

**Information
and Privacy
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**How to Avoid Abandoned Records:
Guidelines on the Treatment of
Personal Health Information,
in the Event of a Change in Practice**



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Guidelines on the Treatment of Records of Personal Health Information in the Event of a Change in Practice

Changes in the practice of health information custodians may occur in a variety of circumstances – death, bankruptcy, retirement or relocation, to name a few. The failure to adequately address privacy and security issues with respect to the treatment of records of personal health information in the event of a change in practice may have harmful consequences for the individuals to whom the personal health information relates.

Inadequate records management policies and procedures following a change in practice may not only lead to breaches of privacy, but may also deprive individuals of their right to access and correct records of personal health information. Furthermore, to the extent that records of personal health information are not available to individuals and their health care providers following a change in practice, the continuity of care of the individuals may be put in jeopardy.

While it is recognized that changes in practice may raise broader issues in relation to the provision of health care, these *Guidelines* focus on compliance with the requirements under the *Personal Health Information Protection Act, 2004 (PHIPA)* and adherence to privacy and access best practices with respect to the management of records of personal health information.

These *Guidelines* are primarily directed to health care practitioners, including those operating in a group practice of health care practitioners, but may be adapted to suit the needs of other custodians as well. Custodians should also consult their governing legislation, for example the *Medicine Act, 1991*, the *Dentistry Act, 1991* and the *Physiotherapy Act, 1991* to name a few, as well as the policies and standards of practice of the college of their health profession.

1. Who is the Custodian in the Event of a Change in Practice?

Generally, a health information custodian (custodian) remains a custodian with respect to a record of personal health information (record) until complete custody and control of the record passes to another person who is legally authorized to hold it.¹ Accordingly, those who are custodians immediately before a change in practice continue to be custodians with respect to those records after the change in practice, unless custody and control of the records is passed on in the following circumstances.

If a custodian dies, section 3(12) of *PHIPA* deems the estate trustee of the deceased custodian or if there is no estate trustee, the person who assumed responsibility for the administration of the deceased custodian's estate, to be the custodian for the records until custody or control passes to another person who is legally authorized to hold them. As a result, the estate trustee or alternatively, the person who assumes responsibility for the administration of the estate, must comply with the duties and obligations imposed on custodians under *PHIPA*.

¹ See section 3(11) of *PHIPA*.

If a custodian becomes bankrupt or insolvent and as a result another person (i.e. a trustee in bankruptcy) obtains complete custody or control of the records of personal health information held by the custodian, then pursuant to section 3(7) of Regulation 329/04 under *PHIPA*, that other person is the custodian with respect to the records.

If a custodian transfers records of personal health information to a successor in accordance with the requirements in section 42(2) of *PHIPA*, the successor becomes the custodian with custody or control of the records of personal health information. For example, where a physician retires and transfers the records to another physician, the latter becomes the custodian of the records.

Finally, under section 42(3) of *PHIPA*, a custodian may divest itself of responsibility for records by transferring them to the Archives of Ontario, or to a prescribed person whose functions include the collection and preservation of records of historical or archival importance.² If the archive is not acting as an agent, then this is the only circumstance where a transfer of records may be to a person who is not a custodian, as defined under *PHIPA*.

2. What Obligations are Imposed on Custodians by *PHIPA* in the Event of a Change in Practice?

Duty to Securely Retain and Safeguard Records of Personal Health Information

Section 13(1) of *PHIPA* requires a custodian to ensure that records of personal health information in its custody or control are retained in a secure manner and in accordance with prescribed requirements, if any. To date, no requirements have been prescribed in the regulations under *PHIPA* mandating the method by which records of personal health information must be securely retained or establishing the specific retention period for records of personal health information.

Section 13(2) of *PHIPA* merely requires a custodian with custody or control of personal health information that is the subject of a request for access under section 53 of *PHIPA*, to retain the personal health information for as long as necessary to allow the individual to exhaust any recourse under *PHIPA* regarding the request. Custodians should consult their governing legislation and the policies and standards of practice of the college of their health profession in regard to the specific retention periods for records of personal health information.

The requirement imposed on a custodian, pursuant to section 13(1) of *PHIPA*, to ensure that records of personal health information in its custody or control are retained in a secure manner, may either be fulfilled by the custodian personally or through an agent of the custodian such as a record storage company. Section 2 of *PHIPA* generally defines an “agent” as a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian.

Accordingly, when a custodian decides to retire or cease to practice, or if other changes in practice are being contemplated, the custodian may either continue to fulfill its obligation to retain records in a secure manner or employ the services of an agent to do so on its behalf.

² For specific conditions, details and requirements, see sections 42(3)(a) and 42(3)(b).

It is important to note however, that pursuant to section 17(1) of *PHIPA*, a custodian remains responsible for records of personal health information even where the records are being retained by an agent of the custodian, such as a record storage company. It is also important to note that an agent of a custodian may only collect, use, disclose, retain and dispose of personal health information on the custodian's behalf if the custodian permits the agent to do so in accordance with certain requirements. Specifically, the custodian must be permitted or required to collect, use, disclose, retain or dispose of the information; the collection, use, disclosure, retention or disposition of the information must be in the course of the agent's duties and not contrary to the limits imposed by the custodian or by law; and any prescribed requirements must be met.

For best practices relating to the retention of records through an agent, please refer to Section 3 of these *Guidelines* entitled "Best Practices In the Event of a Change in Practice."

Further, section 12(1) of *PHIPA* requires a custodian to take steps that are reasonable in the circumstances to ensure that personal health information in its custody or control is protected against theft, loss and unauthorized use or disclosure and to ensure that records containing personal health information are protected against unauthorized copying, modification or disposal.

For additional information and best practices relating to the safeguarding of personal health information, including the implementation of physical, administrative and technical safeguards, please refer to *Fact Sheet No 1: Safeguarding Personal Health Information* of the Information and Privacy Commissioner/Ontario which is available at www.ipc.on.ca.

Duty to Transfer Records of Personal Health Information in a Secure Manner

Section 13(1) of *PHIPA* requires a custodian to ensure that records of personal health information in its custody or control are transferred in a secure manner and in accordance with prescribed requirements, if any. To date, no requirements have been prescribed mandating the method by which records of personal health information must be securely transferred.

As noted in Section 1 of these *Guidelines*, *PHIPA* permits the transfer of records to a successor or to an archive.

Duty to Dispose of Records of Personal Health Information in a Secure Manner

A custodian may securely dispose of records of personal health information when permitted to do so under *PHIPA* and after the specific retention period applicable to the records, if any, has expired. Retention periods may be set out in governing legislation and in policies and standards of practice of the applicable college of the health profession.

Section 13(1) of *PHIPA* requires a custodian to ensure that records of personal health information are disposed of in a secure manner and in accordance with any prescribed requirements, if any. Section 1(5.1) of Regulation 329/04 under *PHIPA* defines "disposed of in a secure manner" for the purpose of section 13(1). According to this definition, when records of personal health

information are destroyed, they must be destroyed in such a manner that their reconstruction is not reasonably foreseeable.

Accordingly, when a custodian decides to retire or cease to practice, or if other changes in practice are being contemplated, the custodian may destroy records where permitted to do so.

For additional information and best practices relating to the secure disposal of personal health information in both paper and electronic formats, including best practices for selecting and engaging service providers to destroy records, please refer to *Fact Sheet No 10: Secure Destruction of Personal Information* of the Information and Privacy Commissioner/Ontario which is available at www.ipc.on.ca.

Duty to Notify

Section 42(2) of *PHIPA* permits a custodian to transfer records to a successor if the custodian makes reasonable efforts to give notice to the individual to whom the personal health information relates before transferring the records or, if that is not reasonably possible, as soon as possible after transferring the records.

3. Best Practices in the Event of a Change in Practice

Record Storage Companies

As noted above, section 13(1) of *PHIPA* requires a custodian to ensure that records of personal health information in its custody or control are retained in a secure manner and in accordance with prescribed requirements, if any. This requirement may either be fulfilled personally by the custodian or through an agent of the custodian, such as a record storage company.

It is recommended that in the event of a change in practice, prior to retaining records of personal health information through an agent such as a record storage company, the custodian provide notice to individuals as outlined below. Furthermore, it is recommended that the custodian enter into a written agreement with the agent setting out:

- That the agent must abide by the information practices of the custodian with respect to the records of personal health information that it stores on behalf of the custodian;
- That the agent may only collect, use, disclose, retain and dispose of personal health information on the custodian's behalf if the custodian permits it to do so in accordance with certain requirements. Specifically, the custodian must be permitted or required to collect, use, disclose, retain or dispose of the information; the collection, use, disclosure, retention or disposition of the information must be in the course of the agent's duties and not contrary to the limits imposed by the custodian or by law; and any prescribed requirements must be met;

- The purpose(s) for which the agent may collect, use, disclose, retain and dispose of person health information on behalf of the custodian;
- Any limits the custodian imposes on the agent with respect to the collection, use, disclosure, retention, or disposal of personal health information;
- The steps that must be taken by the agent to ensure that personal health information that it stores on behalf of the custodian is protected against theft, loss and unauthorized use or disclosure and to ensure that the records are protected against unauthorized copying, modification or disposal;
- The steps that must be taken by the agent to ensure that personal health information that it stores on behalf of the custodian is retained, transferred and disposed of in a secure manner;
- The procedures the agent must follow to allow individuals to access and correct records of personal health information in accordance with *PHIPA*;
- The fees that the agent may charge on behalf of the custodian for access to records of personal health information; and
- That the agent must notify the custodian at the first reasonable opportunity if personal health information handled by the record storage company is stolen, lost or accessed by unauthorized persons.

Notification of Changes in Practice

It is important that individuals be notified of changes in practice of custodians. The following best practices address the method of notification, who should provide such notice and the content of the notice.

Method of Notification

Notification may take a variety of forms. As a best practice, individuals should be directly notified of a change in practice using one of the following means:

- In person, at a scheduled appointment;
- By letter to the individual;
- By telephone call to the individual.³

³ Individualized notice is effective. However, custodians should be cautious when providing such notice as it raises a concern that the individual's personal health information may be inadvertently disclosed to others. For example, various family members may have access to a patient's telephone answering machine.

The methods of notification listed in this section were adapted from those provided in Policy #5-06 issued by the College of Physicians and Surgeons of Ontario, entitled "Practice Management Considerations for Physicians Who Cease to Practise or Take an Extended Leave of Absence."

Since it may not be possible to reach every affected individual through direct notification, indirect notification may be used to supplement direct notification. However, indirect notification alone should occur only where direct notification would be impractical or not possible. For example, direct notification may not be practical or possible where a large number of individuals must be notified and the cost would be prohibitive, or where contact information is inadequate (i.e., out-of-date, missing, or incomplete). Indirect notification of changes in practice may include:

- A notice posted in the custodian's office;
- A notice posted on a website;
- A recorded message on the custodian's telephone answering machine; or
- Printed newspaper advertisements.

Ideally, multiple forms of notification are recommended, particularly where direct notification to every individual is not practical or possible.

Who Should Provide Notice

When a custodian transfers records to a successor, *PHIPA* requires the transferring custodian to provide notice to the individual before or, if that is not reasonably possible, as soon as possible after the transfer. Where other changes in practice are planned, it is also recommended as a best practice that the custodian initiating or undergoing the change in practice similarly provide notice to individuals.

If the estate trustee or person who assumes responsibility for the estate is deemed to be the custodian with respect to records of personal health information, as described above, that person should notify individuals about the change in practice.

Ideally, individuals should be notified by someone who they would expect to have access to their personal health information. Accordingly, notification by the custodian is preferable to notification by an agent of the custodian that is not known to the individual, such as a record storage company.

Content of Notice

As a best practice, notification of a change in practice should impart a clear message which should be adapted to the circumstances. At a minimum, the message should include:

- A description of the planned change in practice;
- Where a practice will be transferred to a successor custodian, the contact information of the successor custodian;
- Where the custodian has died, the contact information for the person deemed to be the custodian with respect to the records of personal health information held by the deceased

custodian (i.e., the estate trustee), or, where applicable, the contact information for the person who is legally authorized to hold the records and to whom custody and control of the records has passed;

- Where the custodian has become bankrupt or insolvent, the contact information for any person who is deemed to be the custodian of the records of personal health information as a result of the bankruptcy or insolvency;
- Where a practice will cease and the custodian plans to retain the records of personal-health information personally, the contact information for the custodian once the practice has ceased;
- Where a practice will cease and the records will be stored by an agent of the custodian such as a record storage company, the contact information for the agent who will be responsible for storing the records on behalf of the custodian;
- Information about the length of time that the records will be retained by the custodian or the agent of the custodian;
- Information about how individuals may request access to or correction of their records or request transfer of their records to another custodian prior to and following the change in practice;

Be Proactive

From the outset, custodians should think proactively about how they will continue to meet their obligations under *PHIPA*, in the event of a change in practice. The following best practices may assist in this regard.

Be Aware of Privacy Protective Record-Keeping Practices

First and foremost, a basic understanding of the requirements of *PHIPA* and record management practices is essential to enable custodians to implement privacy protective practices on a day-to-day basis and in the event of a change in practice.

Clearly Identify the Custodian

While the determination of who is the health information custodian may be obvious for sole practitioners, it may not be as clear for health care practitioners who work together in a group practice. In some situations, two or more practitioners may establish a partnership, with each being a custodian. In other cases, custodians may employ one or more health care practitioners to work as their agents. Where a group practice is incorporated, the professional corporation is the custodian and the practitioners are its agents.

In group practice settings, there must be clear identification of who the custodian is and formal agreements about the obligations of each person involved in the group practice with respect to records of personal health information in the event of a change in practice.

Address Privacy Safeguards and the Continuity of Record Management

Whether practicing solo or in a group, custodians should turn their minds to possible future changes in practice. Some considerations may include:

- Establishing policies and procedures, such a procedure for notifying individuals as suggested in these *Guidelines*, to be followed in the event of a change in practice;
- Trying to arrange for a future successor prior to an event triggering a change in practice (e.g., death or cessation of practice);
- If a future successor has not been identified, custodians should consider:
 - Appointing an estate trustee in their will who is willing and able to fulfill the obligations of a custodian;
 - Arranging for secure record storage upon cessation of practice.

Group Practice Agreement

Custodians engaged in group practice should address the continuity of record management in their practice agreement. In formalizing such agreements, all health care practitioners should bear in mind that they may have professional obligations with respect to the handling of records of personal health information, regardless of whether they are considered to be health information custodians under *PHIPA*. As a best practice, the following privacy safeguards should be addressed in the agreement:

- Arrangements for the secure storage of records. If the services of an agent (e.g. record storage company) are used, then the practice agreement should clearly identify the agent and its responsibilities. As discussed above, it is a best practice to have a separate agreement with the agent that clearly sets out its obligations with respect to personal health information.
- The method of distribution of records in the event of a change in practice.
- The requirement to notify individuals as suggested in the *Guidelines* in the event of change in practice.
- How to deal with the unforeseen departure of a custodian. In these situations, at a minimum:
 - Individuals should be notified of the change in practice; and
 - Records should be kept in a secure location until another custodian assumes responsibility for the records, or an individual directs the file to be transferred to another custodian.

Unforeseen Circumstances

Although it is advisable for custodians to try to plan for changes in practice, there may be events that are not possible to anticipate. For example, a loss of custody and control of records could occur where the custodian has a dispute with a landlord over rental payments.

It is important to note that, even in unforeseen circumstances, custodians are still responsible for ensuring the security of records at all times and for fulfilling their obligations under *PHIPA*.

To the extent possible, custodians should fulfill all business-related obligations (e.g. rental payments) necessary to ensure that they are able to maintain custody or control of records of personal health information at all times. However, should a temporary loss of custody or control occur, custodians should immediately take all necessary steps to regain custody or control of the records as soon as possible.