



Circle of Care Sharing Personal Health Information for Health–Care Purposes

August 2015



Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

The Information and Privacy Commissioner of Ontario, Canada would like to thank the following organizations for their participation in this brochure:

College of Physicians and Surgeons of Ontario

Ontario Association of Community Care Access Centres

Ontario Association of Non-Profit Homes and Services for Seniors

Ontario Hospital Association

Ontario Long Term Care Association

Ontario Medical Association

Ontario Ministry of Health and Long-Term Care

CONTENTS

Introduction	1
1. The health information custodian must fall within a category of health information custodians that are entitled to rely on assumed implied consent.	3
2. The personal health information to be collected, used or disclosed by the health information custodian must have been received from the individual, his or her substitute decision-maker or another health information custodian.	4
3. The health information custodian must have received the personal health information that is being collected, used or disclosed for the purpose of providing or assisting in the provision of health care to the individual.	5
4. The purpose of the collection, use or disclosure of personal health information by the health information custodian must be for the provision of health care or assisting in the provision of health care to the individual.	7
5. In the context of disclosure, the disclosure of personal health information by the health information custodian must be to another health information custodian.	9
6. The health information custodian that receives the personal health information must not be aware that the individual has expressly withheld or withdrawn his or her consent to the collection, use or disclosure.	10
Limiting principles and options when consent cannot be assumed to be implied.	11

INTRODUCTION

The term “circle of care” is not a defined term in the *Personal Health Information Protection Act, 2004 (PHIPA)*. It is a term commonly used to describe the ability of certain health information custodians to assume an individual’s implied consent to collect, use or disclose personal health information for the purpose of providing health care, in circumstances defined in *PHIPA*.

The purpose of this brochure is to clarify the circumstances in which a health information custodian may assume implied consent and the options available to a health information custodian where consent cannot be assumed to be implied. Throughout the brochure, appropriate application of the assumed implied consent provisions of *PHIPA* will be illustrated using a variety of health-care scenarios involving a fictional 61-year-old gentleman named David Mann. It should be noted that the assumed implied consent provisions of *PHIPA* apply equally to paper-based and electronic records of personal health information.

In an appointment with his family physician, David Mann complains of memory loss, disorientation, speech problems and mood swings.

The family physician examines David and asks him a series of questions relating to his medications, his health history and the health history of his family. The family physician also conducts a mini-mental state examination and provides David with a requisition for blood and urine testing and for magnetic resonance imaging. The family physician indicates that she will refer David to both a neurologist and geriatrician for further assessments.

Circumstances When you may Assume Consent to be Implied

A health information custodian may only assume an individual’s implied consent to collect, use or disclose personal health information if all of the following six (6) conditions are satisfied.

1. THE HEALTH INFORMATION CUSTODIAN MUST FALL WITHIN A CATEGORY OF HEALTH INFORMATION CUSTODIANS THAT ARE ENTITLED TO RELY ON ASSUMED IMPLIED CONSENT.

Most health information custodians may rely on assumed implied consent to collect, use and disclose personal health information for the purpose of providing health care or assisting in the provision of health care to an individual.

A health information custodian is a person or organization described in *PHIPA* with custody or control of personal health information as a result of, or in connection with, the performance of its powers, duties or work. For example, health information custodians include:

- health care practitioners
- long-term care homes
- community care access centres
- hospitals, including psychiatric facilities
- specimen collection centres, laboratories, independent health facilities
- pharmacies
- ambulance services
- Ontario Agency for Health Protection and Promotion

However, it is important to note that some health information custodians are not entitled to rely on assumed implied consent. For example, these include:

- an evaluator within the meaning of the Health Care Consent Act, 1996
- an assessor within the meaning of the Substitute Decisions Act, 1992
- the Minister or Ministry of Health and Long-Term Care
- the Minister or Ministry of Health Promotion
- the Canadian Blood Services

2. THE PERSONAL HEALTH INFORMATION TO BE COLLECTED, USED OR DISCLOSED BY THE HEALTH INFORMATION CUSTODIAN MUST HAVE BEEN RECEIVED FROM THE INDIVIDUAL, HIS OR HER SUBSTITUTE DECISION-MAKER OR ANOTHER HEALTH INFORMATION CUSTODIAN.

The personal health information to be collected, used or disclosed must have been received from the individual to whom the personal health information relates, from his or her substitute decision-maker or from another health information custodian.

Personal health information is defined in *PHIPA* as identifying information relating to the physical or mental health of an individual, the provision of health care to an individual, the identification of the substitute decision-maker for the individual and the payments or eligibility of an individual for health care or coverage for health care, including the individual's health number.

A substitute decision-maker is a person authorized under *PHIPA* to consent on behalf of an individual to the collection, use or disclosure of personal health information.

If the personal health information to be collected, used or disclosed was received from a third party, other than the substitute decision-maker for the individual or another health information custodian, consent cannot be assumed to be implied. For example, a health information custodian may not rely on assumed implied consent if the personal health information was received from an employer, insurer or educational institution.

David's family physician provides the neurologist and geriatrician with a referral letter summarizing David's symptoms, health history, and family health history, along with the results of his examination.

Can the family physician disclose and can the neurologist and geriatrician collect this personal health information based on assumed implied consent?

Yes. The family physician, neurologist and geriatrician may assume implied consent. The family physician received the personal health information directly from David and the neurologist and geriatrician received the information directly from another health information custodian, the family physician, for the purpose of providing health care to David.

3. THE HEALTH INFORMATION CUSTODIAN MUST HAVE RECEIVED THE PERSONAL HEALTH INFORMATION THAT IS BEING COLLECTED, USED OR DISCLOSED FOR THE PURPOSE OF PROVIDING OR ASSISTING IN THE PROVISION OF HEALTH CARE TO THE INDIVIDUAL.

The personal health information to be collected, used or disclosed must have been received for the purpose of providing health care or assisting in the provision of health care to the individual to whom it relates. A health information custodian may not rely on assumed implied consent if the personal health information was received for other purposes, such as research, fundraising, marketing or providing health care or assisting in providing health care to another individual or group of individuals.

The geriatrician to whom the referral is made is a co-investigator in a research study involving familial predisposition to Alzheimer's disease. In the course of the research study, while reviewing the list of study participants, the geriatrician notices the name "David Mann." The geriatrician reviews the research file of David Mann and determines, based on a comparison with the information contained in the referral letter, that it is the same David Mann.

The geriatrician photocopies the records of personal health information contained in the research file and places them in the clinical file for use at an appointment with David scheduled for November 13.

Can the geriatrician use the personal health information in this way based on assumed implied consent?

No. The geriatrician may not assume implied consent because the personal health information in the research file was not received for the purpose of providing health care or assisting in the provision of health care to David, but rather, for research purposes.

Following the appointment with David on November 13, the geriatrician would like to contact the laboratory for the results of the blood and urine testing ordered by David's family physician. The geriatrician would also like to contact the pharmacy where David indicated he routinely fills his prescriptions in order to obtain a list of all current medications.

Can the laboratory and pharmacy disclose and can the geriatrician collect this personal health information based on assumed implied consent?

Yes. The laboratory, pharmacy and geriatrician may assume implied consent. The personal health information was received by the laboratory and pharmacy, and will be received by the geriatrician, for the purpose of providing health care to David.

4. THE PURPOSE OF THE COLLECTION, USE OR DISCLOSURE OF PERSONAL HEALTH INFORMATION BY THE HEALTH INFORMATION CUSTODIAN MUST BE FOR THE PROVISION OF HEALTH CARE OR ASSISTING IN THE PROVISION OF HEALTH CARE TO THE INDIVIDUAL.

The collection, use or disclosure must be for the purposes of providing health care or assisting in the provision of health care to the individual to whom the personal health information relates. A health information custodian may not rely on assumed implied consent if the collection, use or disclosure is for other purposes, such as research, fundraising, marketing or providing health care or assisting in the provision of health care to another individual or group of individuals.

Several years pass and David's cognitive abilities continue to decline. Based on a diagnosis of probable Alzheimer's disease and the growing loss of David's functional abilities, David's geriatrician makes a referral to the local Community Care Access Centre. For purposes of assessing David's eligibility and service levels, the care coordinator at the local Community Care Access Centre contacts David's family physician to obtain further information about David's health history, current medications and treatment.

Can the Community Care Access Centre collect and can the family physician disclose this personal health information based on assumed implied consent?

Yes. The Community Care Access Centre is collecting this personal health information and the family physician is disclosing this personal health information for the purpose of providing health care or assisting in the provision of health care to David.

Ultimately, the local Community Care Access Centre facilitates the placement of David into a long-term care home.

One morning, following breakfast at the long-term care home, David falls and is transferred to the hospital by ambulance with a suspected hip fracture.

The next day David's former spouse, a nurse in the labour and delivery unit of the hospital, is advised by their son that David was admitted. The nurse looks at David's electronic health record to determine the reason for admission. The nurse signed a confidentiality agreement with the hospital.

Can the nurse use the personal health information in this way based on assumed implied consent?

No. The nurse may not assume implied consent to use the personal health information because she is not providing health care or assisting in the provision of health care to David.

Following a physical examination and X-ray, it is confirmed that David has a hip fracture and David undergoes a surgical procedure. A week later, David is discharged from hospital and returns to the long-term care home.

Two days following discharge, a nurse at the long-term care home notices small red, swollen and pus-filled bumps on David's skin. David also complains of fever, chills and shortness of breath. Following laboratory testing, David is diagnosed with MRSA infection. Since the infection may have been acquired at the hospital, the nurse would like to disclose the fact that David has MRSA to the hospital to prevent or reduce the risk of a possible outbreak.

Can this personal health information be disclosed to the hospital by the nurse at the long-term care home?

Yes. *PHIPA* permits a health information custodian to disclose personal health information without consent if there are reasonable grounds to believe that it is necessary to eliminate or reduce a significant risk of serious bodily harm to a person or group of persons. The nurse, however, may not rely on assumed implied consent because the disclosure is not for the purposes of providing health care or assisting in providing health care to David.

5. IN THE CONTEXT OF DISCLOSURE, THE DISCLOSURE OF PERSONAL HEALTH INFORMATION BY THE HEALTH INFORMATION CUSTODIAN MUST BE TO ANOTHER HEALTH INFORMATION CUSTODIAN.

A health information custodian may not assume an individual's implied consent in disclosing personal health information to a person or organization that is not a health information custodian, regardless of the purpose of the disclosure.

David is planning to attend an outing away from the long-term care home and will be accompanied by his cousin and the spouse of his cousin.

On the Wednesday prior to the outing, the spouse of David's cousin contacts the long-term care home. She would like information about the medications David is currently taking, including the frequency and dose, and "any other information about his condition" that will assist her in "helping David."

Can the long-term care home disclose this personal health information based on assumed implied consent?

No. The long-term care home may not assume implied consent because the spouse of David's cousin is not a health information custodian within the meaning of *PHIPA*.

6. THE HEALTH INFORMATION CUSTODIAN THAT RECEIVES THE PERSONAL HEALTH INFORMATION MUST NOT BE AWARE THAT THE INDIVIDUAL HAS EXPRESSLY WITHHELD OR WITHDRAWN HIS OR HER CONSENT TO THE COLLECTION, USE OR DISCLOSURE.

PHIPA permits an individual to expressly withhold or withdraw consent to the collection, use or disclosure of his or her personal health information, unless the collection, use or disclosure is permitted or required by *PHIPA* to be made without consent. In most circumstances, if an individual decides to withhold or withdraw consent, *PHIPA* requires the receiving health information custodians or their agents to be notified if the disclosing health information custodian is prevented from disclosing all of the information that is considered to be reasonably necessary for the provision of health care.

For further information about the ability of an individual to expressly withhold or withdraw consent to the collection, use or disclosure of personal health information for health-care purposes, and the obligations on health information custodians in this context, please refer to the Lock-box Fact Sheet produced by the Information and Privacy Commissioner of Ontario, which is available at www.ipc.on.ca.

David must visit the orthopedic clinic of the hospital for follow up related to his hip fracture. The orthopedic clinic is staffed by physiotherapists, occupational therapists, physicians and nurses.

David's current spouse, who is his substitute decision-maker, learns that his former spouse, who was a nurse in the labour and delivery unit of the hospital, now works as a nurse in the orthopedic clinic. David's current spouse wants to ensure that the former spouse and her colleagues do not view David's electronic health record. David's current spouse requests the hospital to ensure that only the orthopedic surgeon and the physiotherapist providing health care to David are permitted to view his electronic health record.

Can David's current spouse make this request?

Yes. David has been determined to be incapable of consenting to the collection, use and disclosure of personal health information and his current spouse is his substitute decision-maker for these purposes. As the substitute decision-maker, David's current spouse may expressly withhold or withdraw consent to the collection, use and disclosure of David's personal health information. The hospital, as a health information custodian, must comply with this decision unless the collection, use or disclosure is required or permitted by *PHIPA* to be made without consent.

LIMITING PRINCIPLES AND OPTIONS WHEN CONSENT CANNOT BE ASSUMED TO BE IMPLIED.

FACTORS TO BE CONSIDERED IN RELYING ON ASSUMED IMPLIED CONSENT

In general, a health information custodian must not collect, use or disclose personal health information if other information will serve the purpose and must not collect, use or disclose more personal health information than is reasonably necessary for that purpose. These general limiting principles apply even where a health information custodian is entitled to rely on an individual's assumed implied consent.

OPTIONS AVAILABLE WHEN YOU CANNOT ASSUME CONSENT TO BE IMPLIED

When consent cannot be assumed to be implied, health information custodians should consider other options. Depending on the circumstances, a health information custodian may be permitted to collect, use or disclose personal health information without consent, with the implied consent of the individual to whom the personal health information relates or with the express consent of that individual. *PHIPA* distinguishes between implied consent and assumed implied consent. In the case of implied consent, health information custodians must ensure that all of the elements of consent are fulfilled; whereas in the case of assumed implied consent, health information custodians may assume that all of the elements of consent are fulfilled, unless it is not reasonable to do so in the circumstances.

WITHOUT CONSENT

Health information custodians may collect, use or disclose personal health information without consent if the collection, use or disclosure is permitted or required by *PHIPA* to be made without consent.¹ For example, health information custodians are permitted to disclose personal health information without consent to a medical officer of health if the disclosure is made for purposes of the Health Protection and Promotion Act. In addition, in certain circumstances set out in sections 37(1)(a), 38(1)(a) and 50(1)(e) of *PHIPA*, health information custo-

¹ Sections 36 and 37 of *PHIPA*, respectively, set out the circumstances in which personal health information may be collected and used without consent and sections 38 - 48 and section 50 set out the circumstances in which personal health information is permitted or required to be disclosed without consent.

dians may use or disclose personal health information without consent where it is reasonably necessary for the provision of health care and the individual has not expressly instructed otherwise.

IMPLIED CONSENT

Health information custodians may imply an individual's consent to collect and use personal health information for most purposes. They may also imply consent to disclose personal health information to another health information custodian for the purpose of providing or assisting in the provision of health care to the individual. However, subject to limited exceptions, health information custodians cannot rely on implied consent when disclosing personal health information to a person or organization that is not a health information custodian. This exception applies regardless of the purpose of the disclosure.

In order to rely on implied consent, health information custodians must be satisfied that all the required elements of consent are fulfilled.

EXPRESS CONSENT

In all other circumstances, health information custodians may only collect, use or disclose personal health information with the express consent, (i.e., verbal or written consent) of the individual to whom the personal health information relates or his or her substitute decision-maker.

In order to rely on express consent, health information custodians must be satisfied that all of the required elements of consent are fulfilled.

ELEMENTS OF CONSENT

The consent of an individual for the collection, use or disclosure of personal health information by a health information custodian:

- Must be a consent of the individual or his or her substitute decision-maker;
- Must be knowledgeable;
- Must relate to the information that will be collected, used or disclosed; and
- Must not be obtained through deception or coercion.

For consent to be knowledgeable, it must be reasonable to believe that the individual knows the purpose of the collection, use or disclosure and knows that he or she may give or withhold consent.

It is reasonable to believe that an individual knows the purpose of the collection, use or disclosure if the health information custodian posts or makes readily available a notice describing these purposes where it is likely to come to the individual's attention or provides the individual with such a notice. Although health information custodians are not required to provide notice in those circumstances where consent may be assumed to be implied, health information custodians are encouraged to do so as a best practice.

ABOUT THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

The role of the Information and Privacy Commissioner of Ontario is set out in three statutes: the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act* and the *Personal Health Information Protection Act*. The Commissioner acts independently of government to uphold and promote open government and the protection of personal privacy.

Under the three Acts, the Commissioner:

- Resolves access to information appeals and complaints when government or health care practitioners and organizations refuse to grant requests for access or correction;
- Investigates complaints with respect to personal information held by government or health care practitioners and organizations;
- Conducts research into access and privacy issues;
- Comments on proposed government legislation and programs; and
- Educates the public about Ontario's access and privacy laws.



**Information and Privacy
Commissioner of Ontario**

**Commissaire à l'information et à la
protection de la vie privée de l'Ontario**

Information and Privacy Commissioner of Ontario
2 Bloor Street East, Suite 1400
Toronto, Ontario
Canada M4W 1A8

Web site: www.ipc.on.ca
Telephone: 416-326-3333
Email: info@ipc.on.ca

August 2015