

The Personal Health Information Act

A Brief Summary for

PUBLIC BODIES

INTRODUCTION

As an employee or administrator of a public body formerly governed by *The Freedom of Information Act*, you are undoubtedly aware of its replacement, *The Freedom of Information and Protection of Privacy Act* (FIPPA). The access provisions in *The Freedom of Information and Protection of Privacy Act* are very similar to those of *The Freedom of Information Act*, however, there are now provisions with respect to the privacy of personal information that you should review. You may be less familiar with this new statute's companion legislation, *The Personal Health Information Act* (PHIA), which will affect the way you carry out your duties if you maintain personal health information.

This brief summary is intended to give you a general idea of your public body's responsibilities under PHIA. It is not comprehensive. For a better understanding, you should review the actual legislation and its regulations. Copies are available from Statutory Publications, 200 Vaughan St., Winnipeg, MB R3C 1T5, phone 945-3101.

To help you, this summary will refer to specific sections in the Acts.

You should note that where personal health information is contained in a clinical record compiled in a psychiatric facility governed by *The Mental Health Act*, that Act prevails over PHIA. *See s. 4(3) of PHIA.*

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 PHIA.*

Personal health information includes health information your organization collects about individual clients of programs you administer. It also includes health information about your employees.

What is a "public body"?

"Public bodies" are defined in the same way in PHIA as in FIPPA. The list of public bodies as defined in these Acts includes:

- provincial government departments;
- provincial government agencies (defined as any board, commission, association, agency or similar body whose entire board of management is appointed by statute or the provincial Cabinet or any other organization designated in the regulations);
- the Executive Council Office;
- the office of a Minister; and
- local government bodies.

"Local public bodies" are:

- education bodies, including:
 - school divisions or school districts;
 - universities;
 - colleges; and
- other educational institutions designated in regulations.



- health care bodies, including:
 - hospitals;
 - regional health authorities;
 - hospital district boards;
 - health and social services district boards; and
 - other bodies designated in regulations.
- local government bodies, including:
 - the City of Winnipeg;
 - all other municipalities;
 - local government districts;
 - local committee and community councils;
 - planning districts; and
 - conservation districts.

See PHIA s. 1(1) and FIPPA s. 1.

Public bodies are identified in PHIA as “trustees” of personal health information. Other trustees include:

- health care facilities (such as hospitals, psychiatric facilities and personal care homes);
- health services agencies (organizations that provide health care under an agreement with another trustee—the Victorian Order of Nurses and We Care are two examples); and
- health professionals in private practice or employed by non-trustees.

See s. 1(1) of PHIA.

Who is responsible for making decisions and ensuring that a public body complies with PHIA?

PHIA provides that decisions made or opinions formed by public bodies may be those made or formed by the “head” of a public body as defined in FIPPA or a person designated by the head. *See s. 58 of PHIA and s. 81 of FIPPA.* “Head” is defined in FIPPA as:

- the Minister of a government department
- the chief executive officer of an incorporated government agency

- the Minister responsible for an unincorporated government agency
- for all other public bodies, the individual or group designated in regulations. *See FIPPA s. 1.*

What are the obligations of a public body as a trustee of personal health information?

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 under PHIA?

PHIA puts in statutory form the common law right of an individual to gain access to *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.

When an individual is requesting access to a record containing his or her personal health information Part 2 of FIPPA does not apply. They must request access under PHIA. *See s. 6 of FIPPA.*

What are a trustee’s obligations to someone wishing to examine his or her own personal health information?

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

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

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

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

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

Even when trustees are allowed to refuse access to some of an individual's personal health information, they still have an obligation to allow access to those portions of an individual's personal health information that are not exempted by PHIA. *See s. 11(2) of PHIA*.

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

PHIA 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 PHIA*.

Is a trustee required to provide copies of an individual's personal health information?

Yes. An individual is entitled to obtain a copy of any personal health information he or she is entitled to examine. *See s. 5(1) of PHIA*.

Can an individual alter his or her personal health information without a trustee'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 or not a correction is needed. A trustee has 30 days to investigate and make a decision about the request for a correction. *See s. 12(3) of PHIA*.

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 PHIA*.

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 PHIA*.

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 PHIA*.

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. PHIA 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*; or
- 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 PHIA*.

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 made under FIPPA.

What if an individual requests access to a file that contains both his or her personal health information and other personal information?

It is important to note the difference between personal information and personal health information. “Personal information” means recorded information about an identifiable individual, including the individual’s

- name;
- home address, telephone or facsimile number, or e-mail address;
- age, sex, sexual orientation, marital or family status;
- ancestry, race, colour, national or ethnic origin;
- religion or creed, religious beliefs, association or activity;
- personal health information;
- blood type, fingerprints or hereditary characteristics;
- political belief, association or activity;
- education, employment or occupation, or educational, employment or occupational history;
- source of income or financial circumstances, activities or history;
- criminal history, including regulatory offences;
- personal views or opinions, except if they are about another person;
- views and opinions expressed about the individual by another person; and
- identifying number, symbol or other particular assigned to the individual.

See s. 1 of FIPPA.

For the definition of personal health information please refer to page 1 of this summary. ***See also s. 1(1) of PHIA.***

When a file contains both personal health information and personal information, the individual must request access to:

1. personal health information under PHIA. A request for access under PHIA for personal health information may be verbal or written and must contain enough detail to identify the portion of the record the individual wishes to access. ***See s. 5(2), (3) of PHIA.***
2. personal information under FIPPA. A request for access under FIPPA for personal information must be in the prescribed form and contain enough detail to identify the portion of the record the individual wishes to access. ***See s. 8 of FIPPA.***

What if another statute of Manitoba prohibits or restricts access to an individual’s personal health information?

A trustee must refuse to permit personal health information to be examined or copied if the access to the information is prohibited or restricted by another law of Manitoba. ***See s. 4(1) of PHIA.***

II. PROTECTION OF PRIVACY

What are a trustee’s obligations concerning the protection of an individual’s privacy with respect to personal health information?

A trustee’s obligations, as set out in PHIA, affect the:

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

of personal health information.

A. COLLECTION OF PERSONAL HEALTH INFORMATION

What are a trustee'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 PHIA. Not only does PHIA impose a requirement on trustees to notify the individual of this purpose at the time the information is collected, but the identified purpose for the collection will help determine which information can be collected and how it can later be used.

The purpose for collecting personal health information will depend on the particular trustee collecting the information as well as the circumstances in which the collection takes place. For example, a university or school board is likely to have a different purpose for collecting personal health information about its students than Manitoba Labour will.

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 PHIA 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 reason personal health information is being collected. *See s. 15(1) of PHIA.*

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 PHIA.*

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

Stressing the need to respect individual privacy, PHIA 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. PHIA 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 PHIA.*

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

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

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 that 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?

PHIA 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;
- circumstances do not permit collection of the information from the individual; or
- the information supplied by the individual is likely to be inaccurate.

For a complete list of exceptions, *see s. 14(2) of PHIA*.

B. USE AND DISCLOSURE OF PERSONAL HEALTH INFORMATION

What is the difference between use and disclosure?

For the purposes of PHIA, “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 friends and family of the individual or to other individuals.

Both use and disclosure involve revealing personal health information to someone. This may be done by permitting others to read it, sending it to them by mail, fax, e-mail, or by revealing the information orally. The terms “use” and “disclosure” have the same meaning under FIPPA.

What obligations are placed on trustees by PHIA 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 PHIA.*

There are some exceptions to this general rule. For example, trustees may use the 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 to the extent necessary 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.

Public bodies and 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 PHIA.*

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

May personal health information be disclosed for research purposes?

PHIA 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 disclose, for research purposes, health 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. 24(2)(a), 59 of PHIA and the Regulations*), if the trustee is the government or a government agency; or

- an institutional research review committee, if the trustee is other than 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 PHIA.*

What if another statute of Manitoba prohibits or restricts disclosing the individual's personal health information?

A trustee must refuse to disclose personal health information if prohibited or restricted by another law of Manitoba. *See s. 4(2) of PHIA.*

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

PHIA defines an information manager 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 PHIA.*

PHIA recognizes that, in order to store or destroy data or to assist in managing information, 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 the personal health information is adequately protected. Moreover, a trustee remains responsible for any use an information manager makes of the information. *See s. 25 of PHIA.*

C. SECURITY AND DESTRUCTION OF PERSONAL HEALTH INFORMATION

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

PHIA 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 PHIA. The information must not even be accessed by people within the trustee organization unless it is determined that they need to have that access.

See s. 20(3) of PHIA.

All trustees are required to 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 about security safeguards, *see s. 18 of PHIA and Regulation 245/97.*

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 PHIA.*

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

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 PHIA.*

III. ENFORCEMENT

A. THE OMBUDSMAN

What is the role of the Ombudsman in enforcing PHIA?

The role of the Ombudsman is the same under both PHIA and FIPPA and can be divided into two broad categories:

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

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 PHIA with respect to:

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

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 PHIA. *See s. 28, 34(3), 41, 48(2) of PHIA.*

In carrying out his or her duties under PHIA, 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 PHIA.*

Is there a responsibility to assist the Ombudsman in carrying out 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, anyone who misleads or obstructs the Ombudsman in the performance of his or her duties is guilty of an offence. *See s. 29, 30, 63(1) of PHIA.*

PHIA 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 PHIA.*

B. PENALTIES

What penalty is imposed for a violation of PHIA?

PHIA permits 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 PHIA.*

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 PHIA; and
- failing to protect personal health information in a secure manner. *See s. 63 of PHIA.*

To whom will the penalty apply?

The penalty for a violation of PHIA may be imposed against the trustee itself but it may also be imposed against any director or officer of a trustee who authorized, permitted or acquiesced in the offence. *see s. 64(2) of PHIA*

Employees may also be personally prosecuted for wilfully disclosing personal health information in circumstances where their employer would be prohibited from doing so or 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 PHIA.*

Is there a defence to a charge for violating PHIA?

Yes. Trustees can escape conviction if they can demonstrate that they took all reasonable steps to comply with PHIA. *See s. 63(4) of PHIA*