



- **OVERVIEW**

Amendments to the *Health Information Act* (HIA or Act) came into force on September 1, 2010. The HIA applies to all health information regardless of how the health service was funded. Previously, only publicly funded health professionals had access to health information and were governed by the Act. **With the amendments, the HIA now also applies to privately funded health professionals who will have access to individuals' health information.** Organizations employing custodians who provide a health service will need to address these changes with the coming new year.

The amendments have resulted in a number of changes to the HIA and its scope, including the expansion of the definition of custodian, the creation of health information repositories, the introduction of electronic health records, and the expansion of the Privacy Commissioner's investigative powers. Due to the new definition of custodian, existing provisions of the Act that impose certain procedural requirements for handling health information may now apply to your organization.

The Act applies to custodians of health information and affiliates who provide a health service and provides them with a framework for the use, disclosure and protection of health information. This summary of the Act, and of the Information and Privacy Commissioner's *A Practical Guide to the Health Information Act*, provides an overview of the changes as well as important provisions of the Act that custodians must keep in mind.

- **CUSTODIANS**

Under the regulations, custodians will now also include **physicians**, dentists, denturists, dental hygienists, optometrists, opticians, chiropractors, podiatrists, pharmacists, **registered nurses** and midwives. With respect to dentists and dental hygienists, the Act will not come into force until March 1, 2011 and not until September 1, 2011 for nurses. **The *Health Information Act* will apply to custodians who provide a health service.**

- **AFFILIATES**

Affiliates are individuals who volunteer with, contract with or are employed by the custodian to help them provide health services. They also include health services providers who admit and treat patients at a hospital, information managers under the Act, and persons designated as affiliates under the regulations. Under the Act, it will be vitally important for custodians to identify their affiliates as they are responsible for their affiliates' actions.

- **HEALTH SERVICE**

A “health service” means a service that is provided to an individual for any of the following purposes: (i) protecting, promoting or maintaining physical and mental health; (ii) preventing illness; (iii) diagnosing and treating illness; (iv) rehabilitation; or (v) caring for the health needs of the ill, disabled, injured or dying. Some services are excluded by the regulations.

## **EMPLOYERS NEED TO KNOW**

***The Act applies to custodians and to health information relating to a health service provided by a custodian. It follows that if the information being collected by a custodian does not relate to the provision of a health service, then the Act does not apply. Therefore, for many organizations in Alberta with occupational health departments and/or physicians or registered nurses on staff who provide a health service, these amendments may significantly affect the handling of individuals’ (e.g., employees’) health information as they impose statutory requirements that must be implemented in order to comply with the Act.***

- **PROTECTION OF HEALTH INFORMATION**

The Act serves to protect the health information of individuals, whether it is diagnostic, treatment and care information (information about a person’s health, treatment plan, drugs and health care aids used, health care benefits paid, etc.), or registration information (name, signature, gender, personal health care number, etc.), when it is in the custody or control of a custodian.

Health information is information contained in a record, which includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, papers and so forth, that is written, photographed, recorded or stored in any manner but does not include software or any mechanism that produces records.

With respect to personal health numbers (PHN), the Act provides that only custodians and persons designated under the regulations may require an individual to provide their PHN.

The Act’s primary concern is the protection of identifying health information. It is important to assess the context of the collection, use and/or disclosure to ensure the information does not identify an individual.

- **POLICIES AND PROCEDURES**

As custodians are responsible for the actions of their affiliates, they must ensure that affiliates comply with the Act and regulations, as well as with the policies and procedures adopted by the custodian.

In order to ensure compliance with the Act, custodians must adopt policies and procedures that will facilitate the implementation of the Act and regulations and, if requested, they must provide a copy of these policies and procedures to the Minister of Alberta Health and Wellness. In addition, the Office of the Information and Privacy Commissioner (OIPC) may ask to review policies when conducting

investigations, which policies, regardless, must be attached to the required Privacy Impact Assessment submission to the OIPC.

It is incumbent upon custodians to preserve the highest degree of an individual's anonymity possible by collecting, using and disclosing the least amount of information necessary.

### **EMPLOYERS NEED TO KNOW**

***Employers who have custodians in their employ providing a health service, need to be aware that their custodians have to establish policies and procedures that deal only with the collection, use and disclosure of health information essential to carrying out the purpose for which the information was provided in the first place.***

- **PRIVACY IMPACT ASSESSMENTS – A Requirement for Custodians**

A custodian must prepare a privacy impact assessment (PIA) that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying health information may affect the privacy of individuals.

The Office of the Information and Privacy Commissioner of Alberta has outlined what must be included in a submission:

- **Cover Letter** signed by the custodian;
- **Cover Page** providing contact information related to the PIA;
- **Section A** - Project summary;
- **Section B** - Organizational privacy management;
- **Section C** - Project privacy analysis;
- **Section D** - Project privacy risks and mitigation plans; and
- **Section E** – Privacy and security policy and procedure attachments.

### **EMPLOYERS NEED TO KNOW**

***The assessment must be submitted to the Commissioner for review and comment before the proposed changes to existing practices and systems, or the proposed new initiatives, are implemented.***

- **INFORMATION MANAGERS**

The Act defines an information manager as:

- (i) a person or body that processes, stores, retrieves or disposes of health information;
- (ii) in accordance with the regulations, strips, encodes or otherwise transforms individually identifying health information to create non-identifying health information; or
- (iii) provides information management or information technology services.

Information managers are affiliates of the custodian. In this context, custodians must enter into a written agreement with the information manager concerning the services that the information manager

will provide; the requirements that are specifically listed in the regulations; and the Act, the regulations and the agreement with the custodian with which the information manager must comply.

The Act dictates that a custodian who is also an information manager for another custodian does not become a custodian of the health information provided to it in its capacity as an information manager.

- **DUTY TO PROTECT HEALTH INFORMATION – A Requirement for Custodians and Affiliates**

Custodians must take reasonable steps to maintain administrative, technical and physical safeguards to protect the confidentiality of the health information and the privacy of the individuals who are the subjects of the information.

The Office of the Information and Privacy Commissioner of Alberta advises that custodians **must**:

- identify and record administrative, technical and physical safeguards for health information;
- implement and periodically assess health information safeguards;
- designate an affiliate responsible for security and protection of health information;
- enter into agreements with persons/groups to maintain the confidentiality and privacy of health information used or stored outside Alberta;
- ensure that affiliates know the safeguards and follow them; and
- create sanctions for affiliates who breach or attempt to breach these safeguards.

The Information and Privacy Commissioner's *A Practical Guide to the Health Information Act* provides examples of the administrative, technical and physical safeguards that may be implemented.

In order to safeguard the health information of a patient, custodians must ensure that affiliates collect, use and disclose health information only in accordance with their duties to the custodian.

### **EMPLOYERS NEED TO KNOW**

***Pursuant to the Act and the regulations, custodians are required to protect health information in their custody or under their control. Employers need to understand that under the Act, custodians must implement safeguards to protect both the confidentiality of the health information and the privacy of the individual. Employers should work with their other available resources, including human resources, the privacy officer and internal or external counsel to ensure that proper safeguards are in place.***

- **COLLECTING HEALTH INFORMATION – Limitations on Custodians and Affiliates**

The Act authorizes custodians (and their affiliates) to collect information for certain purposes only. The Information and Privacy Commissioner summarizes five limits to collection:

- Collect only essential information;
- Collect with highest degree of anonymity;
- Collect in a limited manner;

- Identify authority to collect individually identifying information; and
- Collect directly from the individual unless indirect collection is authorized.

Custodians must collect only as much health information as is essential to carry out the purpose for which the information is being collected. In addition, the information collected must relate directly to the purpose of collection.

### **Individually Identifying Health Information**

The Act allows a custodian to collect individually identifying health information for the purpose of providing a health service, or determining eligibility of a health service. Individually identifying health information is information that will identify the person whom the information is about.

Unless the Act authorizes collection of such information from a third party, the custodian must obtain the information directly from the person it concerns. When doing so, the custodian must take reasonable steps to inform the person of:

- the purpose for which the information is collected;
- the specific legal authority for collecting the information; and
- the title, business address and phone number of an affiliate who can answer questions about the collection.

### **Collecting Information from Third Parties**

Under certain circumstances, the Act authorizes custodians to collect information from third parties:

- Where the individual authorizes collection from someone else;
- Where the individual is unable to provide the information and the custodian collects it from an authorized representative such as a trustee or guardian of a person under the age of 18, or an agent under a personal directive;
- Where the custodian believes, on reasonable grounds, that collecting information directly from the individual would prejudice:
  - the interests of the individual;
  - the purposes of the collection;
  - the safety of any other individual; or
  - that would result in the collection of inaccurate information;
- Where collection from the individual is not reasonably practicable;
- Where collection is for any of the following purposes:
  - assembling a family/genetic history where the collected information is used to provide a health service,
  - determining or verifying eligibility to participate in a program or to receive a benefit, or
  - informing a Public Trustee or Public Guardian about clients or potential clients; and
- Where the information is collected from a third party in a situation where the Act would allow disclosure of that information to the third party; or
- Where the information is available to the public.

The above list is not exhaustive, as the Act sets out additional circumstances. As information collected from a third party may not be as accurate or as reliable as information obtained directly from the individual, custodians have a duty to take steps to ensure that the information is accurate and complete.

### **EMPLOYERS NEED TO KNOW**

*Employers need to recognize that custodians must establish policies that limit the collection of information only to that which is essential to carry out the purpose for which the information is being collected. Further, the information collected must relate directly to the purpose of collection. These policies could establish what information is being collected, and why, and who is allowed to collect it.*

- **USING HEALTH INFORMATION**

The Act authorizes custodians to access and share health information for the primary purpose of providing a health service or for the purpose of determining or verifying eligibility to receive a health service. Prior to using the health information, custodians must take reasonable steps to ensure that the information is accurate and complete.

- **DISCLOSURE**

#### **Disclosure to Third Parties**

Disclosure of health information can occur when a custodian provides it to another custodian or to other entities. Custodians may disclose health information either on a mandatory basis or on a discretionary basis. Custodians may only disclose information when the Act allows them to, and affiliates must do so only in accordance with their duties to the custodian. While information may be identifying or non-identifying, the Act restricts the disclosure of individually identifying health information.

#### **Consent to Disclosure – Requirements**

A custodian may disclose individually identifying health information to the individual who is the subject of the information or to a person referred to in the Act who is acting on behalf of that individual. If an individual has consented to disclosure, then a custodian may disclose individually identifying health information to a person other than that individual who is the subject of the information. The HIA specifies that the consent, which must be given electronically or in writing, must include:

- an authorization for the custodian to disclose the health information specified in the consent;
- the purpose for which the information may be disclosed;
- the identity of the person to whom the health information may be disclosed;
- an acknowledgement that the person providing the consent has been made aware of the reasons why the information is needed and the risks and benefits of either consenting or refusing to consent;
- the effective date of the consent and the expiry date (if any); and
- a statement that the consent may be revoked at any time by the person providing it.

## **EMPLOYERS NEED TO KNOW**

*Employers may want to work in conjunction with custodians to create written or electronic consent forms, which include the requirements for proper consent. In some instances, such as a return to work, or an accommodation, the employee may consent to the custodian disclosing information to the employer. Employers will not be entitled to the entire health record of the employee, but only to that information which is essential to the purpose for which it is being disclosed. Employers should also consider consulting with human resources departments, their privacy officer and internal or external legal counsel where appropriate.*

### **Custodians and Disclosure**

The Act requires custodians to undertake a reasonable effort to ensure that the disclosure of health information is made to the person authorized to receive the information. Furthermore, custodians must disclose only essential information, *i.e.*, information that is related to the purpose for which it is being disclosed.

In deciding how much information to disclose, custodians must consider the expressed wishes of the person whose health information is the subject of disclosure.

### **Disclosure without Consent**

If a custodian makes a disclosure of individually identifying diagnostic, treatment and care information without consent, then the **recipient** of that disclosure must be provided with written notice of the purpose of the disclosure and the authority under which it was made. The foregoing is not required where disclosure is made to the individual who is the subject of the information themselves, to another custodian for specific purposes of the Act, to the police, or to the Minister or Department as specified in the Act.

Otherwise, the collection by the recipient might be found unauthorized or unreasonable and in contravention of the Act, as could be the disclosure. For organizations with occupational health departments and/or physicians or registered nurses on staff, these findings could amount to double jeopardy.

### **Disclosure Without Consent – Log**

Where disclosure of such information is made without consent, the custodian must log the disclosure, and the log must include: the name of the person to whom the information was disclosed; the date and purpose of the disclosure; and a description of the information disclosed. This manual log is not required where electronic logs of electronic access are maintained. These logs must be kept for 10 years following the date of disclosure.

The individual who is the subject of the disclosed information may seek access to and a copy of the information to see which records were disclosed and to whom they were disclosed. These logs accord with general privacy law principles of openness and transparency regarding the rights of individuals to know where and how their information is being handled.

## **Mandatory Disclosure Required Outside of HIA**

Although the HIA itself does not require custodians to disclose health information, it allows them to do so in order to comply with legislation, such as the *Public Health Act* (e.g., an infectious disease warranting notice), or court orders requiring disclosure.

## **Disclosure Without Consent Allowed**

The Act provides certain circumstances where a custodian may disclose individually identifying diagnostic, treatment and care information without the consent of the individual. Disclosure without consent may be made:

- To other custodians for the purpose of providing a health service to the patient;
- To continuing care providers so that they may be able to provide care to the patient;
- To family or close personal relationships, provided that patient has not requested that disclosure not be made, and that the information given is in general terms;
- In judicial or quasi-judicial proceedings;
- To preserve the health or safety of any person.

The Act provides other circumstances where disclosure may be without consent.

## **Disclosure to Police**

- With Consent
  - Custodians may disclose a patient's health information to the police when the patient has consented.
- Without Consent
  - There are a number of circumstances where disclosure without consent may be made to the police.
  - The Act allows the disclosure of specific information to the police without consent to prevent or limit fraud or abuse of health services, and to protect public health and safety.

The Act sets out the information that the custodian may provide to the police and includes, but is not limited to, the name and birth date of the individual, the nature of any illness or injury, the date on which a health service was sought or received, and the location where the individual sought or received a health service.

## **EMPLOYERS NEED TO KNOW**

***For employers with occupational health departments and/or physicians or registered nurses on staff, we recommend that you facilitate the provision of legal advice to the custodian or anyone involved on***

*the organization's behalf before making any such disclosures as there may be associated legal rights and responsibilities to consider that may affect your organization.*

*Custodians rarely have to disclose health information. Much of the Act states that a custodian "may" disclose, not "must" disclose. Therefore, employers should recognize that custodians may exercise their discretion and invoke their professional code of ethics in refusing authorized disclosure. If a custodian does disclose information, then procedures need to be in place to ensure that disclosure is made to the person authorized and intended to receive it.*

- **DATA MATCHING – Requirements for Custodians**

The HIA provides that a custodian or health information repository may perform data matching using information that is in its custody or control.

Custodians may also combine data with information that is in the custody or control of another custodian or health information repository. When combining information, but prior to data matching, the custodian or repository must prepare a privacy impact assessment and submit it to the Commissioner for review and comment. The assessment must describe how the information to be used for the purpose of data matching is to be collected, and set out how the information that is created through data matching is to be used or disclosed.

- **HEALTH INFORMATION REPOSITORY**

The amendments to the Act create a Health Information Repository. The Act provides that custodians may disclose individually identifying health information to a health information repository. While the role or purpose of the repositories is unknown, the regulations provide that the Minister responsible for the Act may designate an agency, corporation or other entity to act as a repository. The amendments provide that the powers, duties and function of a health information repository will be in keeping with the regulations.

- **RIGHT OF ACCESS TO HEALTH INFORMATION**

A person has the right to access (*i.e.*, copy or examine) any record that is in the custody or control of a custodian if that record contains health information about that person. Custodians must make a reasonable effort to respond to the request within 30 days and may be granted an extension of an additional 30 days under certain circumstances. A custodian is deemed to have refused the request if a response is not given within the required time.

There may be situations where the custodian **must** refuse a request to access a health record. For example, if the health information sets out procedures or contains results of an investigation or discipline hearing of a health services provider, or if the disclosure is prohibited by other Alberta legislation, then the custodian must refuse access. In other situations, a custodian **may** refuse access to a health record. For example, if the disclosure could reasonably be expected to result in immediate or grave harm to the applicant's mental or physical health or safety, then the custodian may refuse access.

- **CORRECTING OR AMENDING HEALTH INFORMATION**

Custodians have an obligation to ensure that health information is accurate and complete. In the event that a custodian receives a written request from a person to amend an error in their health information, which is in the custodian's care or control, then the custodian must do so within 30 days. Upon doing so, the custodian must notify the person in writing of the amendment, as well as any person or health information repository to which it was disclosed. If the applicant agrees that there is no harm in not giving notice, then the custodian will not have to do so.

If the custodian refuses to make the amendment, the custodian must tell the applicant of the refusal and the reasons for the refusal.

- **ALBERTA ELECTRONIC HEALTH RECORD (NETCARE)**

The amendments to the Act create regulation for Alberta Electronic Health Records (EHR), known as Netcare. Netcare is an integrated electronic health information system of key health information established to provide shared access by authorized custodians. The Act provides that either a professional governing body may direct a member health professional to make prescribed health information of their patients accessible to other authorized custodians via the Alberta EHR or the Minister may direct such disclosure if it is in the public interest.

The Act specifies that making the prescribed health information accessible to authorized custodians does not constitute disclosure and does not require consent of the individual who is the subject of the information.

### **Contents of an Alberta EHR**

The Alberta EHR is not a patient's full health or medical record. It contains key health information:

- personal demographic information
- prescribed dispensed drugs
- known allergies and intolerances
- immunizations
- lab test results
- diagnostic imaging reports
- other medical reports

### **Expressed Wishes of the Individual**

Custodians have a duty to consider the expressed wishes of an individual regarding the access or use of their health information via Netcare. An individual has the option of "masking" their health information in an Alberta EHR. Masking means that only the first and last name, gender, date of birth and personal health number of the individual will be visible. Only authorized custodians may unmask health information in limited circumstances, *e.g.*, with the individual's consent or to provide care. All unmasking activity is flagged, electronically logged and may be subject to audit.

## **Privacy and Security**

The HIA requires custodians and affiliates to only collect, use and disclose health information in the most limited manner, with the highest degree of anonymity and on a need-to-know basis. Only authorized custodians and their affiliates may access health information in an Alberta EHR. A series of privacy and security assessments must be completed before authorization is granted to access an Alberta EHR. Authorized users must also enter into an information manager agreement with Alberta Health and Wellness, which limits how health information may be collected, used and disclosed in Alberta Netcare. Furthermore, users will be restricted in accessing information based on their role in the health care system.

## **Information Exchange Protocol (IEP)**

The IEP establishes specific rules for the collection, use and disclosure of health information through the Alberta EHR.

## **Record of the Alberta EHR**

Authorized custodians using the health information in an Alberta EHR must keep an electronic log of the following information:

- a name or number identifying the custodian who uses the information
- the date and time that the information is used
- a description of the information used

The custodian must maintain the log for 10 years.

## ***EMPLOYER NEEDS TO KNOW***

***Custodians as defined by the Act and the regulations are not automatically authorized custodians of an Alberta EHR. Therefore, physicians or registered nurses who are custodians in a company are not automatically authorized custodians for the purposes of Alberta Netcare. Those custodians who wish to become authorized custodians must meet certain eligibility requirements set by the regulations.***

- **INFORMATION AND PRIVACY COMMISSIONER**

The amendments to the Act confer additional powers on the Commissioner to exchange information with extra-provincial commissioners, and to enter into information sharing and other agreements with extra-provincial commissioners to coordinate activities and handle multi-jurisdictional complaints. These additional powers may impact large organizations with operations across the country in that their extra-provincial employees may be able to seek recourse for improper handling of their health information through privacy commissioners outside Alberta.

- **CODE OF ETHICS**

The Office of the Information and Privacy Commissioner advises that although the Act must be complied with, professional codes of ethics will apply provided they are not in conflict with the Act. Where the Act prohibits a course of action, then the Custodian may not do the action, even if the applicable code of ethics would have otherwise allowed it. Custodians should still follow their codes of ethics where the Act is silent on an issue.

- **EXCEPTIONS TO THE HEALTH INFORMATION ACT – EMPLOYER WILL BE INTERESTED TO KNOW**

***The Act does not apply to insurance companies, even though they may manage claims and hold health information in their files for the employer, and they are not custodians or affiliates as defined by the Act.***

Private industry organizations or educational institutions are not custodians or affiliates even though they may hold health information in their files. However, health services providers employed by these organizations or institutions are custodians under the HIA, and the health information collected for the purpose of providing a health service is subject to the HIA.

- **CONCLUSION**

The amendments to the *Health Information Act*, and the related regulations, deal with complex issues, as well as statutory requirements that must be strictly complied with. As an employer of custodians who collect, use and disclose health information for the purpose of providing a health service, it is essential that you are fully aware of the requirements that the HIA imposes on you. To discuss how we can help you understand the implications of or assist you with implementing the obligations under the *Health Information Act*, or for any other employment matters, please contact:

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The Office of the Information and Privacy Commissioner's, *A Practical Guide to the Health Information Act* may be found at:

[http://www.oipc.ab.ca/Content\\_Files/Files/Publications/HIA\\_Guide\\_August\\_2010.pdf](http://www.oipc.ab.ca/Content_Files/Files/Publications/HIA_Guide_August_2010.pdf)

This summary is intended for informational purposes only and is not intended to provide legal advice.

For a full legal review, please refer to the *Health Information Act* at

<http://canlii.org/en/ab/laws/stat/rsa-2000-c-h-5/latest/rsa-2000-c-h-5.html> and the Regulations.