

CAUT LEGAL ADVISORY

Personal Health Information Protection

May 2005



**Association canadienne des professeures
et professeurs d'université
Canadian Association of University Teachers**

**2675 promenade Queensview Drive
Ottawa, Ontario
K2B 8K2**

**613.820.2270
613.820.7244
www.caut.ca**

Personal Health Information Protection

Re: Protection of health information gathered and used by your employer; the new model found in Ontario's *Personal Health Information Protection Act*

Privacy protection law varies somewhat from province to province. Due to the fairly minimalist approach taken by governments, the best protection for your members' personal health (or other) information, is contract language. Currently most provinces have decided to rely upon the provisions of the federal *Personal Information Protection and Electronic Documents Act*. But this federal *privacy* legislation does not provide specific protection to individuals for the personal health information obtained, held, or disclosed by doctors in public hospitals, nor does it provide for protection of employee health information held or used by employers who are not part of the federal public service or considered by that legislation to be a "federal work or undertaking". For employees in provincial universities, in some cases the common law right of privacy provides some protection, in other cases contracts provide some protection.

The Ontario *Personal Health Information Protection Act* ("PHIPA") came into force in November 2004¹. PHIPA is important for employees in Ontario, but it is also instructive for academic staff associations in or out of Ontario who seek to negotiate appropriate standards for protection of the personal health information of their members.

While some academic staff associations have negotiated collective agreement language that aims to protect the *personal information* of its members, not all ensure particular protection of the personal *health* information of their members. Courts and tribunals consider personal health information to be *highly sensitive* information requiring special protection. To achieve a higher degree of protection PHIPA provides that employers who receive personal health information of their employees from health information custodians must ensure that they store and protect that information in the same manner as required of the custodians. This however may not be clear to employers (or worse, only observed in the breach), so it is highly recommended that academic staff associations, whether inside Ontario or outside Ontario, negotiate a protocol

¹ Prior to its enactment, (and in the absence of provincial legislation addressing this subject), the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applied to the personal information obtained in the course of commercial activities of medical practitioners carrying on private business, i.e. not employed in hospitals. This legislation does not replace privacy protection obligations found in the federal legislation unless the federal Privacy Commissioner deems PHIPA to be *substantially similar* to PIPEDA.. But PHIPA does have a different affect and scope than PIPEDA. In particular, and as emphasized in this advisory, PHIPA extends the scope of protection to the personal health information provided to employers by the health practitioners defined in the legislation.

with the employer (or better yet, contract language) to ensure that the principles and requirements of *PHIPA* are met, including at least the following:

Personal Health Information:

- a) is defined in the same manner as that found in *PHIPA*²
- b) is not stored in general personnel files (to prevent use for which it was not intended);
- c) is accessible to the member on request in order to confirm accuracy or appropriateness of retention;
- d) is gathered only with the express consent of the employee, (the consent to specify purpose(s));
- e) is retained and used only for the express purpose(s) for which consent was given, and only for the time necessary for those purposes to be achieved;
- f) is as accurate and current as possible and is obtained only from the health information custodian(s) named in the employees' consent;
- g) is not to be disclosed to anyone other than individuals expressly identified in the consent, or as clearly necessary to the purpose of the disclosure, or as mandated by law;
- h) is subject to security protocols to prevent unintended disclosures

PHIPA aims to protect the collection, use and disclosure of personal health information. The primary focus therefore is on the health care providers' collection, storage and disclosure of personal health information because they are the ones who most often have care and control of such information. The information protection however extends to the personal health information that a health care provider (*health information custodian* is the term used in the legislation) directly discloses to others, including employers³.

² *PHIPA* defines (in part) personal health information in section 4(1) as:

- "...identifying information about an individual in oral or recorded form, if the information,
- (a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
 - (b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,
 - (c) is a plan of service within the meaning of the Long-Term Care Act, 1994 for the individual,
 - (d) relates to payments or eligibility for health care in respect of the individual,
 - (e) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,
 - (f) is the individual's health number, or
 - (g) identifies an individual's substitute decision-maker. 2004, c. 3, Sched. A, s. 4 (1).

For complete text go to: <http://www.canlii.org/on/laws/sta/2004c.3sch.a/20050211/whole.html#BK1>

³ 7. (1) Except if this Act or its regulations specifically provide otherwise, this Act applies to,

- (a) the collection of personal health information by a health information custodian on or after the day this section comes into force;
- (b) **the use or disclosure of personal health information**, on or after the day this section comes into force, by,

The Ontario Information and Privacy Commission advises on its website⁴ that the legislation imposes obligations on employers who receive personal health information about their employees from a health information custodian. By way of example, if an employer receives personal health information from a health information custodian for the purposes of determining appropriate workplace accommodation of an employee's disability, that information can not be used for any other purpose, must be as accurate and current as possible, must be retained with appropriate safeguards to restrict relevant access to the information, and is kept only as long as is necessary for the purpose.

What does this mean for members inside Ontario/outside of Ontario? It is highly recommended that in addition to the suggestions made above for specific protocols (or contract language) for protection of the personal health information of your members, that you advise your members not to sign any employment or pre-employment forms containing general consents to release of personal health (or otherwise) information (this may in many instances be contrary to the collective agreement as well). For employees in Ontario, when the employer (or benefit provider) does legitimately require personal health information, they should only disclose such information through their personal health care practitioner(s) (rather than giving such information to the employer themselves in the form of an information sheet). This latter measure ensures that employees secure the protections and remedies available under this legislation in the event that the employer attempts to use the information for purposes unrelated to the disclosure, (e.g., for discipline or termination), or fails to ensure protection of the information.

An enhanced safeguard of the Ontario legislation includes improved employee control over the content of the information that is disclosed by the health care provider. Disclosure requires written consent that is specific, e.g. that only health information that is relevant to the accommodation request should be disclosed⁵. If non-relevant information is subsequently disclosed the employee can file a complaint with the Privacy Commissioner.

-
- (i) a health information custodian, even if the custodian collected the information before that day,
 - (ii) **a person who is not a health information custodian and to whom a health information custodian disclosed the information,...**

⁴ http://www.ipc.on.ca/scripts/index_.asp?action=31&P_ID=15371&N_ID=1&U_ID=0&LG_ID=1#application

⁵ The CAUT Policy Statement on Privacy and Health Related Information (Nov. 2004) articulates similar principles:

"In cases where an accommodation is sought by an employee, expert consultants shall similarly restrict their opinions to the need and appropriateness of the proposed accommodation. Employers shall not request nor shall health professionals provide the details of an individual health condition beyond that needed to ensure appropriate accommodation."

(http://www.caut.ca/en/policies/privacy_health.asp)