
2. It prevents trustees from revealing personal health information to others by the questions they pose.
3. It ensures that personal health information the individual wants to keep private is not revealed to the trustee.

When is it legitimate to collect personal health information from someone other than the individual it is about?

The Act permits collection from other sources (including other trustees) in specified circumstances. For example, it is permissible to do so when the individual has authorized it, when circumstances do not permit collection of the information from the person, or when the information supplied by the individual is likely to be inaccurate. For a complete list of exceptions, *see s. 14(2) of the Act.*

B. USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION

What is the difference between use and disclosure?

For the purposes of *The Personal Health Information Act*, “use” refers to what is done with the personal health information within the trustee organization.

“Disclosure” involves revealing personal health information outside the trustee organization to other trustees, to the individual’s friends and family or to other individuals.

Both use and disclosure involve revealing the information to someone. This may be done by permitting others to read it, sending it to them by mail, fax, or e-mail, or by revealing the information orally.

What obligations does the Act place on my facility when using or disclosing personal health information?

Trustees cannot use or disclose personal health information unless:

- it is necessary to accomplish the purpose for which the personal health information was collected; or
- the trustee has the informed consent of the individual it is about. *See s. 21, 22 of the Act.*

There are some exceptions to this general rule. For example, trustees may use personal health information for a purpose directly related to the purpose for which it was collected. In some cases, personal health information may be disclosed without the individual's consent as it is required to provide health care or for specific humanitarian purposes such as contacting the relative or friend of someone who is ill or injured, informing relatives of someone's death, and assisting in identifying a deceased person. Trustees may also use or disclose personal health information to prevent or ease a serious and immediate threat to the mental or physical health or safety of the individual, another individual or the public.

Health care facilities can also use personal health information without consent:

- to deliver, monitor or evaluate a health care program; or
- for research and planning related to health care. *See s. 21(d) of the Act.*

For more exceptions to the general rule, *see ss. 21, 22(2) and 23 of the Act.*

May personal health information be disclosed for research purposes?

The Act does not deal with statistical information that cannot be linked to an identifiable individual. This sort of information can always be used or disclosed for research purposes.

It is also possible to access information that does identify an individual if the individual has been advised at the time the information was collected

that it would be used for research purposes, or if the trustee obtains the individual's informed consent.

The only other way personal health information may be used for research is if approval is provided by:

- a health information privacy committee (described in *s. 59 of the Act and the Regulations*), if the trustee is the government or a government agency; or
- an institutional research review committee, if the trustee is not the government or a government agency.

These committees can only approve such requests if the researcher signs an agreement with the trustee guaranteeing that the personal health information will not be used for any purpose other than the research project for which it is to be disclosed. The trustee remains responsible for the confidentiality of the personal health information to which the researcher has been given access. *See s. 24 of the Act.*

Is it permissible to disclose personal health information to information managers?

Yes.

An information manager is defined in the Act as a person or body that:

- processes, stores or destroys personal health information,
- provides information management, or
- provides information technology services

for or to a trustee. *See s. 1(1) of the Act.*

The Act recognizes that, in order to perform their functions, information managers may require access to personal health information. Trustees may disclose personal health information to an information manager but only after the information manager has entered into a written agreement with the trustee that ensures that the personal health information is adequately protected. Moreover, a trustee remains responsible for any use an information manager makes of personal health information. *See s. 25 of the Act.*

C. SECURITY AND DESTRUCTION OF PERSONAL HEALTH INFORMATION

What security precautions must be taken with respect to personal health information?

The Act requires trustees to store personal health information in such a way that only those who need to obtain the information will have access to it. Personal health information should not be disclosed outside the trustee organization unless such a disclosure has been assessed to determine whether it is permitted by the Act. Personal health information must not be accessed even by people within the trustee organization unless it is determined that they need to have that access. *See s. 20(3) of the Act.*

All trustees must establish administrative, technical and physical safeguards to ensure the confidentiality and accuracy of personal health information. Among other things, these safeguards must include procedures to limit access to the information to authorized people and ensure that the electronic transmission of personal health information is not intercepted. For more information about security safeguards, *see s. 18 of the Act and the Regulations*

What are the rules concerning destruction of personal health information?

Personal health information must be destroyed in a manner that preserves its confidentiality. *See s. 17(2), (3) of the Act.*

All trustees must establish a written policy concerning the destruction of personal health information and must comply with it. *See s. 17(1) of the Act.*

Trustees must also keep a record of the destruction of personal health information, noting:

- the individual whose personal health information was destroyed;
- the time period to which the information relates;
- the method of destruction used; and
- the person responsible for supervising the destruction. *See s. 17(4) of the Act.*

III. ENFORCEMENT

A. THE OMBUDSMAN

What is the role of the Ombudsman in enforcing the Act?

The Ombudsman's role can be divided into two broad categories:

- supervising compliance with the Act generally. *See Part 4 of the Act.*
- dealing with complaints about specific violations of the Act. *See Part 5 of the Act.*

What sort of complaints can be made to the Ombudsman?

Individuals are permitted to make complaints to the Ombudsman about a failure by a trustee to comply with the provisions of the Act with respect to:

- access requests or
- protection of privacy. *See Part 5 of the Act.*

What powers does the Ombudsman have?

Among other things, the Ombudsman is empowered to investigate complaints and may also launch an investigation or an audit on his or her own initiative. The results of these investigations may be provided to a professional regulatory body for disciplinary action or to Manitoba Justice for prosecution. In addition, the Ombudsman is permitted to publish reports about compliance with the Act and must file an annual report with the Manitoba Legislature. *See s. 28, 34(3), 41, 48(2) of the Act.*

In carrying out his or her duties under the Act, the Ombudsman enjoys a wide variety of powers, including the power to require evidence under oath, to require the production of documents, to enter premises, and to obtain the assistance of the police. *See s. 28, 29, 30 of the Act.*

Is there a responsibility to assist the Ombudsman in carrying his or her duties?

Trustees have no general duty to assist the Ombudsman. However, they must comply with every order or request legitimately made by the Ombudsman. In addition, it is illegal to mislead or obstruct the Ombudsman in the performance of his or her duties. *See s. 29, 30, 63(1) of the Act.*

The Act also protects people who comply with orders or requests from the Ombudsman. For example, an employer may not punish or penalize any employee who has provided information to the Ombudsman in response to the Ombudsman's order or request. *See s. 65(2) of the Act.*

B. PENALTIES

What penalty is imposed for a violation of the Act?

The Act provides for a fine of up to \$50,000 for a violation of the Act. This fine can be imposed for each day that an offence continues. *See s. 64(1) of the Act.*

To what offences will this penalty apply?

This penalty applies to a variety of offences, including:

- deliberately erasing or destroying personal health information to prevent an individual from getting access to it;
- collecting, using, selling or disclosing personal health information in violation of the Act; and
- failing to protect personal health information in a secure manner. *See s. 63 of the Act.*

To whom will the penalty apply?

The penalty for a violation of the Act may be imposed against the health care facility itself but it may also be imposed against any director or officer of the health care facility that authorized, permitted or acquiesced in the offence. *See s. 64(2) of the Act.*

Employees of a health care facility may be prosecuted for deliberately erasing or destroying personal health information to prevent an individual from getting access to it, or for wilfully disclosing personal health information when his or her employer would not be permitted to disclose it. *See s. 63(1)(c), 63(2) of the Act.*

IV. MISCELLANEOUS

Who is responsible for ensuring that a health care facility complies with the Act?

The Act requires a health care facility to appoint at least one of its employees to be a "privacy officer." The role of a privacy officer is to:

- facilitate access by individuals to their personal health information, and
- facilitate the health care facility's compliance with the Act. *See s. 57 of the Act.*

The ultimate responsibility for a health care facility's compliance with the Act rests with its board of directors and officers. As noted earlier, directors and officers may be personally prosecuted for authorizing, permitting or acquiescing in a violation of the Act by a health care facility. *See s. 64(2) of the Act.*