

Proposed HIPA Amendments

June 2024

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The Health Information Protection Act (HIPA) Proposed Amendments

Citizens

Subsection 10(2) – document disclosures	It is proposed that subsection 10(2) be amended to require a trustee to document or keep a record of when they disclose personal information without express consent unless the information system itself logs or records user activity.
Repeal - subsection 24(4)	It is proposed that subsection 24(4) be repealed. This provision allows a trustee to collect personal health information for “any purpose” with the consent of the subject individual; collection should only be for a specific purpose.
Repeal - subsection 25(1)(e)	It is proposed that subsection 25(1)(e) be repealed. This subsection allows a trustee to collect personal health information on an individual from public sources.
Subsection 26(3) – require express consent	It is proposed that subsection 26(3) be amended to add that “express” consent is required to authorize a trustee to access an employee’s or prospective employee’s personal health information.
Section 27 – additional disclosure provisions	It is proposed that section 27 be amended to clarify when it is appropriate to use or disclose personal health information for certain secondary purposes. These include when carrying out someone’s wishes with respect to donation of body parts, when a person is conducting an audit or reviewing an application for accreditation, and to the Canadian Institute for Health Information.
New Subsection 33(2), (3) – oral requests at hospital	It is proposed that when an oral request for personal health information is made by a patient in a hospital, that the trustee must respond within 24 hours.
Subsection 36(1)(d) – transfer within 15 days	It is proposed that section 36 be amended to require trustees to transfer a written request to another trustee within 15 days rather than 30 to be consistent with FOIP.
Subsection 38(1)(b) – release family health history	It is proposed that subsection 38(1)(b) be amended to release personal health information of third parties that was collected for the purposes of creating a family health history.

New subsection 39(2) – fee waiver	It is proposed that new subsection 39(2) be added to allow conditions under which a trustee may consider a request to waive a fee.
Subsection 42(1)(a) – may request a review of fees	It is proposed that subsection 42(1)(a) be amended to allow citizens to apply to the Commissioner to review a trustee’s decision regarding fees.
Subsections 45(1), (2) – third party intervention	It is proposed that subsections 45(1) and (2) be amended to allow for third party intervention in a review similar to provisions found in Alberta.
Government/Trustees	
Subsection 2(1) – new definitions	It is proposed that definitions for: “data matching,” “next of kin,” “disclosure,” “third party” be added. It is proposed that the definition of “record” be amended to explicitly include databases.
New subsection 22(4) – recoup costs	It is proposed a new subsection 22(4) be included to add a provision allowing the Government of Saskatchewan to recoup costs the Government incurs because of the failure of a trustee to comply with section 22.
Subsections 29(1)(c) and (d) – researchers to enter into agreements	It is proposed that these subsections be amended to require researchers to enter into written agreements with a trustee or designated archive.
New section 29.1 – data matching	It is proposed that new section 29.1 be added regarding data matching.
Section 39 – limiting charges	It is proposed that section 39 be amended to state that a trustee shall not charge more to provide access to personal health information than the costs for reproducing the record, and that a trustee shall not charge a fee for a record of user activity. These are similar to provisions found in both Alberta and Nova Scotia.
New Section 40.1 – abandoned requests	It is proposed that new section 40.1 be added to allow trustees to consider a request for access to personal health information to be abandoned under certain circumstances, and the right for an individual to request a review by the Commissioner when this occurs.
Subsections 43(1), (2) – consistent approach to discontinuing a review or investigation	It is proposed that subsections 43(1) and (2) be amended or replaced to align with language used in FOIP and LA FOIP when the Commissioner may discontinue a review or investigation.

Subsection 64(1), new subsection 64(3.4) – new offences	It is proposed that section 64 be amended to include offence provisions when someone knowingly collects, uses, or discloses personal health information, or knowingly gains access to personal health information in contravention of HIPA. This is similar to provisions found in Alberta and Nova Scotia.
Commissioner	
Repeal - subsections 4(4), (5) and (6)	It is proposed that these subsections be repealed. HIPA has many requirements for the use and disclosure of personal health information, as well as many years of solid case law on how to interpret HIPA. We no longer have a need for this override.
New Section 30.1 – notify Commissioner of breach	It is proposed that new section 30.1 be included to require trustees to provide notice of a privacy breach to an affected individual if there is real risk of significant harm to be consistent with FOIP and LA FOIP; when this occurs, the trustee must also notify the Commissioner of the privacy breach.
New Section 30.2 – submit PIAs	It is proposed that new section 30.2 be added to require trustees to complete and submit PIAs to the Commissioner in certain circumstances.
Sections 41 to 63 – consistent language adding investigations	It is proposed that these sections be amended, as necessary, to recognize that the Commissioner conducts investigations as well as review.
Section 44 – alignment with FOIP/LA FOIP, requiring immediate action	It is proposed that the requirement that the Commissioner provide notice of a review or investigation in “no less than 30 days” be modified to not include a time limit so that it aligns with amendments to FOIP and LA FOIP in 2018.
Section 46 – clarifying powers to produce, etc	It is recommended that section 46 be amended similarly to proposals made for LA FOIP and FOIP regarding the Commissioner’s powers.
Section 49 and New Sections 49.1, 49.2 – compliance and recommendations	It is proposed that section 49 be changed to allow the Commissioner to seek an order for compliance with his recommendations.
New subsection 53(d) – make procedures	It is proposed that new subsection 53(d) be added to support the Commissioner’s ability to make procedures.
New Section 53.1 – extra-provincial agreements	It is proposed that new section 53.1 be added regarding the Commissioner’s ability to enter into extra-provincial agreements when necessary to include language similar to what is found in FOIP.

Subsection 54(3) – disclosure authorized	<p>It is proposed that subsection 54(3) be amended to disclose personal health information in limited circumstances.</p>
<p>Other Items</p>	
Subsection 51(2) – clarifying what form of privilege	<p>It is proposed that this subsection be amended to include the phrase “including solicitor-client privilege.”</p>
New Section 64.1 – Statutory Review Period	<p>It is proposed that new section 64.1 be added to require a statutory review of HIPA every five years.</p>

This document provides details of the proposals to amend *The Health Information Protection Act* (HIPA). It provides some reasons for the proposed amendments and offers examples from other laws in other provinces or territories of Canada.

I - Amendments for Citizens

1. Subsection 10(2) - Trustee to Keep a Record when Disclosing without Consent

Section 10 of HIPA requires a trustee to take reasonable steps to ensure that it can inform an individual about any disclosures of that individual's personal health information made without the individual's consent, in some cases. It does not however, require the trustee to maintain a record of those disclosures.

Nova Scotia's (NS) *Personal Health Information Act* (PHIA) requires such records to be kept as follows:

- 42 (1) A disclosure of health information without consent must be documented.
- (2) The documentation must include
 - (a) a description or copy of the personal health information disclosed;
 - (b) the name of the person or organization to whom the personal health information was disclosed;
 - (c) the date of the disclosure; and
 - (d) the authority for the disclosure.

Newfoundland and Labrador's (NL) *Personal Health Information Act* (PHIA) also requires documentation of disclosures as follows:

Maintaining certain disclosure information

48. (1) Except as otherwise provided under subsection (2) or section 37, a custodian that discloses personal health information shall make a note of the following:

- (a) the name of the person to whom the custodian discloses the information;
- (b) the date and purpose of the disclosure; and
- (c) a description of the information disclosed.

(2) Subsection (1) does not apply where a custodian discloses personal health information by permitting access to the information stored in the information system of the custodian, provided that when the information is accessed, the database automatically keeps an electronic log of the following information:

- (a) the user identification of the person that accesses the information;
- (b) the date and time the information is accessed; and
- (c) a description of the information that is accessed or that could have been accessed.

The Northwest Territory's (NWT) *Health Information Act* (HIA) also requires a record of disclosure as follows:

84. (1) Subject to subsections (2) and (3), a health information custodian that discloses personal health information about an individual without his or her express consent, shall make a record of

- (a) the name of the person or organization to which the information is disclosed;
- (b) the date of the disclosure;
- (c) the purpose of the disclosure; and
- (d) a description of the information disclosed.

...

(3) Subsection (1) does not apply where a health information custodian discloses personal health information by permitting collection of information from an electronic record stored in an electronic health information system, if the system automatically keeps an electronic log

- (a) of the user identification of the person who collects the information;
- (b) of the date and time the information is collected; and
- (c) that identifies the information that is collected or that could have been collected.

Proposal

It is proposed that the existing subsection 10(2) of HIPA is repealed as it gives trustees permission to not inform patients/individuals of disclosures permitted by subsection 27(2). Subsection 10(2) should be replaced with the following wording.

10(2) A disclosure of personal health information without express consent must be documented unless the information system accessed automatically keeps a record of user activity.

2. Subsection 24(4) - Collection of Personal Health Information for Any Purpose with Consent

Presently, subsection **24(4)** of HIPA reads as follows:

24(4) A trustee may collect personal health information for any purpose with the consent of the subject individual.

This wording opens up the potential for abuse as it does not explicitly require “express” consent of the patient, and could authorize the collection of personal health information for purposes completely unrelated to diagnosis, treatment or care and other many secondary purposes already authorized.

Proposal

Repeal subsection 24(4).

3. Subsection 25(1)(e) - Collecting Personal Health Information that is Available to the Public

Presently, subsection 25(1)(e) of HIPA reads as follows:

25(1) Subject to subsection (2), a trustee shall collect personal health information directly from the subject individual, except where:

...

(e) the information is available to the public;

Trustees must collect personal health information directly from the subject individual unless otherwise authorized by HIPA, and when collecting personal health information from anyone

other than the subject individual, HIPA requires that trustees verify the accuracy of the information collected. Collecting information that is publicly available would be an indirect collection which, depending on the source, is not typically an accurate or reliable source of truth. As most trustees provide healthcare, relying on inaccurate personal health information can negatively impact patient care.

Proposal

Repeal subsection 25(1)(e).

4. Subsection 26(3) - "Express" Consent Required

Subsection 26(3) of HIPA reads as follows:

Restrictions on use

26(3) Nothing in subsection (2) authorizes a trustee as an employer to use or obtain access to the personal health information of an individual who is an employee or prospective employee for any purpose related to the employment of the individual without the individual's consent.

Section 26 of HIPA speaks to a trustee's use of personal health information that is in their custody or control. Subsection 26(3) of HIPA limits a trustee who is an employer from using or obtaining access to an employee's or prospective employee's personal health information for any purpose related to their employment without their consent. This consent should be "express", which means it should not be implied.

Proposal

Amend subsection 26(3) by adding the underlined as follows:

26(3) Nothing in subsection (2) authorizes a trustee as an employer to use or obtain access to the personal health information of an individual who is an employee or prospective employee for any purpose related to the employment of the individual without the individual's express consent.

5. Section 27 - Secondary Purposes

HIPA is not clear in terms of when it is appropriate to use or disclose personal health information for certain secondary purposes.

Some other secondary purposes are legitimate needs of the system but not presently clearly authorized by HIPA. These include risk and error management, quality improvement, internal management and sharing with family members in certain circumstances. However, de-identified information should be relied on wherever possible.

NL's PHIA includes the following:

Permitted uses

34. A custodian may use personal health information its custody or under its control for one or more of the following purposes:

...

(d) for the purpose of risk management or error management or for the purpose of activities to improve or maintain the quality of care or to improve or maintain the quality of related programs or services of the custodian;

Ontario's (ON) [Personal Health Information Protection Act](#) (PHIPA) provides as follows:

Permitted use

37. (1) A health information custodian may use personal health information about an individual,

...

(d) for the purpose of risk management, error management or for the purpose of activities to improve or maintain the quality of care or to improve or maintain the quality of any related programs or services of the custodian;

(e) for educating agents to provide health care;

Alberta's (AB) [Health Information Act](#) (HIA) authorizes use without consent for the following secondary purposes:

Use of individually identifying health information

27 (1) A custodian may use individually identifying health information in its custody or under its control for the following purposes:

...

(c) conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline;

...

(e) providing for health services provider education;

...

(g) for internal management purposes, including planning, resource allocation, policy development, quality improvement, monitoring, audit, evaluation, reporting, obtaining or processing payment for health services and human resource management.

Yukon's (YT) [Health Information Privacy and Management Act](#) (HIPMA) states the following:

Use not requiring consent

56 (1) A custodian may, without an individual's consent, use the individual's personal health information that is in its custody or control

...

(i) for the purpose of payment, or for contractual or other legal requirements, in respect of the custodian's provision to the individual of health care or other related goods, services or benefits, including goods, services or benefits that are part of a program of the custodian;

...

(l) for the purpose of managing or auditing the health care activities of the custodian;

Disclosures not requiring consent

58 A custodian may disclose an individual's personal health information without the individual's consent

...

(f) for the purpose of determining or carrying out the individual's wishes in relation to the donation of the individual's body parts, tissue, or bodily substances;

...

(n) to the Canadian Institute for Health Information, or to a prescribed health data institute in Canada that has entered into a written agreement with the Minister governing its collection, use and disclosure of the personal health information;

...

(dd) to a person conducting an audit, reviewing an application for accreditation or conducting an accreditation, if the audit, review or accreditation relates to the services provided by the custodian and the person has agreed in writing before commencing the audit, review or accreditation process

(i) to destroy the personal health information at the earliest possible opportunity after completing the audit, review or accreditation, and

(ii) not to disclose the personal health information to any other person, except as required to accomplish the audit, review or accreditation or to report unlawful conduct by the custodian; or

Proposal

The inclusion of the following underlined provisions to subsection 27(4) of HIPA is proposed:

27(4) A trustee may disclose personal health information in the custody or control of the trustee without the consent of the subject individual in the following cases:

...

(q) for the purpose of determining or carrying out the individual's wishes in relation to the donation of the individual's body parts, tissue, or bodily substances;

(r) to a person conducting an audit, reviewing an application for accreditation or conducting an accreditation, if the audit, review or accreditation relates to the services provided by the trustee and the person has agreed in writing before commencing the audit, review or accreditation process;

(i) to destroy the personal health information at the earliest possible opportunity after completing the audit, review or accreditation, and

(ii) not to disclose the personal health information to any other person, except as required to accomplish the audit, review or accreditation or as required by law; or

(s) to the Canadian Institute for Health Information after entering into a written agreement; or

...

6. New Subsection 33(2), (3) - Hospitals Operated by Trustees

Section 36 requires a trustee to respond to a written request for access to personal health information within 30 days. There are times when waiting up to 30 days for access to patient records is not reasonable or puts an individual's quality of care at risk.

Manitoba's (MB) *The Personal Health Information Act* (PHIA) sets a time-limit of 24 hours when the request is by a patient who is in hospital as follows:

Trustee to respond promptly

6 (1) A trustee shall respond to a request as promptly as required in the circumstances but not later than

(a) 24 hours after receiving it, if the trustee is a hospital and the information is about health care currently being provided to an in-patient;

Information provided in 24 hours

6 (1.1) In the circumstance mentioned in clause (1)(a) (hospital patient), the trustee is required only to make the information available for examination and may or may not, despite section 7, provide a copy.

Failure to respond

6 (3) The failure of a trustee to respond to a request within the time frame required under subsection (1) is to be treated as a decision to refuse to permit the personal health information to be examined or copied.

Proposal

It is proposed that Saskatchewan's HIPA should contain similar language as the above at section 33, Oral Request for Access, specifically the following new subsections:

33(2) A hospital that is operated by a trustee shall respond to an oral request from a patient in the hospital within 24 hours if the information is about the individual's health care.

(3) Pursuant to subsection (2), the trustee is required only to make the information available for examination and may or may not provide a copy.

7. Subsection 36(1)(d) - Trustee to Transfer Written Request in 15 Days

Saskatchewan's FOIP and LA FOIP both contain provisions regarding a transfer of an access to information application when it is considered that another public body has a greater interest in the record. A greater interest is where two or more public bodies have possession or control of a record and the responsive record was originally prepared in or for the other public body, or the public body was the first to obtain the responsive record or a copy of it. A head has 15 days from the date an application is received to transfer it. Section 11 of FOIP (and similarly section 11 of LA FOIP) reads as follows:

Transfer of application

11 (1) Where the head of the government institution to which an application is made considers that another government institution has a greater interest in the record, the head:

- (a) may, within 15 days after the application is made, transfer the application and, if necessary, the record to the other government institution; and

(b) if a record is transferred pursuant to clause (a), shall give written notice of the transfer and the date of the transfer to the applicant.

(2) For the purposes of this section, a government institution has a greater interest in a record if:

(a) the record was originally prepared in or for the government institution; or

(b) the government institution was the first government institution to obtain the record or a copy of the record.

(3) For the purposes of section 7, an application that is transferred pursuant to subsection (1) is deemed to have been made to the government institution on the day of the transfer.

Within 30 days after receiving a written request for access pursuant to subsection 36(1)(d) of HIPA, the trustee may transfer the written request if the personal health information is found to be in the custody or control of another trustee. The time limit of 30 days is only for the transfer; once transferred, the receiving trustee has an additional 30 days to provide a response, which may not be timely enough for patients requiring health care services.

Further, subsection 36(2) of HIPA states that a trustee must notify an applicant "as soon as reasonably possible" about the transfer, but this should also be completed within the proposed 15 days that a trustee has to transfer the request.

Proposal

It is proposed that subsection 36(1)(d) be amended as follows:

Response to written request

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

...

(d) If a trustee transfers a written request for access to another trustee because the other trustee either created the record or was the first trustee to obtain the record, the trustee shall make the transfer within 15 days of having received the written request.

8. Subsection 38(1)(b) - Individual's Family Health History

Presently, subsection 38(1)(b) of HIPA provides as follows:

38(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:

...

(b) disclosure of the information would reveal personal health information about another person who has not expressly consented to the disclosure;

A patient's medical record may contain the personal health information of another person. This might be because the patient themselves provided it for the purposes of assembling the family health history of the individual. If the patient otherwise has knowledge of that information and it relates to them, it would be absurd to withhold that information from them.

Proposal

Amend subsection 38 of HIPA as follows:

38(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:

...

(b) disclosure of the information would reveal personal health information about another person who has not expressly consented to the disclosure **except if the personal health information was collected for the purpose of assembling the family health history of an individual.**

9. New Subsection 39(2) - Fee Waivers

Section 39 of HIPA does not include a fee waiver provision.

AB's HIA contains the following language:

67 (4) A custodian may excuse an applicant from paying all or part of a fee if, in the opinion of the custodian, the applicant cannot afford the fee or in any other circumstances provided for in the regulations.

(5) If an applicant has requested a custodian to excuse the applicant from paying all or part of a fee and the custodian has refused the applicant's request, the custodian must notify the applicant that the applicant may ask for a review by the Commissioner.

NS's PHIA includes the following fee waiver provision:

Fees

82 (3) A custodian has the discretion to determine whether to grant a fee waiver and may waive the payment of all or any part of the fee that an individual is required to pay under

that subsection if, in the custodian's opinion, the individual cannot afford the payment or for any other reason it is fair to excuse payment.

AB's *Health Information Regulation* includes the following fee waiver provision:

13 For the purposes of section 67(4) of the Act, a custodian may excuse an applicant from paying all or part of a fee if in the opinion of the custodian it is fair to excuse payment.

The comparable provision in Ontario's PHIPA is:

54 (12) A health information custodian mentioned in subsection (10) may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, it is fair and equitable to do so.

Saskatchewan's *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations) provides as follows:

Waiver of fees

9 For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

- (a) where the actual cost of responding to an application varies from the total of the prescribed fees that are applicable to the application;
- (b) where payment of the prescribed fees will cause a substantial financial hardship for the applicant and:
 - (i) in the opinion of the head, giving access to the record is in the public interest; or
 - (ii) the application involves the personal information of the applicant;
- (c) where the prescribed fee or actual cost for the service is \$10 or less.

Proposal

It is proposed that section 39 of HIPA be amended to be similar to NS's HIA as follows:

39(2) If an individual requests a fee waiver, a trustee may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the trustee's opinion, the individual cannot afford the payment or for any other reason it is fair to waive payment.

10. Subsection 42(1)(a) - Commissioner to Review Fees

FOIP and LA FOIP and their respective regulations set out provisions for prescribed fees which include what fee amount(s) a head may charge for searching and preparing a record for disclosure. FOIP and LA FOIP allow an applicant to request that the Commissioner undertake a review of concerns regarding fees, fee estimates and fee waivers.

HIPA allows for the prescribing of fee amounts but does not include a fee schedule. It only indicates that the trustee should charge a reasonable fee. Along with a recommendation that HIPA be amended (section 39) to contain provisions for a fee schedule (see page 23 for section on fees), there should also be the opportunity for an individual to ask the Commissioner to undertake a review of any fee-related matter including a request to consider a fee waiver.

Proposal

It is proposed that section 42(1)(a) of HIPA be amended as follows:

42(1) A person may apply to the commissioner for a review of the matter where:

(a) the person is not satisfied with the decision of a trustee pursuant to sections 36 **or 39**;

11. Subsections 45(1) and (2) - Third party Intervention

Part VI of HIPA does not allow for third party intervention. Section 45 of HIPA currently provides:

Conduct of review

45 (1) The commissioner shall conduct a review in private.

(2) The applicant and the trustee whose decision is the subject of a review are entitled to make representations to the commissioner in the course of the review.

(3) No one is entitled as of right:

(a) to be present during a review; or

(b) before or after a review, to have access to, or to comment on, representations made to the commissioner by any other person.

AB's HIA provides for circumstances when others may intervene as follows:

Notifying others of review

75(1) On receiving a request for a review or investigation, the Commissioner must as soon as practicable

(a) give a copy of the request

(i) to the custodian concerned, and

(ii) to any other person who in the opinion of the Commissioner is affected by the request, and

(b) provide a summary of the review procedures and an anticipated date for a decision in respect of the review

(i) to the person who asked for the review,

(ii) to the custodian concerned, and

(iii) to any other person who in the opinion of the Commissioner is affected by the request.

(2) Despite subsection (1)(a), the Commissioner may sever any information in the request that the Commissioner considers appropriate before giving a copy of the request to the custodian or any other person affected by the request.

Proposal

It is proposed that section 45 be amended as follows:

Conduct of review or investigation

45(1) The commissioner shall conduct a review **or investigation** in private.

(2) The applicant, the trustee whose decision is the subject of a review or investigation **and any other individual, who in the opinion of the Commissioner is affected by the review or investigation**, are entitled to make representations to the commissioner in the course of the review **or investigation**.

II - Amendments for Government/Trustees

1. Subsection 2(1) - Definitions

HIPA currently does not contain definitions for "data matching", "disclosure", "next-of-kin" and "third party". HIPA's current definition of "record" should clearly support that a dataset is a record.

i. Data matching

AB's HIA defines "data matching" as follows:

1 (g) "data matching" means the creation of individually identifying health information by combining individually identifying or non-identifying health information or other information from 2 or more electronic databases, without the consent of the individuals who are the subjects of the information;

Proposal

It is proposed that HIPA have a definition similar to that in Alberta.

ii. Disclosure

Although HIPA contains definitions of "collection" and of "use", it does not define "disclosure."

ON's PHIPA defines "disclose" as follows:

Definitions

2. In this Act,

"disclose", in relation to personal health information in the custody or under the control of a health information custodian or a person, means to make the information available or to release it to another health information custodian or to another person, but does not include to use the information, and "disclosure" has a corresponding meaning;

YT's HIPMA defines disclose as follows:

2(1) In this Act

...

"disclose", in relation to information in the custody or control of a person, means making the information available or releasing it to another person, but includes neither using the information nor its transmission between a custodian and an agent of that custodian;

A simple definition is offered by the Northwest Territories' HIA as follows:

"disclose", in relation to information, means to release information or make information available in any manner, including verbally or visually, to a person or organization;

NS's PHIA contains the following definition of "disclose":

3 In this Act,

...

(h) "disclose", in relation to personal health information in the custody or under the control of a custodian or a person, means to make the information available or to release it to another custodian or to another person, but does not include to use the information;

Proposal

It is proposed that Nova Scotia's definition be adapted as follows:

2(1)(f) "disclose", in relation to personal health information in the custody or under the control of a trustee, means to make the information available or to release it to another trustee or to another person, but does not include to use the information;

iii. Next of kin

"Next of Kin" is not defined in HIPA. British Columbia, Nova Scotia, Newfoundland and Labrador and the Northwest Territories use the term "next of kin" in their privacy legislation in the same manner as section 29(2)(n) of FOIP in Saskatchewan. None of these statutes however offer a further definition of next of kin.

Next of kin could generally be defined as mother, father, children, brothers, sisters, grandparents, aunts, uncles, nieces, nephews and a spouse and adult interdependent partner of a person, or any of them. Depending on the statute, "next of kin" may mean one particular individual or sometimes one of many relatives or family members.

In the event that the individual is deceased, other jurisdictions allow for disclosure to more than just immediate family or those to whom the individual has a close personal relationship. For example, Nova Scotia's PHIA includes the following language:

Disclosure of general information

37 A custodian has the discretion to disclose personal health information about an individual to

- (a) family members of the individual; or
- (b) to another person if the custodian has a reasonable belief that the person has a close personal relationship with the individual, 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.

...

40 (2) Where an individual is deceased, personal health information may be disclosed by a custodian to

- (a) a family member of the individual; or
- (b) to another person if the custodian has a reasonable belief that the person has a close personal relationship with the individual, if the information relates to circumstances surrounding the death of the individual or to health care recently received by the individual and the disclosure is not contrary to a prior express request of the individual.

Saskatchewan's *The Health Care Directives and Substitute Decision Makers Act, 2015* doesn't define "next of kin", but discusses what is a nearest relative, in order of decision making, at section 15 as follows:

15 (1) Subject to subsections (2) and (3), a nearest relative is, with respect to a person requiring treatment mentioned in section 16, the person first described in the following clauses who is willing, available and has the capacity to make a health care decision:

- (a) the spouse or person with whom the person requiring treatment cohabits and has cohabited as a spouse in a relationship of some permanence;
- (b) an adult son or daughter;
- (c) a parent or legal custodian;
- (d) an adult brother or sister;
- (e) a grandparent;
- (f) an adult grandchild;

- (g) an adult uncle or aunt;
- (h) an adult nephew or niece.

Proposal

It is proposed that the definition of "next of kin" be added to reflect wording contained in *The Health Care Directives and Substitute Decision Makers Act, 2015* as follows:

2(1)(l) "next of kin" means:

(a) the spouse or person with whom the individual cohabits and has cohabited as a spouse in a relationship of some permanence;

(b) an adult son or daughter;

(c) a parent or legal custodian;

(d) an adult brother or sister;

(e) a grandparent;

(f) an adult grandchild;

(g) an adult uncle or aunt; or

(h) an adult nephew or niece.

(2) For the purposes of subsection (1), the relationships listed in clauses (1)(a) to (h) include adoptive relationships.

iv. *Third party*

In recommending that a third party be allowed to make representations in a review, there should be a definition of "third party" similar to what is found in section 2(1)(j) of FOIP:

2(j) "third party" means a person, including an unincorporated entity, other than an applicant or a government institution.

Proposal

It is proposed that the following definition be added:

2(1)(s.1) "third party" means a person, including an unincorporated entity, other than an applicant or a trustee or its agents

v. *Data Set and Record*

Datasets are the types of information kept in databases. NL's [Access to Information and Protection of Privacy Act](#) (ATIPPA) defines "dataset" and then includes datasets in its definition of "record" as follows:

2 In this Act

...

(g) "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection

(i) has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or the carrying out of another function of the public body,

(ii) is factual information

(A) which is not the product of analysis or interpretation other than calculation, and

(B) to which section 13 of the *Statistics Agency Act* does not apply, and

(iii) remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded;

...

2(y) "record" means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

Proposal

It is proposed that a definition for "dataset" be added as follows in subsection 2(1):

(c.2) "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection:

(i) has been obtained or recorded for the purpose of providing a trustee with information in connection with the provision of a service by the trustee or the carrying out of another function of the trustee;

(ii) is factual information which is not the product of analysis or interpretation other than calculation; and

(iii) remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded;

It is proposed that the definition of "record" be amended as follows:

2(1)(p) "record" means a record of information in any form and includes information that is written, photographed, recorded, digitized or stored in any medium or manner, **including a dataset**, but does not include computer programs or other mechanisms that produce records;

2. New Subsection 22(4) - Recouping Costs from Trustees

Trustees who cease to be trustees (former trustee) have continuing duties regarding personal health information in their custody and control until they transfer custody and control to another trustee or to an Information Management Service Provider (IMSP) that is a designated archive.

When a former trustee fails to meet their continuing duties, subsection 22(2) of HIPA authorizes the Minister to appoint a person or body to act in place of the former trustee until custody and control of the personal health information is re-established, transferred to another trustee or to an IMSP that is a designated archive. If a trustee fails to keep secure personal health information in their custody or control, the Minister also has the power to appoint a person or body to act in place of the trustee until custody or control is re-established, transferred to another trustee or to an IMSP that is a designated archive.

Either situation may cause the government or a new trustee to incur associated costs (e.g., costs for transport or storage). There should be the ability to recoup any such actual costs from the trustee who has failed their obligations.

Proposal

It is proposed that section 22 be amended by adding a subsection (4) as follows:

Continuing duties of trustees

...

(4) Pursuant to subsection 22(2) and 22(2.1), the Minister may recover certain costs from a trustee mentioned in these subsections where the trustee has failed to carry out their duties or to keep secure personal health information. Costs recoverable shall be limited to costs associated with transport and storage of the personal health information that were incurred by the Ministry in the securing of the personal health information.

3. Subsections 29(1)(c), (d) - Researchers to Enter into Written Agreements

HIPA contains few provisions to guide trustees when dealing with researchers. HIPA's section 29 provides the rules around the use and disclosure of personal health information for research purposes, but could be stronger in terms of ensuring accountability. AB's HIA contains the following language that could be incorporated into our existing provision:

54 (1) If the custodian decides to disclose health information to a researcher, the researcher must enter into an agreement with the custodian in which the researcher agrees:

(a) to comply with

(i) this Act and the regulations made under this Act,

(ii) any conditions imposed by the custodian relating to the use, protection, disclosure, return or disposal of the health information, and

(iii) any requirement imposed by the custodian to provide safeguards against the identification, direct or indirect, of an individual who is the subject of the health information,

(b) to use the health information only for the purpose of conducting the proposed research,

(c) not to publish the health information in a form that could reasonably enable the identity of an individual who is the subject of the information to be readily ascertained,

(d) not to make any attempt to contact an individual who is the subject of the health information to obtain additional health information unless the individual has provided the custodian with the consent referred to in section 55,

(e) to allow the custodian to access or inspect the researcher's premises to confirm that the researcher is complying with the enactments, conditions and requirements referred to in clause (a), and

(f) to pay the costs referred to in subsection (3).

(2) When an agreement referred to in subsection (1) has been entered into, the custodian may disclose to the researcher the health information requested under section 52

(a) with the consent of the individuals who are the subjects of the information, where the ethics committee recommends that consents should be obtained, or

(b) without the consent of the individuals who are the subjects of the information, where the ethics committee does not recommend that consents be obtained.

(3) The custodian may set the costs of

(a) preparing information for disclosure,

b) making copies of health information, and

(c) obtaining the consents referred to in section 55,

which must not exceed the actual cost of providing that service.

(4) If the researcher contravenes or fails to meet the terms and conditions of an agreement under this section, the agreement is cancelled.

Subsection 29(3) of *The Archives and Public Records Management Act* clarifies obligations of researchers as follows:

29 (3) Personal health information that is obtained from or on behalf of a trustee, person, body or organization mentioned in subsection (2) and that is under the care, control or custody of the Provincial Archives of Saskatchewan may be disclosed to a researcher if:

...

(c) before disclosing the personal health information to the researcher, the researcher enters into an agreement with the Provincial Archivist:

- (i) to use the personal health information only for the purpose set out in the agreement;
- (ii) to not disclose the personal health information except where authorized by law to do so;
- (iii) to not contact the individual who is the subject of the personal health information, directly or indirectly, for any purpose, except where authorized by law to do so;
- (iv) to take reasonable steps to ensure the security and confidentiality of the personal health information;
- (v) to destroy copies of any records containing personal health information in the manner and within the period set out in the agreement;
- (vi) to notify the Provincial Archivist in writing immediately if the researcher becomes aware that any conditions set out in this section or the agreement have been breached; and
- (vii) to allow the Provincial Archivist to access or inspect the researcher's premises to confirm that the researcher is complying with the terms and conditions of this Act and of the agreement.

Proposal

It is proposed that subsection 29(1)(c) be amended and that subclause (d) be added as follows:

29(1)(c) before disclosing the personal health information to the researcher, the researcher enters into a written agreement with the trustee or designated archive:

(i) to use the personal health information only for the purpose set out in the agreement;

(ii) to not disclose the personal health information except where authorized by law to do so;

(iii) to not contact the individual who is the subject of the personal health information, directly or indirectly, for any purpose, except where authorized by law to do so;

(iv) to take reasonable steps to ensure the security and confidentiality of the personal health information;

(v) to destroy copies of any records containing personal health information in the manner and within the period set out in the agreement;

(vi) to notify the trustee or designated archive in writing immediately if the researcher becomes aware that any conditions set out in this section or the agreement have been breached; and

(vii) to allow the trustee or designated archive to access or inspect the researcher's premises to confirm that the researcher is complying with the terms and conditions of this Act and of the agreement.

(d) If the researcher contravenes or fails to meet the terms and conditions of an agreement under this section, the agreement is cancelled.

It is also proposed that the same language above be included when 29(2) of HIPA applies so both subsections require researchers to enter into written agreements before being provided access to personal health information.

4. New Section 29.1 - Data Matching

Data matching or data linkage becomes a concern primarily if the intention is to use personal health information for secondary purposes. HIPA presently does not contain any provisions regarding data matching or data linkage or set out rules associated with using data for data matching purposes.

New Brunswick's (NB) [Personal Health Information Privacy and Access Act](#) (PHIPAA) includes the following section regarding data matching:

Data matching

57 (1) A custodian shall not, in contravention of this Act,

- (a) collect personal health information to be used in data matching, or
- (b) use or disclose personal health information to be used in data matching or created through data matching.

57 (2) A custodian may perform data matching using personal health information in its custody or control, provided there is authority for the collection, use or disclosure of the

personal health information being used for data matching or created as a result of data matching.

AB's HIA contains the following language pertaining to data matching:

Prohibition

68 A custodian or health information repository must not

- (a) collect the health information to be used in data matching, or
- (b) use or disclose the health information to be used in data matching or created through data matching in contravention of this Act.

Data matching by custodian or health information repository

69 A custodian or health information repository may perform data matching using information that is in its custody or under its control.

Data matching by custodians or health information repository

70(1) A custodian or health information repository may perform data matching by combining information that is in its custody or under its control with information that is in the custody or under the control of another custodian or health information repository.

(2) Before performing data matching under this section, the custodian or health information repository in whose custody and control the information that is created through data matching will be stored must prepare a privacy impact assessment and submit the assessment to the Commissioner for review and comment.

(3) A privacy impact assessment referred to in subsection (2) must

- (a) describe how the information to be used in the data matching is to be collected, and
- (b) set out how the information that is created through data matching is to be used or disclosed.

Data matching by custodian or health information repository and non-custodian

71 (1) A custodian or health information repository may perform data matching by combining information that is in its custody or under its control with information that is in the custody or under the control of a person that is not a custodian or health information repository.

(2) Before performing data matching under this section, the custodian or health information repository must prepare a privacy impact assessment and submit the assessment to the Commissioner for review and comment.

(3) A privacy impact assessment referred to in subsection (2) must meet the requirements of section 70(3).

Data matching for research

72 If data matching is performed for the purpose of conducting research, sections 48 to 56 must be complied with before the data matching is performed.

Proposal

In addition to adding a definition for "data matching", it is recommended that the following also be added to Part IV of HIPA to support the practice of data matching:

Data matching

29.1(1) Subject to subsections (2), (3), and (4) a trustee shall not:

(a) collect personal health information to be used in data matching, or

(b) use or disclose personal health information to be used in data matching or be created through data matching.

(2) A trustee may perform data matching using personal health information in its custody or control, provided there is authority for the collection, use or disclosure of the personal health information being used for data matching or created as a result of data matching.

(3) A trustee may use personal health information in data matching if the data matching is for a secondary purpose consistent with any of the purposes for which personal health information may be disclosed pursuant to sections 27, 28 or 29.

(4) Nothing in this section prohibits the data matching of personal health information where that data matching is authorized by another Act or by a regulation made pursuant to another Act.

5. Section 39 - Fee Schedule

HIPA only contains one provision that speaks to fees which provides as follows:

39 A trustee may charge a reasonable fee not exceeding the prescribed amount to recover costs incurred in providing access to a record containing personal health information.

Alberta's HIA contains the following language:

Power to charge fees

67 (1) A custodian may charge the fees provided for in the regulations for services provided under Part 2.

(2) Subsection (1) does not permit a custodian to charge a fee in respect of a request for access to an applicant's own health information, except for the cost of producing the copy.

(3) A custodian must give an applicant an estimate of the total fee for its services before providing the services.

NS's PHIA does not allow a custodian to charge for a record of user activity as follows:

63 (4) A custodian shall not charge an individual for a record of user activity.

Costs should not be a barrier for gaining access to one's own personal health information or medical records. The fee an individual pays for access to personal health information or a medical record should be limited to the actual cost to the trustee for reproducing the record. An individual should also not have to pay for a copy of a record of user activity that indicates who has made access to their personal health information.

Proposal

It is proposed that section 39 of HIPA be amended to adopt language similar to what is found in AB's HIA and NS's PHIA as follows:

39(1) A trustee shall not charge a fee in respect of a request for access to an applicant's own personal health information, except for the cost of producing the copy.

(2) A trustee shall not charge an individual for a record of user activity.

6. New Subsection 40.1 - Abandoned Requests

In 2018, FOIP was updated to include provisions for applications deemed to be abandoned (LA FOIP contains the same language):

Applications deemed abandoned

7.1 (1) If the head has invited the applicant to supply additional details pursuant to subsection 6(3) or has given the applicant notice pursuant to clause 7(2)(a) and the applicant does not respond within 30 days after receiving the invitation or notice, the application is deemed to be abandoned.

(2) The head shall provide the applicant with a notice advising that the application is deemed to be abandoned.

(3) A notice provided pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

AB's HIA contains a similar provision to FOIP and LA FOIP as follows:

9 (1) Where a custodian contacts an applicant in writing respecting the applicant's request, including

(a) seeking further information from the applicant that is necessary to process the request, or

(b) requesting the applicant to pay a fee or to agree to pay a fee, and the applicant fails to respond to the custodian, as requested by the custodian, within 30 days after being contacted, the custodian may, by notice in writing to the applicant, declare the request abandoned.

(2) A notice declaring a request abandoned must state that the applicant may ask for a review of that decision by the Commissioner.

HIPA does not contain a provision for access requests that are deemed abandoned, but it should.

Proposal

It is proposed that new section 40.1 be added as follows:

40.1(1) If the trustee has invited the applicant to supply additional details pursuant to section 34 and the applicant does not respond within 30 days after receiving the invitation or notice, the application is deemed to be abandoned.

(2) The trustee shall provide the applicant with notice that the application is deemed to be abandoned.

(3) A notice provided pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

7. Subsections 43(1) and (2) - Refuse, Discontinue or Disregard a Review

FOIP and LA FOIP contain similar language as follows (from FOIP):

Review or refusal to review

50(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 49, the commissioner shall review the matter.

(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:

- (a) is frivolous or vexatious;
 - (a.1) does not affect the applicant or individual personally;
 - (a.2) has not moved forward as the applicant or individual has failed to respond to the requests of the commissioner;
 - (a.3) concerns a government institution that has an internal review process that has not been used;
 - (a.4) concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure available through the professional body has not been used;
 - (a.5) may be considered pursuant to another Act that provides a review or other mechanism to challenge a government institution's decision with respect to the collection, amendment, use or disclosure of personal information and that review or mechanism has not been used;
 - (a.6) does not contain sufficient evidence;
 - (a.7) has already been the subject of a report pursuant to section 55 by the commissioner;
- (b) is not made in good faith; or
- (c) concerns a trivial matter.

These provisions allow a public body to apply to the Commissioner if it is believed that a request for review meets any of the criteria set out in subsection 50(2) of FOIP (or similarly subsection 39(2) of LA FOIP).

Section 77 of AB's HIA allows Alberta's Commissioner to conduct an inquiry (review) if a person asking for it is not satisfied with the actions of a custodian (trustee). Section 78 of AB's HIA then provides the Commissioner the following powers:

Refusal to conduct inquiry

78 The Commissioner may refuse to conduct an inquiry pursuant to section 77 if in the opinion of the Commissioner

- (a) the subject of the request for a review under section 73 has been dealt with in an order or investigation report of the Commissioner, or
- (b) the circumstances warrant deciding not to conduct an inquiry.

ON's PHIPA allows its Commissioner to undertake a review under certain circumstances. Subsection 57(4) of ON's PHIPA allows the Commissioner the following powers:

No review

(4) The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,

- (a) the person about which the complaint is made has responded adequately to the complaint;
- (b) the complaint has been or could be more appropriately dealt with, initially or completely, by means of a procedure, other than a complaint under this Act;
- (c) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date the complaint was made is such that a review under this section would likely result in undue prejudice to any person;
- (d) the complainant does not have a sufficient personal interest in the subject-matter of the complaint; or
- (e) the complaint is frivolous or vexatious or is made in bad faith.

Proposal

It is proposed, to be consistent with provisions laid out in FOIP and LA FOIP, that subsections 43(1) and (2) be replaced or amended as follows:

Review or refusal to review or investigate

43(1) Where the commissioner is satisfied that there are reasonable grounds to review **or investigate** any matter set out in an application **made pursuant to section 42 or 52**, the commissioner shall review **or investigate** the matter.

(2) The commissioner may refuse to conduct a review **or investigation** or may discontinue a review **or investigation** if, in the opinion of the commissioner, the application for review:

- (a) is frivolous or vexatious;**
- (b) does not affect the applicant or individual personally;**
- (c) has not moved forward as the applicant or individual has failed to respond to the requests of the commissioner;**

(d) concerns a trustee that has an internal review or investigation process that has not been used;

e) concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure available through the professional body has not been used;

(f) does not contain sufficient evidence;

(h) has already been the subject of a report pursuant to section 48 by the commissioner;

(i) is not made in good faith; or

(j) concerns a trivial matter.

8. New Subsection 64(1), New Subsection 64(3.4) - Offence Provisions

Several offence and penalty provisions came into force June 1, 2016. Other offence provisions could be added. For example, AB's HIA contains the following provisions:

Offences and penalties

107 (2) No person shall knowingly

(a) collect, use, disclose or create health information in contravention of this Act,

(b) gain or attempt to gain access to health information in contravention of this Act,

(c) make a false statement to, or mislead or attempt to mislead, the Commissioner or another person performing the duties, powers or functions of the Commissioner or other person under this Act,

(d) obstruct the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act,

...

(3) No researcher shall knowingly breach the terms and conditions of an agreement entered into with a custodian pursuant to section 54.

(4) No information manager shall knowingly breach the terms and conditions of an agreement entered into with a custodian pursuant to section 66.

NS's PHIA contains the following unique offense provision:

106 A person is guilty of an offence if the person

...

(m) breaches the terms and conditions of an agreement entered into with a custodian under this Act.

Proposal

It is proposed to include provisions in HIPA similar to those above, including provisions regarding researchers, by adding the following to the existing provisions:

64(1) No person shall

...

(g) knowingly collect, use, or disclose personal health information in contravention of this Act,

(h) knowingly gain or attempt to gain access to personal health information in contravention of this Act

...

(3.4) Any researcher that knowingly breaches the terms and conditions of a written agreement entered into with a trustee pursuant to section 29 is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the information management service provider has been prosecuted or convicted.

III - Amendments to Assist the Commissioner

1. Subsections 4(4), (5) and (6) - Overrides

When developing HIPA, legislators were cautious about its scope. Thus, they built in exceptions that exempted certain Acts from portions of HIPA, or that recognized that other Acts had their own privacy schemes. Subsections 4(4), (5) and (6) of HIPA provide as follows:

(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:

- (a) *The Adoption Act or The Adoption Act, 1998*;
- (b) Part VIII of *The Automobile Accident Insurance Act*;
- (c) Repealed. 2006, c.C-1.1, s.26.
- (d) *The Child and Family Services Act*;
- (e) Repealed. 2014, c.16, s.47.
- (f) *The Public Disclosure Act*;
- (g) *The Public Health Act, 1994*;
- (g.1) *The Vital Statistics Act, 2009* or any former Vital Statistics Act;
- (g.2) *The Vital Statistics Administration Transfer Act*;
- (h) *The Workers' Compensation Act, 2013*;
- (h.1) *The Youth Drug Detoxification and Stabilization Act*; or
- (i) any prescribed Act or regulation or any prescribed provision of an Act or regulation.

(5) Sections 8 and 11 apply to the enactments mentioned in subsection (4).

(6) *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

We no longer have a need for these overrides.

Proposal

It is proposed that subsections 4(4), (5) and (6) of HIPA be repealed.

2. New Section 30.1 - Notice Where Privacy Breaches Pose Real Risk of Significant Harm

Currently, subsection 29.1 of FOIP (28.1 LA FOIP) require a head to take reasonable steps to notify an individual of an unauthorized use or disclosure of that individual's personal information as follows:

29.1 A government institution shall take all reasonable steps to notify an individual of an unauthorized use or disclosure of that individual's personal information by the government institution if it is reasonable in the circumstances to believe that the incident creates a real risk of significant harm to the individual.

HIPA should also include similar language, and it should also include a requirement that the Commissioner also be notified when this occurs. For example, in 2015, the Ontario government announced it would make it mandatory to report privacy breaches to the Information and Privacy Commissioner and, in certain cases, to affected individuals. AB's *Personal Information Protection Act* (PIPA) provides as follows:

Report to commissioner

31 (1) If section 30 requires a custodian to notify an individual of a security breach in relation to the individual's personal health information in the custodian's custody or control, the custodian must, within a reasonable time after discovering the security breach, submit to the commissioner a written report that

(a) assesses the risk of harm to individuals as a result of the security breach, and estimates the number of individuals so affected; and

(b) describes the measures, if any, that the custodian has taken to reduce the risk of harm to individuals as a result of the security breach.

(2) The commissioner may, after reviewing a report submitted by a custodian under subsection (1) in respect of a security breach, recommend to the custodian any measures that the commissioner considers appropriate to reduce the risk of similar breaches occurring in the future.

Proposal

It is proposed that new section 30.1 be added to require notice to an affected individual and to the Commissioner when a privacy breach that poses a real risk of significant harm occurs as follows:

30.1(1) A trustee shall take all reasonable steps to notify an individual of an unauthorized use or disclosure of that individual's personal health information by the trustee if it is reasonable in the circumstances to believe that the incident creates a real risk of significant harm to the individual.

(2) If a trustee makes a notice under subsection (1), the trustee shall also provide notice to the Commissioner. A notice to the Commissioner under subsection (1) shall include the information prescribed by the regulations.

3. New Section 30.2 - Privacy Impact Assessments

The following quote is taken from New Brunswick's *Operational Review of the Personal Health Information Protection and Access Act*, Department of Health, January 2015:

Section 69 of British Columbia's *Freedom of Information and Protection of Privacy Act* requires PIAs to be conducted and established policies in that province ensure they occur for any new legislation, information system or policy. Alberta's *Health Information Act* is more inclusive. Section 64(1) of that Act states that "each custodian must prepare a privacy impact assessment that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying health information may affect the privacy of the individual who is the subject of the information." PIA requirements in New Brunswick are broader still, but are specific to public bodies or custodians prescribed by regulation. Under PHIPAA, public bodies must conduct PIAs when any new or modified means of collecting, using or disclosing personal health information, is being considered.

The same British Columbia Information and Privacy Commissioner special report noted earlier proposes the following: "It should be mandatory for PIAs regarding proposed administrative practices and information systems and data-linking initiatives in the health sector to be submitted to the Commissioner for review and comment. There is such a requirement in Alberta's HIA. PIAs must be submitted to the Information and Privacy Commissioner of Alberta for review and comment."

AB's HIA provides as follows:

Duty to prepare privacy impact assessment

64(1) Each custodian must prepare a privacy impact assessment that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying health information may affect the privacy of the individual who is the subject of the information.

(2) The custodian must submit the privacy impact assessment to the Commissioner for review and comment before implementing any proposed new practice or system described in subsection (1) or any proposed change to existing practices and systems described in subsection (1).

Similarly, the NWT's HIA includes the following provision regarding privacy impact assessments:

89. (1) In this section, "prescribed custodian" means a health information custodian prescribed as a custodian to which this section applies.

(2) A public custodian and a prescribed custodian shall prepare a privacy impact assessment in respect of a proposed new, or a proposed change to an information system or communication technology relating to the collection, use or disclosure of personal health information.

(3) A health information custodian to which this section applies shall give a copy of the privacy impact assessment to the Information and Privacy Commissioner.

It is proposed that similar provisions for PIAs be included in FOIP and LA FOIP.

Proposal

It is proposed to add a new section 30.2 similar to what is recommended for FOIP and LA FOIP:

30.2(1) A trustee must prepare a privacy impact assessment that describes how any proposed substantive changes to administrative practices and information systems relating to the collection, use and disclosure of individually identifying personal health information may affect the privacy of the individual who is the subject of the information.

(2) The trustee must submit the privacy impact assessment to the Commissioner for review and comment before implementing any proposed new practice or system described in subsection (1) or any proposed change to existing practices and systems described in subsection (1).

4. Sections 41 to 63 - Consistency in Language

FOIP and LA FOIP both refer to the Commissioner's powers to conduct a review or an investigation, although the language in those Acts is not entirely consistent. Regarding HIPA, the Commissioner undertakes reviews when requested by applicants if a trustee denies access to personal health information or denies a request for correction to personal health information. The Commissioner also conducts investigations into privacy breaches to assess the steps a trustee took to manage the breach. The language found in HIPA should clearly reflect this.

Proposal

It is proposed that, where appropriate, subsections 41(b), 42(1), (3), 43(1), (2), (e), (g), (3), 44(a), (b), 45(1), (2), (3), 46(1), (2), (3), 47, 48(1), (2), 54(3), 60(2) and 63(1)(v) be amended to include a reference to investigations.

5. Section 44 - Commencing a Review

Currently, section 44 of HIPA states that the Commissioner will issue a notice of intention to undertake a review "not less than 30 days before commencing a review." LA FOIP (section 40) and FOIP (section 51) had a similar requirement, but were amended in 2018 to remove the 30 day time. Sections 40 and 52 of FOIP and LA FOIP use the following wording:

40/51 The commissioner shall, immediately on commencing an investigation or review, inform the head of:

Section 44 of HIPA should be worded the same way for consistency.

Proposal

It is proposed that section 44 be worded as follows:

44 The commissioner shall, immediately upon commencing an investigation or review, inform the trustee of:

6. Section 46 - Commissioner's Powers Changed

Regarding the Commissioner's powers to review or investigate, section 46 should be worded similarly to proposed wording for sections 43 of LA FOIP and section 54 of FOIP. The provision should also recognize the Commissioner's ability to review records where solicitor-client privilege is claimed without waiving that privilege.

Proposal

It is proposed that section 46 be replaced with the following:

Powers of Commissioner

46(1) Notwithstanding any other Act, including a provision of an Act requiring a person to maintain secrecy in relation to a matter related to a review or investigation or any privilege that is available at law, including solicitor-client privilege, the commissioner may, in a review or investigation:

(a) require to be produced and examine any record, document or thing that is in the possession or under the control of a trustee within 30 days of being requested; and

(b) enter and inspect any premises occupied by a trustee.

(2) For the purposes of conducting a review or investigation, the commissioner may summon and enforce the appearance of any person, who in the opinion of the commissioner is able to give any information relating to any matter being reviewed or investigated pursuant to this Act, before the commissioner and compel them:

(a) to give oral or written evidence on oath or affirmation; and

(b) to produce any documents, things, or copies;

that the commissioner considers necessary for a full review or investigation, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

(4) Every examination by the commissioner pursuant to this section is deemed a judicial proceeding for the purposes of section 136 of the *Criminal Code of Canada*.

(5) Any disclosure of information, document or provision of a record pursuant to this section does not constitute a waiver of Crown privilege, solicitor-client privilege or any other privilege recognized in law.

7. Section 49 - Compliance with the Commissioner's Recommendations

Freedom of information laws promote transparency by allowing citizens to access records in the possession or control of a public body. FOIP and LA FOIP require public bodies to disclose records, subject to applicable exemptions.

Saskatchewan is one of six jurisdictions in Canada without order making power. Saskatchewan's Commissioner has only the power to make recommendations to release records, which a public body can choose to ignore. If a public body chooses to ignore the Commissioner's recommendations, then an applicant's only recourse is to appeal the public body's decision in the Court of King's Bench. The overwhelming majority of applicants do not appeal, likely because of associated costs.

British Columbia, Alberta, Ontario, Quebec, Prince Edward Island, the Northwest Territories and the federal government all have order making powers, or the power to make a public body disclose records.

Newfoundland and Labrador, has unique provisions making its commissioner's recommendations convertible to an order. In Newfoundland and Labrador, a public body has 10 days to respond to the commissioner's recommendations. If a public body does not respond within 10 days, then they are said to comply with the recommendation. If a public body responds within 10 days that they do not agree with the commissioner, then the applicant has a right to appeal, or the commissioner has the right to file an order in one. The provisions are set out in sections 48-51 of ATIPPA, as follows:

48. (1) On completing an investigation, the commissioner shall

- (a) prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and
- (b) send a copy of the report to the person who filed the complaint, the head of the public body concerned and a third party who was notified under section 44 .

(2) The report shall include information respecting the obligation of the head of the public body to notify the parties of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.

Response of public body

49. (1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,

- (a) decide whether or not to comply with the recommendation in whole or in part; and
- (b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

(3) The written notice shall include notice of the right

- (a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or
- (b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in subsection 51(1).

Head of public body seeks declaration in court

50. (1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

- (a) grant the applicant access to the record or part of the record; or
- (b) make the requested correction to personal information.

(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because

- (a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;
- (b) the head of the public body is required under this Part to refuse access to the record or part of the record; or
- (c) the decision of the head of the public body not to make the requested correction to personal information is in accordance with this Act or the regulations.

(3) The head shall, within the time frame referred to in subsection (2), serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(4) The commissioner, the minister responsible for this Act, or a person who was sent a copy of the commissioner's report may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

(5) Sections 57 to 60 apply, with the necessary modifications, to an application by the head of a public body to the Trial Division for a declaration.

Filing an order with the Court

51. (1) The commissioner may prepare and file an order with the Trial Division where

(a) the head of the public body agrees or is considered to have agreed under section 49 to comply with a recommendation of the commissioner referred to in subsection 50 (1) in whole or in part but fails to do so within 15 business days after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply under section 50 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body either

(a) to grant the applicant access to the record or part of the record; or

(b) to make the requested correction to personal information.

(3) An order shall not be filed with the Trial Division until the later of the time periods referred to in paragraph (1)(a) and section 54 has passed.

(4) An order shall not be filed with the Trial Division under this section if the applicant or third party has commenced an appeal in the Trial Division under section 54 .

(5) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

Newfoundland also includes separate provisions for the response by a public body when there is a privacy complaint at sections 77 to 80 of ATIPPA.

Proposal

It is proposed that section 49 be replaced with the following:

Response of trustee

49(1) A trustee shall, not later than 30 business days after receiving a recommendation of the commissioner:

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner, the applicant or individual and any third party who was a party to the review or investigation.

(2) Where the trustee does not give written notice within the time required by subsection (1), the trustee is considered to have agreed to comply with the recommendations of the commissioner.

(3) The written notice shall include notice of the right:

(a) of an applicant or third party to appeal under section 50 to the Court of King's Bench and of the time limit for an appeal; or

(b) of the commissioner to file an order with the Court of King's Bench in one of the circumstances referred to in subsection 49.2.

Trustee seeks order in court

49.1 (1) This section applies to a recommendation of the commissioner in a report where the commissioner conducted a review or investigation, and made recommendations, on any matter set out in section 42 or 52.

(2) Where the trustee decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the trustee shall, no later than 30 days after receipt of that recommendation, apply to the Court for an order that the trustee is not required to comply with that recommendation.

(3) The trustee shall, within the time frame referred to in subsection (2), serve a copy of the application for an order on the commissioner, the applicant, and a third party who was sent a copy of the commissioner's report.

(4) The commissioner, the applicant, or a third party who was sent a copy of the commissioner's report may intervene in an application for an order by filing a notice to that effect with the Court of King's Bench.

Filing an order with the Court of King's Bench

49.2(1) The commissioner may prepare and file an order with the Court of King's Bench where:

(a) the trustee agrees or is considered to have agreed under section 49 to comply with a recommendation of the commissioner in whole or in part but fails to do so within 30 days after receipt of the commissioner's recommendation; or

(b) the trustee fails to apply under section 49.1 to the Court of King's Bench for an order.

(2) The order shall be limited to a direction to the head of the trustee on matters set out in section 42.

(3) An order shall not be filed with the Court of King's Bench until the later of the time periods in subsection (1).

(4) An order shall not be filed with the Court of King's Bench under this section if the applicant or third party has commenced an appeal in the Court of King's Bench under section 50.

(5) Where an order is filed with the Court of King's Bench, it is enforceable against the trustee as if it were a judgment or order made by the Court of King's Bench.

8. New Subsection 53(d) - Commissioner Able to Make Procedures

Similar to provisions found in FOIP, the Commissioner should have the ability to set out the procedures the Commissioner will follow in a review or investigation. Subsection 45(2) of FOIP (which also applies to LA FOIP by virtue of section 48 of LA FOIP) provides as follows:

45(2) The commissioner may:

...

(d) determine the procedure to be followed in the exercise of the powers or performance of any duties of the commissioner pursuant to this Act; and

Proposal

It is proposed HIPA be amended similar to FOIP as follows:

53 The commissioner may:

....

(d) determine the procedure to be followed in the exercise of the powers or performance of any duties of the commissioner pursuant to this Act; and

9. New Section 53.1 - Extra-Provincial Agreements

HIPA should allow the Commissioner to share information with commissioners in other jurisdictions where necessary to undertake a joint or coordinated investigation where more than one jurisdiction's health information law is engaged. As personal health information moves over provincial borders, eventually there will be a need to conduct an investigation into a related privacy breach. It will require collaboration with the oversight office in a different jurisdiction.

HIPA requires a provision that allows the Commissioner to share information about matters within his jurisdiction with the commissioner(s) in other jurisdictions where more than one jurisdiction is involved. There are currently strict confidentiality requirements that constrain the Commissioner from sharing case file information with the oversight agency elsewhere.

The provision in AB's HIA is as follows:

General powers of Commissioner

84 (1) In addition to the Commissioner's powers and duties under Divisions 1 and 2 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure its purposes are achieved, and may

...

(j) exchange information with an extra-provincial commissioner and enter into information sharing and other agreements with extra-provincial commissioners for the purpose of co-ordinating activities and handling complaints involving 2 or more jurisdictions.

(2) For the purposes of subsection (1)(j), "extra-provincial commissioner" means a person who, in respect of Canada or in respect of another province or territory of Canada, has duties, powers and functions similar to those of the Commissioner.

YT's HIPMA contains the following:

General powers of commissioner

92 In addition to the specific duties and powers assigned to the commissioner under this Act, the commissioner is responsible for overseeing how this Act is administered to ensure that its purposes are achieved, and may

...

(f) exchange personal information and personal health information with any person who, under legislation of another province or Canada, has powers and duties similar to those conferred upon the commissioner under this Act or the Access to Information and Protection of Privacy Act;

(g) enter into information-sharing agreements for the purposes of paragraph (f) and into other agreements with the persons referred to in that paragraph for the purpose of coordinating their activities and exercising any duty, function or power conferred on the commissioner under this Act; and

(h) perform any prescribed duties or functions or exercise any prescribed power.

ON's PHIPA includes the following but is not as clear:

General powers

66. The Commissioner may,

...

(e) assist in investigations and similar procedures conducted by a person who performs similar functions to the Commissioner under the laws of Canada, except that in providing assistance, the Commissioner shall not use or disclose information collected by or for the Commissioner under this Act;

Also, similar to provisions found in FOIP, the Commissioner should have the ability to set out the procedures the Commissioner will follow in a review or investigation. Subsection 45(2) of FOIP (which also applies to LA FOIP by virtue of section 48 of LA FOIP) provides as follows:

45(2) The commissioner may:

...

(e) exchange personal information with an extra provincial, territorial or federal commissioner for the purpose of carrying out investigations with respect to personal information in the possession or under the control of government institutions or to conduct a review involving a government institution and at least one other jurisdiction.

Proposal

It is proposed that language be included in HIPA that is similar to the wording in FOIP:

53.1(1) In addition to the Commissioner's powers and duties in this Act, the Commissioner is generally responsible for monitoring how this Act is administered to ensure its purposes are achieved, and may exchange information with an extra-provincial commissioner and enter into information sharing and other agreements with extra-provincial commissioners for the purpose of co-ordinating activities and handling complaints involving two or more jurisdictions.

(2) For the purposes of subsection (1), "extra-provincial commissioner" means a person who, in respect of Canada or in respect of another province or territory of Canada, has duties, powers and functions similar to those of the Commissioner.

10. Subsection 54(3) - Commissioner Disclose Personal Health Information in Limited Circumstances

There are circumstances in which it may be necessary for the Commissioner to exercise his discretion and disclose limited information in certain situations. In this regard, AB's HIA includes the following provision:

91 (3.2) The Commissioner may disclose any information to any person where the Commissioner reasonably believes the disclosure of the information to that person

- (a) is necessary to protect the privacy, health or safety of an individual, or
- (b) is in the public interest.

The *Personal Information Protection and Electronic Documents Act* (PIPEDA) also allows for disclosure if in the public interest as follows:

20. (2) The Commissioner may, if the Commissioner considers that it is in the public interest to do so, make public any information that comes to his or her knowledge in the performance or exercise of any of his or her duties or powers under this Part.

HIPA should have wording similar to what is found in Alberta's legislation.

Proposal

It is proposed that subsection 54(3) of HIPA be amended as follows:

54(3) In the course of a review or investigation pursuant to section 45, the commissioner may disclose any information:

(a) that the commissioner considers necessary to disclose to facilitate the review or investigation; or

(b) to any person where the commissioner reasonably believes the disclosure of the personal health information to that person:

(i) is necessary to protect the privacy, health or safety of an individual; or

ii) is in the public interest.

IV - Other Items

1. Subsection 51(2) - Privilege

Subsection 51(2) of HIPA provides as follows:

51(2) Notwithstanding any other Act or any privilege that is available at law, the court, on an appeal, may examine any record in the custody or control of a trustee, and no person shall withhold information from the court on any grounds.

This provision should specify that any privilege available at law should include "solicitor client privilege". This is consistent with proposals made for FOIP and LA FOIP.

Proposal

It is proposed that subsection 51(2) be amended as follows:

51(2) Notwithstanding any other Act or any privilege that is available at law, **including solicitor-client privilege**, the court, on an appeal, may examine any record in the custody or control of a trustee, and no person shall withhold information from the court on any grounds.

2. New Section 64.1 - Statutory Review Period

Many access and privacy laws in Canada contain a statutory requirement for a review by a legislative committee after a fixed period of three or five years. HIPA does not. An example of one that does is AB's HIA which contains the following provision:

Review of Act

109 (1) A special committee of the Legislative Assembly must begin a comprehensive review of this Act within 3 years after the coming into force of this section and must submit to the Legislative Assembly, within one year after beginning the review, a report that includes the committee's recommended amendments.

(2) The review referred to in subsection (1) must include a review of the application of this Act

(a) to departments of the Government of Alberta,

(b) to local public bodies as defined in the Freedom of Information and Protection of Privacy Act, and

(c) to any other entity that is not a custodian and has information about the health of an individual in its custody or under its control.

Proposal

It is proposed that new section 64.1 be added as follows:

64.1 After five years and every five years thereafter, the minister responsible for this Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operations of this Act.