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Personal Health Information Act (PHIA) Compliance
Adapted by the Nova Scotia Board of Examiners in Psychology

This document is intended to assist Registrants with some of the base requirements of PHIA. Throughout this Guide reference will be made to section numbers in brackets such as: “(section 4(2))”. These are references to the provisions of the PHIA unless otherwise indicated. This document is not to be construed as legal advice or to substitute for the psychologist’s own awareness of the legislation and his/her review of the supporting documentation provided by government. PHIA is new legislation. Thus, the descriptions provided below are based on current information and may change as experience with the legislation develops. Some provisions in the Act are simplified for the purpose of identifying issues for consideration. For legal advice, please speak to your own lawyer.

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1. What is PHIA?

PHIA is an act to govern personal health information. The Act received Royal Assent in December 2010 and became effective June 1, 2013. In short, the Act applies to custodians when they collect, use, disclose, retain, or destroy personal health information in the course of providing or supporting health care.

- Similar legislation exists in other provinces except PEI.
- Many fundamental requirements contained in PHIA are already required by the Personal Information and Protection of Electronic Documents Act (PIPEDA).
- PIPEDA has been in force since 2004 and is applicable to private practices.
- PHIA has been designed to be substantially similar to PIPEDA.

2. Who needs to pay attention to PHIA?

- All psychologists should be aware of this legislation.
- Those considered a “Custodian” under PHIA bear the primary responsibility.
- Employers (who are Custodians) can authorize their employees as “Agents” under PHIA. However, in such instances the employer must inform its agents of their duties under the Act.

3. Determining whether you are a Custodian according to PHIA

In order to be a custodian requires you to be designated as a custodian according to the Act or Regulations and to have custody or control over the health records containing personal health information. Custodians include the following:

- A psychologist who is operating a private practice,
- The IWK and district health authorities;
- A continuing-care facility licensed by the Minister under the Homes for Special Care Act or a continuing-care facility approved by the Minister;
- A home care agency that is approved by the Department of Health and Wellness and has a service agreement with a district health authority under the Health Authorities Act or with the Izaak Walton Killam Health Centre;
- A psychologist who is in private practice and is simply a tenant in the hospital would be a custodian of his/her own records;
- If services are provided by a psychologist as a result of a referral from the hospital, the psychologist would be the custodian for the records s/he created, and the subsequent report to the hospital would be part of the hospital's record, where the hospital would be the custodian. In that case, there are two custodians – the psychologist and the hospital;
- Those otherwise defined as a Custodian by PHIA and its Regulations.
- A psychologist who is employed by a custodian (e.g. a hospital) would be considered an “agent” of the custodian;

The following are not custodians under PHIA:

- Organizations under the Department of Community Services;
- Federal Institutions;
- Public schools in the province. As part of the consultation process, the Department of Health and Wellness and the Department of Education agreed that schools and school boards would not be designated as custodians. The Department of Education indicated that the school psychologists' records would be part of the student record. The Department of Health and Wellness determined that a psychologist in this case is not the custodian of the records as s/he does not have custody or control of the record, and the organization who does have custody is not a custodian under PHIA.

4. What is personal health information as it relates to healthcare?

Personal health information is defined as identifying information about an individual, whether living or deceased (in both recorded and unrecorded forms), if 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;
- 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;
- relates to payments or eligibility for health care in respect of the individual;
- 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;
- is the individual's registration information, including the individual's health-card number; or
- identifies an individual's substitute decision-maker.

Identifying information means information that identifies an individual, or where it is reasonably foreseeable could identify an individual when used alone or with other information.

For PHIA to apply, the personal health information that is collected, used, or disclosed must be in relation to the provision of health care or for the planning and management of the health system (section 6(1)). Therefore, PHIA does not apply to every piece of personal health information in Nova Scotia; it only covers the management of personal health information which is collected, used, or disclosed for health care-related purposes.

Specifically, *PHIA* does not apply to identifying information in a record of a custodian where:

- (a) the identifying information contained in the record relates primarily to an employee or agent of the custodian; and
- (b) 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 (section 4(2)).

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 or more of the following health-related purposes:

- the diagnosis, treatment or maintenance of an individual's physical or mental condition;
- the prevention of disease or injury;
- the promotion and protection of health;
- palliative care;

- the compounding, dispensing or selling of a drug, health-care aid, device, product, equipment or other item to an individual or for the use of an individual, under a prescription, or
- a program or service designated as a health-care service in the regulations.

***Important:* The above information should be used by the custodian to determine whether information is personal health information subject to PHIA, not the presence or absence of information on an individual's clinical file.**

5. Steps to Ensuring Compliance as a Custodian:

- It is recommended that you first read this document in its entirety and then return to the beginning and visit the referenced items.
- All information including the Act and many additional resources are available from the Government's website.
- Government has provided a TOOLKIT FOR CUSTODIANS: A TOOLKIT TO THE PERSONAL HEALTH INFORMATION ACT. Hereafter referred to as the "Toolkit".
- The Toolkit is available as one document or individually by chapter.
- Government has also provided a number of useful templates. Keep in mind these are generic for healthcare providers so you will need to adapt them for your own purposes.
- To access the Act, Toolkit and templates, click on the below URL. You will need to scroll down on the resulting page to locate the information organized by chapter and to locate individual templates
<http://novascotia.ca/dhw/phia/custodians.asp>
- All templates share the same URL, so the distinct name of the individual template is provided.
- Full URLs are provided to allow more efficient access to referenced items. Note: After a link is clicked, it may take a brief period of time before the resulting page opens.

Main Custodian Responsibilities

1. Prepare and Make Ready a Notice of custodian's purposes

- The custodian may either provide a notice or poster describing the purpose of the custodian's collection, use and disclosure of personal health information (section 15); or
- explain the purpose(s) to the individual.

A template: *Notice of Purposes* is available and should be consulted regardless of the method used:

<http://novascotia.ca/dhw/phia/custodians.asp>

Important note about Consent and Disclosure:

Even when PHIA becomes effective, psychologists who are custodians can adhere to the same consent process that they followed in the past.

This is made clear by 41 (1) of PHIA:

A provision of this Act that permits a custodian to disclose personal health information about an individual without the consent of the individual does not prevent the custodian from obtaining the individual's consent for the disclosure.

Also pursuant to 17(1):

An individual may request to limit or revoke consent for the collection, use or disclosure of personal health information in the custody or control of a custodian by giving notice to the custodian.

2. Have a Written Retention and Destruction Schedule for Personal Health Information

A custodian under *PHIA* is required to have a written retention schedule for personal health information in its custody or under its control (section 50(1)). The *Act* does not set out a specific period for which records must be retained by a custodian, but does provide that the schedule set out all legitimate purposes for retaining the information, and the retention and destruction schedules associated with each purpose.

- information is only retained for as long as is needed to fulfill the identified purpose(s);
- legislation affecting retention takes precedence over retention times tied to specific purposes;
- the Standards of Practice for psychologists in Nova Scotia require a minimum retention period.

The Standards of Practice for psychologists in Nova Scotia state that psychologists' records shall be kept for a minimum of 10 years since the date of the last contact with the client. In the case of a client who was less than 18 years of age at the time of last contact, the records shall be kept for a minimum of 10 years following the client's 18th birthday.

Please see *Retention Schedule* Template:

<http://novascotia.ca/dhw/phia/custodians.asp>

3. Implement specific information practices

that:

- a. meet the requirements of the *Act* and the regulations;
- b. are reasonable in the circumstances; and
- c. ensure that personal health information in the custodian's custody or under its control is protected against theft or loss of the information, and unauthorized access to or use, disclosure, copying or modification of the information. (section 62(1)) 1

Chapter 8 of the Toolkits provides a number of excellent suggestions on the necessary considerations in an electronic environment.

<http://novascotia.ca/dhw/phia/documents/chapters/8-Information-Practices-EHR-and-EIS.pdf>

4. Implement, maintain and comply with a complaints policy for an individual to make a complaint under this Act (section 62(2));

Pursuant to section 62(2), every custodian is required to implement, maintain and comply with a complaints policy which outlines the process under which an individual may make a complaint. This requirement is part of the custodian's responsibilities to protect the personal health information of the individuals it serves.

Chapter 9 of the Toolkit provides specific information about how to comply with this requirement

<http://novascotia.ca/dhw/phia/documents/chapters/9-Complaints-under-PHIA.pdf>

5. Have the ability to create and maintain a record of user activity for any electronic information system it uses to maintain personal health information (section 63)

Individuals should be made aware that under *PHIA* they have the right to request a record of user activity that shows who has looked at their personal health information in an electronic format.

A record of user activity, if it exists, may be generated by taking specific fields from a system's audit log, if the information system enables such a practice. However, the following example illustrates the minimum that would be required if a record of user activity is requested.

Dr. John Smith a psychologist is operating his own private practice with a support staff person, an electronic scheduling and bookkeeping system, and paper records. Eileen, a client of the practice, requests a record of user activity. Dr. Smith explains to Eileen that his system is not able to produce a record detailing the specific times of access and by whom, but based on his hours of operation, and having only one staff member – he gives Eileen a record of user activity highlighting the following information:

Dr. Smith and his staff member (Carol) may have accessed Eileen's personal health information contained in the electronic system (appointment times, receipts for payment) at any point during the practice's hours of operation (Monday – Friday, 8 a.m.-5 p.m.) during the past six months. The staff members have legitimate work reasons to access the personal health information for scheduling appropriate appointment times and for filing any follow-up on any financial transactions.

6. Designate a contact person to perform the functions set out in the Act (section 67)

A custodian is required to designate a contact person under PHIA to enhance accountability. An individual health care practitioner may act as the contact person. For example, if a psychologist is operating his/her own private practice, he/she can be the contact person.

Under section 67, the contact person's duties are to:

- facilitate the custodian's compliance with the Act;
- ensure that all agents of the custodian are informed of their duties under the Act;
- respond to inquiries about the custodian's information practices;
- respond to requests for access to and correction of records*;
- receive and process complaints under the Act;
- facilitate the communications to and the training of the custodian's staff about the custodian's policies and procedures and about the Act; and
- develop information to explain the organization's policies and procedures.

****A note about access to and correction of personal health information.***

Just as was required by PIPEDA or other pertinent legislation, clients have a right of access to their personal health information and ability to ask for information to be corrected. Furthermore page 78 of the Toolkit explains the following:

The general principle under *PHIA* is that an individual has the right to access a record of personal health information about him/herself that is in the custody or under the control of a custodian (section 71). This provision is consistent with the long-standing principle stated by the Supreme Court of Canada that a patient is entitled, upon request, to examine and copy all information in their medical records. Under *PHIA*, this includes the right to request to examine a record or ask for a copy of a record (section 75).

There are exceptions to the individual's right of access. Under section 72(1); a custodian may refuse to grant access to all or part of the individual's personal health information if it is reasonable to believe that:

- a legal privilege restricts disclosure;
- another law prohibits disclosure;

- the information in the record was collected or created primarily for the purpose of ensuring quality or standards of care within a quality review program in the custodian's organization;
- the information in the record was collected or created in anticipation of or for use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded;
- the information was collected or created in the course of an inspection, investigation or similar procedure not yet concluded;
- access could result in a risk of serious harm to the treatment or recovery of the individual or to the mental or physical health of the individual;
- access could result in a risk of serious harm to the mental or physical health of another individual;
- access could lead to the identification of a person who provided information in the record to the custodian in circumstances in which confidentiality was reasonably expected;
- access could result in the release of another individual's personal health information.
- A custodian may refuse to grant access to some or all of an individual's personal health information where the custodian believes on reasonable grounds that the request for access is either frivolous or vexatious or is part of a pattern of conduct that amounts to an abuse of the right of access (section 81(1)). This should be rare justification for refusal.

Additional information about an individual's access to information:

- A custodian may only deny access to all or part of an individual's personal health information on reasonable grounds.
- The onus is on the custodian to justify the decision to deny access.
- An individual has a right of access to personal health information that can reasonably be severed from the part of the record to which the individual does not have access given the above-noted reasons (section 72(2)).
- The individual does not have to provide the reasons or purposes for which they are requesting the information (section 78).
- Under PHIA, an individual has a right of access to personal health information that can reasonably be severed from the part of the record to which the individual does not have access given the above-noted reasons.

Timelines and Fees for access to information

- Typically the custodian must respond as soon as possible but no later than 30 days after the request was made.
- The custodian may extend the deadline for a response for 30 days or longer with the Review Officer's permission (section 84(1)).

- A custodian may also charge fees. Page 5 of the Toolkit discusses Fees along with providing a schedule of the fees that may be charged for the various activities related to the request.
- No fee may be charged for a correction to personal health information.

A useful checklist to consult about the functions set out in the Act is the *Compliance Checklist*:

<http://novascotia.ca/dhw/phia/custodians.asp>

7. Prepare and make available a written privacy statement about the custodian's information practices, how to reach the contact person, how to request access and correction of the individual's record, and how to make a complaint (section 68).

Section 68 of the Act requires that a custodian make available to the public a written privacy statement explaining: the custodian's information practices; how to contact the designated contact person; how to obtain access to or request correction of a record; and how to make a complaint under PHIA to the custodian and to the Review Officer.

Please see *Written Privacy Statement Template*

<http://novascotia.ca/dhw/phia/custodians.asp>

6. Next Steps for a Custodian to Ensure Compliance with PHIA

- Ensure you have read this document in its entirety and visited the links and additional resources on the Government's website. In particular, the Toolkit delves more deeply into the application of PHIA.
<http://novascotia.ca/dhw/phia/custodians.asp>
- There is a chapter in the Toolkit that provides additional resources for consideration:
<http://novascotia.ca/dhw/phia/documents/chapters/Appendix-III-Resources.pdf>
- Consult with colleagues.
Psychologists are already required to comply with PIPEDA when operating their private practices. As mentioned, although there are differences between these pieces of legislation, PHIA is designed to be substantially similar to PIPEDA.

PHIA is new legislation and collaboration with colleagues can yield additional tips and strategies to help with compliance. It would be useful to include learning about and complying with PHIA as a Goal in your Continuing Competence Plan.
- Privacy and Access Office of the Department of Health and Wellness can be contacted with questions
Department of Health and Wellness
Privacy and Access Office
1894 Barrington Street
PO Box 488
Halifax, NS B3J 2R8

Phone: (902) 424-5419
Toll-free: 1-855-640-4765
e-mail: phia@gov.ns.ca
- Obtain legal advice when appropriate.
The Personal Health Information Act is paramount to any information provided in the Toolkit.
Tip: Most psychologists' insurance coverage provides some free legal consultation. Use it when necessary!
Also consider obtaining your own lawyer in complicated situations.