

## Health Care and Privacy Law

November 2004

### Privacy Law & The Health Care Sector

#### ***Personal Health Information Protection Act To Take Effect On November 1, 2004***

On November 1, 2004, two new pieces of legislation will establish a set of rules for the protection of personal health information ("PHI") in Ontario - the *Personal Health Information Protection Act* (the "Act") and the *Quality of Care Information Protection Act*.

The Act will have application in the health care sector in Ontario and will augment the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), which currently applies to the collection, use and disclosure of all types of personal information in the course of private sector commercial activity in Ontario. The Act establishes a comprehensive set of requirements for the collection, use and disclosure of PHI within the health care sector.

Some organizations, such as public hospitals, that were not subject to the requirements of PIPEDA will now find themselves subject to privacy legislation.

#### **Will the Act apply to you?**

The Act will apply to all health information custodians in Ontario. The definition of "Health Information Custodian" as defined in the Act broadly covers institutional and individual health care service providers such as doctors, nursing homes, laboratories, hospitals, community care access corporations and pharmacies. The Act will also apply to agents (such as medical secretaries, nurses and health care volunteers) who perform work on behalf of Custodians, to all individuals or organizations who receive PHI from Custodians and to all individuals or organizations who have custody of a health insurance number (such as insurance companies, employers, researchers and benefits providers).

PHI means identifying information about an individual, whether living or deceased within the past 50 years, such as information that:

- relates to the physical or mental health of the individual;
- relates to the provision of health care to the individual;
- relates to payments or eligibility for health care in respect of the individual; or
- is an individual's health insurance number.

Identifying health information held by Custodians in their capacity as employers is not considered PHI if the information is maintained for a non-health care purpose.

#### **If the Act applies, what are your information management obligations?**

Custodians must implement information management practices that include drafting a written description of their information practices and making this document publicly available; taking responsibility for the actions of agents to whom they disclose PHI; taking reasonable precautions to ensure the protection of PHI throughout its lifecycle (such as in during its retention, transfer and disposal); and notifying individuals whose PHI is stolen, lost, accessed, used or disclosed by unauthorized persons or sources.

#### **Collection, use and disclosure of PHI**

##### **Custodians**

Subject to certain limited exceptions, a Custodian may not collect, use or disclose PHI without express or implied consent. Generally, implied consent may be relied upon where a Custodian is involved in providing direct health care or assisting in providing health care to an individual and the Custodian has posted (or made readily available) a notice describing its information management practices. However, where a Custodian discloses PHI to another party for a purpose unrelated to the delivery of health care to the affected individual or where a Custodian wishes to use PHI (as opposed to non-health-related information) for fundraising or marketing purposes, express consent will be required. Whether consent is express or implied, an individual may withdraw any consent previously given.

# Goodmans<sup>LLP</sup> Update

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In specific, limited circumstances, Custodians may collect, use and disclose PHI without consent. Examples of collections and uses not requiring consent include risk and error management, quality of care improvements or maintenance, to obtain payment for services and for research purposes. Examples of permitted disclosures without consent include circumstances where it is not reasonably possible to obtain consent in a timely manner, where it is required to reduce or eliminate a significant risk of serious bodily harm, disclosures to researchers approved by a research ethics board or to medical officers of health for public information purposes and in contemplation of, or as part of, the sale of a medical/health practice.

## Non-Custodians

Generally speaking, the Act will not apply to non-Custodians (such as employers and schools) who hold PHI provided directly to them by the individuals to whom the information relates. Where non-Custodians receive PHI from a Custodian, the subsequent use and disclosure of the PHI by the non-Custodian will be governed by the Act. Importantly, the only permitted uses of all PHI disclosed by the Custodian to the non-Custodian will be restricted to the purpose or purposes for which the Custodian disclosed the information to the non-Custodian in the first place, or to carry out a statutory or legal duty.

## Access Requests

Individuals are entitled to request access to and correction of their own PHI held by a Custodian, subject to certain exceptions. The Act sets out procedures and rules for Custodians to follow in reaching their decision to grant or refuse an individual's request. Where a Custodian refuses a request, the individual will be entitled to file a complaint with the Information and Privacy Commissioner (Ontario), who will be responsible for overseeing compliance with the Act. Under the Act, there will be potential fines of up to \$50,000 for individuals and \$250,000 for corporations that have not complied with the Act.

It is important that affected individuals and organizations understand their obligations and comply with the requirements of the Act. If you have any questions about how the Act will affect you or if we can help you prepare your organization for compliance with the Act, please contact:

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