

Personal Health Information Act Questions & Answers for Licensed Practical Nurses

The *Personal Health Information Act* (PHIA) was passed by the Nova Scotia government in December 2010. The Act came into force on June 1, 2013. To assist Licensed Practical nurses (LPNs) in better understanding important elements of the *Personal Health Information Act* that affect nursing practice, a Q&A document has been developed by the College of Licensed Practical Nurses of Nova Scotia (the College).

Q-1. What is the *Personal Health Information Act*?

A. *PHIA* is an act developed by the Nova Scotia Department of Health and Wellness. It governs the manner in which personal health information may be collected, used, disclosed and retained within Nova Scotia's health care system. This Act balances the individual's right to privacy with the benefits of the use of personal health information by the health care sector to deliver and improve health care services.

Q-2. What is considered 'personal health information'?

A. Personal health information is defined in the Act as identifying information about an individual, whether living or deceased (in both recorded and unrecorded forms), when the information relates to the individual's physical or mental health, and includes information that consists of the individual's family health history. It also relates to the:

- application, assessment, eligibility and provision of health to the individual, including the identification of a person as a provider of health care to the individual;
- individual's payments for health care;
- individual's eligibility for health care;
- donation by an individual of any body part or bodily substance;
- information derived from the testing or examination of any body part or bodily substance, and;
- individual's registration information, including their health card number and if the information identifies an individual's substitute decision-maker.

Q-3. Why does Nova Scotia require additional legislation to protect personal information?

A. In Nova Scotia, personal health information has been governed by a mixture of federal and provincial legislation, health profession codes and organizational policies and procedures. PHIA brings the majority of the provincial health sector under one piece of legislation, provides better privacy protection for individuals, and applies to both paper and electronic records. PHIA was

developed specifically for health care in Nova Scotia, including direct patient care, public health, planning and management of the health system and research.

Q-4. Do other Canadian provinces / territories have provincial health information legislation?

- A. Yes. In fact, as of January 2013, Nova Scotia was among the last provinces to adopt such legislation.

Q-5. What is the scope of the *Personal Health Information Act*?

- A. Generally, PHIA applies to custodians when they collect, use, disclose, retain, or destroy personal health information in the course of providing or supporting health care.

Q-6. Who are considered ‘custodians’ of health information?

A. The Act defines a variety of individuals and organizations within the health care sector as custodians of health information. To be considered a custodian requires that the individual or organization have custody or control of personal health information. A custodian can be:

- an individual regulated health professional;
- a person who operates a group practice of regulated health professionals (i.e., physicians or dentists);
- a district health authority;
- a pharmacy;
- a continuing care facility;
- Canadian Blood Services;
- Nova Scotia Hearing and Speech Centre;
- a home care agency approved by the Department of Health and Wellness, or;
- health professionals who are self-employed(i.e., an LPN who owns a foot care business).

For a complete list of custodians, go to <http://www.novascotia.ca/just/regulations/regs/hipershealth.htm> .

Q-7. Who are considered ‘agents’ of a custodian?

A. An agent is someone who acts for the custodian or acts on behalf of the custodian when collecting, using or disclosing personal health information. The agent must be authorized by the custodian to carry out these activities for the custodian’s purposes. While agents do not share all the duties of custodians, they are not permitted to use personal health information for their own purposes and have reporting

obligations in the event of inappropriate access to the personal information. Examples of agents include employees such as LPNs, volunteers, health professionals with privileges, or a custodian's insurer.

Q-8. Are there instances where *PHIA* does not apply?

A. *PHIA* does not apply to statistical, aggregate or de-identified health information or to provider information. It does not apply to personal health information about an individual 50 years after death or 120 years after a record containing the information was created, whichever is earlier.

Q-9. What type of consent applies under *PHIA*?

A. The *Personal Health Information Act* relates only to consent for the management of personal health information, not consent to treatment. Knowledgeable consent must be: given by the individual or substitute decision-maker; specific to the information, and; given freely.

Q-10. What are the consent principles followed under *PHIA*?

A. The principles followed for consent under *PHIA* state that a custodian shall not collect, use or disclose personal health information if other information would serve the purpose and that the collection, use, and disclosure of personal health information shall be limited to the minimum amount of personal health information necessary to achieve the purpose. Personal health information cannot be collected for a purpose in the future.

Q-11. What are the consent models defined under *PHIA*?

A. There are three consent models found within the *Personal Health Information Act*.

Express Consent

Although not defined in *PHIA*, according to the *PHIA* toolkit, express consent is considered to be *voluntary agreement with what is being done or proposed*. Express consent can be written or verbal. Express consent of the individual is required for the collection and use of personal health information for fund-raising activities as well as for market research and the marketing of any service for a commercial purpose. Express consent is also required for disclosure of information:

- by a custodian to a non-custodian (unless required or authorized by law);
- by a custodian to another custodian if it is not for the purpose of providing health care (unless required or authorized by law);
- for fund-raising activities;
- for market research;
- to the media, and;

- to a person or organization for the purpose of research.

Knowledgeable Implied Consent

Knowledgeable implied consent means it is reasonable in the circumstances for the custodian to believe that: the individual knows the purpose of the collection, use or disclosure of the information, and that the individual knows that they may give or withhold consent. If the individual pursues a health service, the custodian may infer that the individual is consenting to the collection, use and/or disclosure of the personal health information. To ensure that consent is “knowledgeable,” a custodian must provide written or verbal information directly to the individual, or post a notice or distribute brochures describing the purpose of the collection, use and disclosure of personal health information.

Disclosure Without Consent

There are provisions in *PHIA* for circumstances where personal health information may be collected, used or disclosed without consent. A custodian is not obliged to disclose information to a third party unless required to do so under another law or enactment. It should be noted that the custodian may choose to obtain the individual’s consent for the disclosure or give notice to the individual of the disclosure even when not required by *PHIA*.

Q-12. Can an individual’s personal health information be used for research?

A. The *Personal Health Information Act* has introduced rules to provide protection of personal health information in circumstances where a custodian wants to use personal health information under their control for research. Prior to commencing the research, a custodian may use personal health information for research if the custodian:

- prepares a research plan that meets the requirements in section 59 of the Act;
- submits the research plan to a research ethics board;
- receives the approval of the research ethics board, and;
- meets any conditions imposed by the research ethics board.

Q-13. What does the term ‘circle of care’ mean?

A. Knowledgeable implied consent is the basis for the exchange of information between custodians within an individual’s ‘circle of care’. The term ‘circle of care’ is not used in legislation but is used in the health sector to refer to custodians who provide or support care to an individual in each instance of care provision. Industry Canada guidelines for the health sector define ‘circle of care’ as *Individuals and activities related to the care and treatment of a patient. Thus, it covers the health care providers who deliver care and services for the primary therapeutic benefit of the patient and it covers related activities such as laboratory work and professional or case consultation with other health care providers.*

Therefore 'knowledgeable implied consent' is required from the individual within the 'circle of care' and 'express consent' is required outside the 'circle of care'. For more examples, click the link <http://novascotia.ca/dhw/phia/documents/PHIA-complete-toolkit.pdf> and go to, the Department of Health and Wellness publication: 'Toolkit for Custodians: A Guide to the Personal Health Information Act'.

Q-14. Can an individual receiving health care limit or withdraw consent to a custodian's use and disclosure of personal health information?

A. Yes, an individual receiving health care may limit or revoke consent to a custodian's collection, use and disclosure of personal health information at any time. However, these requests are not retroactive meaning that the custodian is not required to request that information previously disclosed to another provider be returned.

When an individual limits or withdraws consent to have information disclosed to another health care provider, the custodian must inform the provider that the information is not complete. The custodian must also inform the individual of the consequences of limiting or revoking consent, including the fact that the other provider may decide that s/he is not confident in providing care to the individual without understanding what information has been withheld.

Q-15. Are there any provincial Acts that prevail or override *PHIA*?

A. Yes, examples of legislation that overrides *PHIA* are the *Health Protection Act* (e.g. reporting of notifiable diseases), *Protection for Persons in Care Act*, *Health Act*, and *Children and Family Services Act* (e.g. duty to report suspicion of abuse).

Q-16. When may a custodian disclose personal health information about an individual without the individual's consent?

A. A custodian may disclose personal health information about an individual without the individual's consent to another custodian if required by law or if the custodian disclosing the information has a reasonable expectation that the disclosure will prevent or assist an investigation of fraud, limit abuse in the use of health services or prevent the commission of an offence under an enactment of a province or the Parliament of Canada.

Q-17. What should a Licensed Practical Nurse do when personal health information in their possession is stolen, lost or accessed by unauthorized persons?

A. According to the *PHIA*, the agent (LPN) of the custodian (employer) must notify the custodian at the first reasonable opportunity if personal health information handled by the agent on behalf of the custodian is stolen, lost or accessed by unauthorized persons.

Q-18. When may a custodian disclose personal health information about an individual who is deceased?

A. A custodian may disclose personal health information about an individual who is deceased, or is believed to be deceased:

- for the purpose of identifying the individual
- for the purpose of informing any person whom it is reasonable to inform that the individual is deceased or believed to be deceased;
- to a spouse, parent, sibling or child of the individual if the recipient of the information reasonably require the information to make decisions about the recipient's own health care or the recipient's children's health care and it is not contrary to a prior express request of the individual
- for carrying out the deceased person's wishes for the purpose of tissue or organ donation.

Q-19. When may a custodian disclose personal health information about an individual collected within the province to a person outside the province?

A. A custodian may disclose personal health information about an individual collected in the province to a person outside the province if:

- the individual consents to the disclosure;
- the disclosure is permitted by this Act or the regulations;
- the disclosure is to a regulated health professional and the disclosure is to meet the functions of another jurisdiction's prescription monitoring program;
- the following conditions are met:
 - the disclosure is for the purpose of the planning and management of the health system or health administration;
 - the information relates to health care provided in the province to an individual who resides in another province of Canada, and;
 - the disclosure is made to the government of that other Canadian province.
- the disclosure is reasonably necessary for the provision of health care to the individual and the individual has not expressly instructed the custodian not to make the disclosure.

Q-20. Do individuals have the right to access their record of personal health information that is under the control of a custodian?

A. As a general principle, under *PHIA*, individuals have the right to access their record of personal health information that is in the custody of or under the control of a custodian. This includes the right to request

to examine a record or ask for a copy of a record. A person may ask to examine a record or ask for a copy of a record, or both, by:

- making a request in writing to the custodian that has the custody or control of the record;
- specifying the subject-matter of the record requested with sufficient particulars to enable the custodian to identify and locate the record, and;
- paying any required fees.

Q-21. Can an individual request that the custodian correct the record?

A. Where a custodian has granted an individual access to a record of the individual's personal health information and the individual believes that the record is not accurate, complete or up-to-date, the individual may request in writing that the custodian correct the record. No fee may be charged for a correction to personal health information.

Q-22. When may a custodian refuse to grant an individual access to their record of personal health information?

A. There are exceptions to an individual's right to access their personal health information. A custodian may refuse to grant access to all or part of the individual's personal health information if it is reasonable to believe that the record:

- is subject to privilege (e.g., a lawyer's letter contained within a health record);
- disclosure is prohibited by other legislation;
- was created solely to ensure quality or standards of care as part of an internal quality review process;
- was created for use in a proceeding (e.g., report of a care provider to a legal representative in anticipation of a lawsuit);
- was collected or created in the course of an ongoing inspection/investigation, and;

A custodian may also refuse access to an individual's health information when it is reasonable to believe that access to the record could result in:

- serious harm to the individual's physical or mental health or to that of another individual;
- disclosure of the identity of the provider of the information where confidentiality was reasonably expected ;
- disclosure of a third party's health information, and;
- when a request is 'frivolous and vexatious' or part of a course of conduct intended to abuse the right to request information.

Q-23. If a Licensed Practical Nurse is self-employed, how long must patient records be kept?

A. Under *PHIA* a custodian is required to have a written retention schedule for personal health information in its custody or under its control. The Act does not set out a specific period for which records must be retained by a custodian, but does provide that the schedule sets out all legitimate purposes for retaining the information, as well as the retention and destruction schedules associated with each purpose. As a custodian, when establishing a retention schedule, it is important to be mindful of the law regarding potential liability claims which may be brought against the custodian. Agents should follow custodian policy. LPNs, acting as custodians should consult with legal counsel to determine retention policies.

For more information about Self-Employment, go to <http://clpnns.ca/wp-content/uploads/2013/04/Self-Employment.pdf> .

Q-24. When is a person guilty of an offence under *PHIA*?

A. A person is guilty of an offence if the person willfully collects, uses or discloses health information in contravention of this Act or the regulations. A person who is guilty of an offence under this Act or the regulations is liable on summary conviction in the case of an individual, to a fine of not more than ten thousand dollars or imprisonment for six months, or both. A corporate custodian is liable to a fine of up to \$50,000.00. An officer, member, employee or other agent of the corporation who authorized the offence, or who had the authority to prevent the offence from being committed but knowingly refrained from doing so can similarly be held liable whether or not the corporation is convicted.

References

Nova Scotia Department of Health and Wellness Privacy and Access Office. (2013). *Toolkit for custodians: A guide to the Personal Health Information Act*. Halifax, NS: Author. Retrieved from www.novascotia.ca/DHW/PHIA.

Personal Health Information Act. c. 41. (2010). Statutes of Nova Scotia. Halifax, NS: Government of Nova Scotia. Retrieved from http://nslegislature.ca/legc/bills/61st_2nd/3rd_read/b089.htm.

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