

PRIVACY AND HEALTH LAW BULLETIN

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HEALTH INFORMATION PROTECTION ACT, 2003

In late December, George Smitherman, Ontario's Health Minister introduced major legislation affecting the entire health care sector. Bill 31 aims to protect the personal health information of Ontario residents. The Bill, entitled the *Health Information Protection Act, 2003*, follows a common architecture borrowed from the Conservative government's Bill, but responds to many of the criticisms leveled at the former government's initiatives in the sector. Although twenty years of policy study and draft legislation have preceded the new Bill, this Bill looks as if it will pass into law.

Technological advances and increased public concern about privacy have made action in the area of health records unavoidable. Moreover, the introduction of a broad-ranging law at the federal level aimed at protecting personal information means Canada has a policy framework balancing organizational needs for information and individual privacy. In the area of health privacy, most major Canadian provinces have been well ahead of Ontario in acting.

As the Romanow Report noted, there are significant benefits for both patients and health care providers in the development of electronic health care records. But unless adequate and appropriate privacy protections are in place, such systems cannot be introduced. The Bill establishes a framework of safeguards for such systems.

Ontario's Bill has two parts, the *Personal Health Information Protection Act* and the *Quality of Care Information Protection Act*. The latter part will regulate the information collected or prepared by quality of care committees in health facilities such as hospitals. It prohibits the disclosure of quality of care information, except in certain, narrow circumstances. These circumstances include disclosure aimed at improving health care or avoiding a significant risk of bodily harm.

The *Personal Health Information Protection Act* comprises the bulk of the legislation. It sets rules for health information custodians regarding "collecting, using, disclosing and disposing of personal health information." "Health information custodian" includes those individuals and organizations specifically listed in the Act or regulations who have custody or control of personal health information because of their work. Health information custodians include health care practitioners and individuals operating public hospitals or pharmacies.

The *Personal Health Information Protection Act* is significant for all in the health care sector because it requires all health information custodians to establish and comply with information management policies, which are publicly accessible. Such practices include taking reasonable steps to ensure personal health information is secure, individuals are notified as early as possible if their records are lost, and that information is accurate, complete and up-to-date regarding the purposes it is used for.

It also requires that health care custodians obtain consent to collect, use or disclose personal health information. Part III lists appropriate substitute decision makers empowered to consent on behalf of those incapable of doing so meaningfully. Part IV establishes requirements for the collection, use and disclosure of personal health information, including situations where an individual is deceased, the disclosure is required for research purposes, and where health care records are transferred to another institution.

Since the Conservative Bill was criticized for being overly permissive with respect to government access to personal information, the new Bill narrows the opportunity and discretion of the government to access such information. Information provided by a health information custodian to a health data institute for the purpose of analyzing the health system must be "de-identified" before being linked to other information and provided to the Minister. The health data institute must also establish Information and Privacy Commissioner of Ontario approved 'practices and procedures' to protect the privacy of those whose information is received and to maintain its confidentiality.

Administration of the *Personal Health Information Protection Act* will fall to the Commissioner. Its administrative and enforcement provisions empower her office to investigate breaches. Although inspectors may demand the production of documents and records connected to the inspection, fishing expeditions into an individual's personal health information without first obtaining consent are not permitted. The Commissioner also has general powers to engage in and commission research, and to conduct public education programs to inform the public about the purposes of the law.

The *Personal Health Information Protection Act* will primarily be enforced through compliance orders issued by the Commissioner. When a compliance order is made, the offended individual may be entitled to bring an action in the Superior Court of Justice for damages for actual harm suffered, including an award of up to \$10,000 against the health information custodian for mental anguish. Willfully collecting, using or disclosing personal health information, knowingly making false representation to the Commissioner and willfully failing to comply with an order of the Commissioner are offenses that can result in fines up to \$20,000 for individuals and up to \$250,000 for corporations.

Health information is currently regulated by more than twenty subject-specific statutes. Each sets out privacy protecting provisions that are specific to the area of regulation. As a result, health care providers are subject to a web of legislated requirements established to protect individual privacy in a number of situations. While the *Personal Health Information Protection Act* amends most of these Acts to comply with the new requirements, each Act continues to govern as it did before. For example, the *Ambulance Act*, will incorporate new provisions that re-define "personal health information" to have the same meaning as in the Bill.

Ottawa's privacy legislation, the *Personal Information Protection and Electronic Documents Act*, also regulates personal health information to some degree. Since its introduction, however, this legislation has been a source of concern for many health care providers and other organizations that deal with health information. It was drafted with a business, not a health care, paradigm in mind. As a result, it has been singularly unsuccessful at creating a proper framework to address health-related privacy issues such as the use of electronic health records, sharing patient data as a result of restructured health systems, remote diagnosis, data linkage, teaching, health research and system planning.

Ottawa's Act does not apply to not-for-profit organizations such as hospitals, and is unclear on issues such as implied consent, the right to refuse access to patient records and record retention rules. Furthermore, federal legislators did not foresee the inequality that was created in the health industry by their Act. Under it, the medical records of a patient in a for-profit nursing facility would be covered and therefore confidential. On the other hand, a patient in a not-for-profit nursing home would have no such guarantee.

Although not-for-profit organizations may have a clearer set of guidelines, other corporations may need to comply with both Ottawa's Act and the Ontario Bill, which will further complicate the existing patchwork of health privacy laws in Ontario. Since January 1, Ottawa's Act applies to all personal health information that is collected, used or disclosed during the course of commercial activity. This means that for-profit health sector organizations dealing with health information are required to comply with the provisions of both Ottawa's Act and any Ontario legislation, once in force. Ottawa's Act however, provides an opportunity for the provinces to respond with similar

legislation that achieves similar ends. If the Federal Cabinet deems the Bill to be substantially similar to Ottawa's Act the provincial legislation will govern Ontario businesses collecting, using or disclosing personal health information. For such a determination to be made the Ontario legislation will need, at the very least, to embody the ten principles set forth in the *Personal Information Protection and Electronic Document Act*.

While the Act briefly addresses health privacy issues, the new Bill is considerably more comprehensive and may offer health information custodians a clearer understanding of their obligations with respect to privacy rights of Ontarians. Although privacy breaches will undoubtedly still occur, the lawmakers view the Bill as the means to balance an individual's right to privacy with the need to disclose personal information for legitimate purposes.

Given the long history of controversy over Ontario's health privacy initiatives, it remains unclear whether the legislative committee hearings being held across Ontario will result in significant change. The forces compelling legislative action are strong and we believe Minister Smitherman will succeed in having legislation on this topic passed in the Spring. Expect a delay for implementation and regulations.

Health care providers should be looking at the Bill and making plans to institutionalize privacy safeguards, once the final details for the requirements are settled. 2004 should be your year for privacy compliance.

The Health and Privacy groups at McMillan Binch regularly advise health care providers on compliance issues such as those arising from the Bill. Our extensive specialized knowledge and experience in the health care industry, combined with our progressive approach and responsible business practices, ensures that we provide cost-effective legal services that meet the needs and exceed the expectations of our clients. Please contact us if you have concerns about the effects this legislation will have on you.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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For further information, please contact your McMillan Binch lawyer or one of the lawyers listed below:

Sarah Diamond	416.865.7223	sarah.diamond@mcmillanbinch.com
Graham W.S. Scott, Q.C.	416.865.7247	graham.scott@mcmillanbinch.com
Lydia Wakulowsky	416.865.7066	lydia.wakulowsky@mcmillanbinch.com

McMILLAN BINCH LLP

TELEPHONE: 416.865.7000
FACSIMILE: 416.865.7048
WEB: WWW.MCMILLANBINCH.COM

BCE PLACE, SUITE 4400, BAY WELLINGTON TOWER, 181 BAY STREET, TORONTO, ONTARIO, CANADA M5J 2T3