

## **What the New Personal Health Information Protection Act Means for Audiologists and Speech-Language Pathologists**

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Since January 2004, health practitioners, including audiologists and speech-language pathologists, have had new obligations under the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. This is federal legislation that contains a number of rules to ensure that clients/patients' privacy rights in their own personal information are protected.

Shortly before *PIPEDA* took effect, the Ontario government introduced Bill 31, which includes the *Personal Health Information Protection Act, 2004 (PHIPA)*. Like *PIPEDA*, *PHIPA* has rules that will regulate personal health information. While not all of *PIPEDA*'s rules are the same as *PHIPA*'s, it is hoped that, as explained below, audiologists and speech-language pathologists will soon only need to be concerned with the rules contained in *PHIPA*. Until that time, members should be aware of their obligations under *PIPEDA* and they should know what rules will likely soon apply under *PHIPA*, which is currently scheduled to take effect on November 1, 2004.

*PIPEDA* requires audiologists and speech-language pathologists in private practice to obtain the consent of their patients/clients to collect, use and disclose their patients/clients' personal information, which includes personal health information. Because *PIPEDA* likely does not apply to hospitals or other facilities where there is no "commercial activity", these rules generally apply only to private practices. However, one of the difficulties with *PIPEDA* is that the meaning of "commercial activities" is not entirely clear, as *PIPEDA* was not designed specifically for the health sector.

In cases where *PIPEDA* applies, practitioners have a number of obligations:

- Practitioners must ensure that a process is in place for dealing with complaints about how their patients/clients' personal health information is handled, and to inform patients/clients about this process.
- There is a detailed set of requirements that practitioners must follow in the event that a patient/client is concerned about information that is contained in their charts or files. Under *PIPEDA*, in virtually all cases practitioners are obliged to record their patient/client's concerns and to correct the information that is the subject-matter of the concern.
- *PIPEDA* also requires that each "organization" appoint an information officer to be responsible for ensuring compliance with *PIPEDA*, and to handle requests for information and complaints about how the practitioner deals with their patients/clients' personal health information, as well as its accuracy. In the case of sole practitioners, the practitioner himself or herself will normally be both the "organization" and the information officer. In the case of group practices, the

“organization” will usually be the group, while one practitioner, or a senior office administrator, can fulfill the role of information officer.

- *PIPEDA* also requires that all organizations have a written privacy policy.

Whereas *PIPEDA* only applies to persons engaged in a “commercial activity”, including persons working outside of the health care sector, *PHIPA* was designed specifically for the entire health care sector, regardless as to whether practitioners are engaged in a “commercial activity”.

There are both similarities and differences between *PIPEDA* and *PHIPA*:

While *PHIPA* maintains the general principle that informed consent is required in order for practitioners to collect, use and disclose personal health information, *PHIPA* applies to any collection, use and disclosure of personal health information by a “health information custodian”. Health information custodians are broadly defined. They include a person or organization who has custody or control of personal health information in connection with performing the person’s or organization’s powers or duties. This includes, among others,

- A health care practitioner or a person who operates a group practice of health care practitioners (“health care practitioner” includes practitioners registered under the *Regulated Health Professions Act, 1991*, as well as unregistered persons whose primary function is to provide health care for payment.)
- A service provider within the meaning of the *Long-Term Care Act, 1994* who provides a community service to which that Act applies.
- A community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*.
- A person who operates,
  - a hospital within the meaning of the *Public Hospitals Act*,
  - an independent health facility within the meaning of the *Independent Health Facilities Act*,
  - a nursing home within the meaning of the *Nursing Homes Act*,
  - a home for special care within the meaning of the *Homes for Special Care Act*, and,
  - a centre, program or service for community health or mental health whose primary purpose is the provision of health care.

Only those persons and institutions specifically identified in *PHIPA*, of which these are only some, are custodians. The custodians listed here are the ones that are likely to be most relevant to audiologists and speech-language pathologists.

This is a significant expansion from *PIPEDA*, which generally applied only to practitioners working in private practice. *PHIPA* will therefore apply to almost all audiologists and speech-language pathologists regardless of the setting of their clinical practices including, for example, those working for hospitals, CCACs, school boards, and anywhere else personal health information is collected. However, because school boards

are not listed as custodians, they are not custodians. In the case of members working for school boards, the member functions as the health information custodian.

Each custodian must appoint an information officer, called a “contact person”, who will likely be the same person who would have been designated as the information officer under *PIPEDA* if it applied. However, where the member practises in an institution that is considered a health information custodian such as a hospital, CCAC, etc., the member is likely an “agent” of that custodian, and will therefore have no obligations under *PHIPA* that are independent of the larger custodian other than their duty to report privacy breaches.

- More specifically:
  - Members who are sole practitioners with their own offices are custodians;
  - The operator of a group practice of practitioners, whether the practitioners are regulated or not, is a custodian;
  - Employees of custodians (such as hospitals) are not independent custodians themselves, but they must comply with their employer’s privacy policies as agents of those custodians;
  - Employees of non-custodians will be the custodians.
  - Members who either work as independent contractors or work through a services company may be independent custodians, depending on where and for whom they work. For example, an independent contractor who provides services for a custodian (i.e., a hospital or CCAC) is not an independent custodian, but an independent contractor who provides services for a non-custodian (i.e., a school board) will have the obligations of a custodian. The status of the member (i.e., employee v. independent contractor) is not the issue; the issue is where and for whom they practice.
- *PHIPA* will be enforced by the Ontario Information and Privacy Commissioner, although the federal Privacy Commissioner will still be responsible for enforcing *PIPEDA*. The Ontario Commissioner has broad powers of investigation under *PHIPA*, and can order a custodian to comply with their *PHIPA* obligations. Practitioners are also subject to prosecution for breaches of *PHIPA* and to civil actions for damages, including a maximum of \$10,000 for mental anguish.
- *PHIPA* imposes a few new obligations that are not contained in *PIPEDA*. For example, if there is a privacy breach, custodians have an obligation to notify their patient/client of the theft, loss or unauthorized access. Members are therefore reminded that they need to ensure that they regularly back-up their electronic records.
- There is an explicit duty on “agents” of custodians, such as a practitioner employed by or having privileges at a health facility, to notify the custodian if they have been involved in a privacy breach. As *PHIPA* is new legislation, however, it remains unclear as to whether members in this situation will be seen

to be “agents” of the health facility although the prevailing view seems to be that health practitioners will be “agents” of custodians. Until the issue is resolved, members are encouraged to report any such breaches to the custodian, that is, the health facility.

*PHIPA* clarifies a number of ambiguities that exist under both *PIPEDA* and under the current patchwork of statute and case law:

- *PHIPA* applies to any personal health information collected, used or disclosed by a custodian (i.e., audiologists and speech-language pathologists and the facilities where they practice) regardless of whether the custodian engages in “commercial activities”. Audiologists and speech-language pathologists in private practice who are already complying with *PIPEDA* will therefore likely need to do very little in order to comply with *PHIPA*. On the other hand, practitioners who work for a health facility or health agency, such as hospitals and CCACs, will generally be able to rely on the information handling practices at those facilities, which will need to develop information handling practices that those in private practice have already had to develop.
- *PHIPA* provides more workable consent procedures for the collection, use and disclosure of personal health information than *PIPEDA*. Generally, implied consent will be sufficient for the collection, use and disclosure of personal health information in the course of providing health care. A poster or brochure readily available and likely to be seen by a client can be used to support implied consent but only for a typical or expected use and disclosure of personal health information. Since this may be difficult in the context of a school board, for example, audiologists and speech-language pathologists will need to take additional steps to ensure that they have the consent of the client or their guardian by requesting a clear written consent to the collection, use and disclosure of personal health information.
- Under *PHIPA*, typical or expected uses of information will generally be permitted without obtaining a separate consent. For example, members can generally assume implied consent for disclosure of personal health information to other custodians who are treating the client. Members can therefore send reports and assessments to other custodians without written or express consent, unless the client objects. However, consent is required when custodians send reports to non-custodians, such as school boards.
- Other problem areas are also addressed by *PHIPA*. For example, a direction from a client not to record pertinent information will clearly be invalid. Also, if a patient/client directs that relevant information not be provided to another custodian, practitioners will be able to warn the recipient that they are receiving only part of the file or chart, which is likely not permitted under *PIPEDA*.

- *PHIPA* also provides for more options for using and disclosing personal health information without the client's consent. These include using the information for health care planning and delivery, risk management and education. Disclosure of personal health information can generally be made without consent to others on the health care team to provide basic status reports on those admitted to facilities, to support families and friends of a deceased client, for audit and accreditation purposes, for serious safety issues and to successor custodians (e.g., the purchaser of a practitioner's practice).
- *PHIPA* requires that reasonable safeguards be taken to protect personal health information. For example, clients have the right to be advised of privacy breaches. Information technology suppliers to custodians will be obliged to comply with certain standards. In addition, *PHIPA* will allow practitioners to reasonably store personal health information at their client's home (e.g., for homecare situations) or at an off-site storage facility, with client consent.
- *PHIPA* provides for a more health-specific system for client access and correction of their records than *PIPEDA*. For example, requests by patients/clients to access information can be refused in respect of "quality of care" information,<sup>1</sup> or information generated for purposes of quality assurance programs, such as the program administered by CASLPO. The same is true in respect of raw data from psychological tests and where there is a risk of serious harm to either the client or others.
- Perhaps more important, requests by clients/patients that the practitioner "correct" health records will be able to be declined for professional opinions and observations and, in many circumstances, where the record was provided by another custodian. In addition, custodians do not have to provide copies of corrected records (or statements of disagreements) to those the custodian has previously disclosed the personal health information where the correction would have no impact on the patient/client's care.

Accompanying *PHIPA* is a related statute called the *Quality of Care Information Protection Act, 2004*. *QCIPA* protects certain information from being used against a practitioner or other custodian in any civil or other proceeding (including discipline proceedings). For example, information compiled by a risk management committee at a facility or by the College's quality assurance program about a practitioner is protected. Even information collected by a practitioner in order to comply with the College's quality assurance program cannot be used against the practitioner. This statute will provide greater assurance to practitioners that when they take steps to improve their practice or that of their facility, they will not be creating liability for themselves.

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<sup>1</sup> Quality of care information is information collected by or prepared for a quality of care committee for the sole or primary purpose of assisting the committee in carrying out its functions, or information that relates solely or primarily to any activity that a quality of care committee carries on as part of its functions, although there are exceptions: see the definition of quality of care information in the companion *Quality of Care Information Protection Act, 2004*.

Until the federal government determines that *PHIPA* is substantially similar to *PIPEDA*, both statutes will be law once *PHIPA* comes into effect on November 1, 2004. Assuming that the federal government declares that *PHIPA* is substantially similar to *PIPEDA*, only *PHIPA* will apply insofar as the management of personal health information. While as noted the requirements are similar, *PHIPA* is more specifically designed to deal with health care practitioners, and its application is broader than *PIPEDA*, and the College is optimistic that its members will eventually only need to be concerned with *PHIPA* and not *PIPEDA*, at least in terms of their practices. The College will continue to keep its members up to date as the law changes.

Finally, what follows are a few frequently asked questions that should help members understand their current obligations as well as the obligations that they are soon likely to have:

**Q:** What legislation is in effect now?

**A:** Right now, only *PIPEDA* is law. As of November 1, 2004, both *PIPEDA* and *PHIPA* will be law, even though they are not entirely consistent with each other. If the federal government declares that *PHIPA* is “substantially similar” to *PIPEDA*, which the provincial government expects, only *PHIPA* will apply to personal health information.

**Q:** I am an audiologist in private practice with other CASLPO members, members of other health Colleges and unregulated practitioners. What obligations do I have?

**A:** Under *PIPEDA*, the group practice could be considered an “organization”, and you can therefore divide responsibility for complying with *PIPEDA* with your other colleagues as long as at least one person is appointed an information officer to be ultimately responsible for the group practice’s compliance with *PIPEDA*.

Under *PHIPA*, the health information custodian will be the person who “operates a group practice of health care practitioners”. Since “health care practitioners” includes both regulated health practitioners and others whose “primary function is to provide health care for payment”, it doesn’t matter whom among these practitioners performs the function of a health information custodian, but someone must.

There may also be situations where the group practice is operated by a corporation or an outside person and, in those situations, the outside person or the corporation will be the health information custodian. In addition, the health information custodian must appoint a contact person or assume the responsibilities of the contact person.

**Q:** I work in a hospital; what are my obligations now, and will they change once *PHIPA* comes into force?

**A:** While hospitals are not generally covered by *PIPEDA*, some hospitals have developed voluntary privacy policies and you need to familiarize yourself with them. In any event,

the hospital will be covered under *PHIPA* although you will likely have few additional obligations as a practitioner other than your duty to report privacy breaches, because the hospital will likely be the health information custodian. However, you will need to familiarize yourself with the hospital's privacy policy.

**Q:** I am an employee of a school board; what are my obligations?

**A:** In part because school boards are not health information custodians, you will be the health information custodian, even though you are an employee of a non-custodian, and therefore have all of the obligations of a custodian, including obtaining consent to collect, use and disclose personal health information, develop a privacy policy, etc. More specifically, you will need to ensure that consent is obtained not just for assessment and treatment, but also for releasing personal health information to the school board.

**Q:** I often work in schools, although I am not an “employee” of the school board. What are my obligations?

**A:** Again, because neither schools nor school boards are health information custodians, you are the health information custodian because you will be collecting personal health information. In addition to your usual obligations as a regulated health practitioner, you will need to ensure that you have the consent of the patient (student) or their substitute decision-maker to disclose the information to the school board, and you will have all of the other obligations that *PIPEDA* now imposes, and that *PHIPA* will impose, as summarized in the previous answer.

**Q:** When I do consultations in schools, can the school or school board keep the records if the school is not a health information custodian, or do I need to keep the records?

**A:** Provided the patient/substitute decision-maker consents, and the member is satisfied that the records will be kept reasonably, the records can probably be kept by the school or the school board. However, members should either keep copies or ensure that they maintain the right to access these records should they need such access in the future in order, for example, to be able to respond to a complaint.

**Q:** Are public health units and children's treatment centres covered under either or both of *PIPEDA* and *PHIPA*?

**A:** Under *PIPEDA*, these organizations are probably not covered, because they probably do not engage in what *PIPEDA* defines as “commercial activities”. However, these organizations probably will be covered under *PHIPA*, because they likely fall within the following part of the definition of health information custodian: “a centre, program or service for community health or mental health whose primary purpose is the provision of health care”. However, because practitioners providing services in these workplaces are probably “agents” of these custodians, they will not themselves be considered to be custodians. They will however be obliged to comply with the custodian's privacy policies and report any privacy breaches.

If you wish additional information, *PIPEDA* can be accessed at <http://laws.justice.gc.ca/en/P-8.6/index.html>, and *PHIPA* can be accessed at [http://www.ontla.on.ca/documents/Bills/38\\_Parliament/Session1/b031ra.pdf](http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b031ra.pdf).

*Bernie LeBlanc practices health law, and is a frequent speaker and the author of numerous articles. For more information about his upcoming presentation for the Federation of Health Regulatory Colleges on PHIPA and other accountability issues see: [www.sml-law.com/seminars/details.asp?eventID=73](http://www.sml-law.com/seminars/details.asp?eventID=73).*