

# Privacy Challenges in the Brave New World of the EHR



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# What is the EHR?

2

- An electronic health record (EHR) is an integrated health information system that provides authorized users a shared view of health information in a secure environment
- EHRi refers to the supporting infrastructure that enables the interoperable electronic health record

# EHR or EMR?

3

- **Electronic medical report will typically be the personal health information of a patient created by the primary provider or health care organization.**
- **Challenge is the rate of take-up by primary providers i.e. in most jurisdictions, physicians are still reliant on paper records**

# Stand-alone health information laws

4

- **Proliferation of laws designed to facilitate the EHRi and information sharing among trustees/custodians:**
  - Manitoba (1997)
  - Alberta (2001)
  - Saskatchewan (2003)
  - Ontario (2004)
  - New Brunswick (2010)

# *The Health Information Protection Act (HIPA)*

5

- **Definition of ‘personal health information’ s.2(m)**
- **Definition of ‘trustee’ (s. 2(t))**
- **‘Custody or control” (s. 2(t))**
- **HIPA only engaged with all 3 elements present**
- **Exclusions s. 4**

# HIPA General Duties

6

- **Transparency (ss 9, 10, 16)**
- **Policies & procedures (s. 16)**
- **Reasonable steps to protect personal health information (s. 16)**
- **Physical, technical and administrative safeguards (s. 16)**
- **Data minimization (s. 23)**
- **Need-to-know rule (s. 23)**

# HIPA transaction specific duties

7

- **Collection**
- **Use**
- **Disclosure**
- **Access**
- **Correction**

# Figuring out the lingo

8

- *Glossary of Common Terms (HIPA)*
- *Circle of care*
- *Collection, use, disclosure*
- *Access vs. disclosure*
- *Confidentiality vs. privacy*
- *Patient portals*
- *Approver*
- *User*

# HIPA Oversight

9

- SK Information and Privacy Commissioner office
- Ombudsman model – no order making power
- Power to investigate, require production of documents, take evidence under oath, etc.
- Creates tools, resources for HIPA compliance
- E-newsletter – Saskatchewan FOIP FOLIO
- Own motion investigations (e.g. *Report on Misdirected Faxes from Sk trustees*)

# Role of PIPEDA

10

- *Personal Information Protection and Electronic Documents Act (PIPEDA)*
- Applies to organizations that collect, use, disclose personal information in the course of commercial activities
- Captures physician clinics, dentists, private labs and diagnostic clinics, etc.
- PIPEDA is consent-based unlike HIPA

# Substantially similar to PIPEDA?

11

- Ontario PHIPA is only provincial law that has been certified by feds as substantially similar
- Not likely for Alberta, SK or Manitoba
- But, does it really matter?
- Privacy Commissioner can exercise her discretion under s. 13(2)(b) to defer to HIPA

# *Pan Canadian Health Information Privacy and Confidentiality Framework*

12

- Endorsed by all provinces except Quebec and Saskatchewan
- Attempt to harmonize key features of PIPEDA with provincial, territorial stand-alone health information laws
- Available at <http://www.hc-sc.gc.ca/hcs-sss/pubs/ehealth-esante/2005-pancanad-priv/index-eng.php>
- Sets implied consent as pan-Canadian model

# Saskatchewan modification

13

- Shift, for purposes of EHR, from deemed (no) consent to implied consent
- This aligns with Pan-Canadian Framework
- Difficulty is misalignment (e.g. deemed consent still used where not appropriate in non-EHR applications)

# Canada Health Infoway (CHI)

14

- **FPT agency**
- **Not-for-profit organization that is charged with accelerating the use of EHRs in Canada**
- **Board comprised of Deputy Ministers of Health**
- **Privacy Forum (comprised of a rep. from each Ministry and each oversight office)**

# Challenging issues

15

- **Accountability to the patient**
- **Patient access to own PHI**
- **Security**
- **Privacy is much more than security**
- **Breach notification**
- **Multiple breach investigations by different agencies**

# Investigation Report H-2010-001

16

- **L & M Pharmacy, Sunrise RHA and Sk Health**
- **Importance of s. 16 of HIPA**
- **Lack of training, policy and procedures**
- **Indiscriminate approval of Users**
- **Lack of technical safeguards**
- **Lack of proactive monitoring and audit**
- **Curiosity of Users**

# Investigation H-2010-002 (2)

17

- Carelessness and curiosity pose bigger threat than hackers
- Multiple investigations add complexity
- Role of regulatory Colleges
- See Postscript (pp. 52-54)

# Consequences for breach of HIPA

18

- **Offence & penalty provision (s. 64 HIPA)**
- **Discipline by regulatory body**
- **Discipline by employer**
  - CUPE (Local 3967) & RQHR
  - SEIU-West & Saskatoon RHA (St. Paul's)
  - Dismissals quashed and minor suspensions substituted
  - implications

# Enforcement

19

- **Saskatchewan experience to date:**
  - Prosecutions = 0
  - Dismissal = 2 overturned by arbitrators and minor suspensions substituted
  - Colleges = small number of modest fines levied

# Resources (1)

20

- **Saskatchewan:**

- Report on Misdirected Faxes from Saskatchewan Trustees
- OIPC Investigation Report H2010-001  
(<http://www.oipc.sk.ca/Reports/H-2010-001,%20March%2023%202010.pdf>)
- Glossary of Common Terms – HIPA  
(<http://www.oipc.sk.ca/Resources/HIPA%20Glossary%20-%20Blue%20Box.pdf>)

# Resources (2)

21

- OIPC Annual Report 2009-2010, pages 20-26  
(<http://www.oipc.sk.ca/Annual%20Reports/Annual%20Report%202009-2010%20FINAL.pdf>)
- OIPC Annual Report 2008-2009, pages 26-30  
([http://www.oipc.sk.ca/Annual\\_Report\\_2008-2009.pdf](http://www.oipc.sk.ca/Annual_Report_2008-2009.pdf))

# Resources (3)

22

## From the Canadian Medical Association (CMA):

- *Principles for the Protection of Patients' [PHI]*  
(<http://www.cma.ca/policybase>)
- *Data Sharing Agreements: Principles for Electronic Medical Records/Electronic Health Records*
- *Physician Guidelines for Online Communication with Patients*
- Still in development – a new Privacy Code to supplant the *Privacy Code (1998)*

# Resources (4)

23

From Canada Health Infoway:

- *White Paper on Information Governance*  
([http://www2.infoway-inforoute.ca/Documents/Information%20Governance%20Paper%20Final\\_20070328\\_EN.pdf](http://www2.infoway-inforoute.ca/Documents/Information%20Governance%20Paper%20Final_20070328_EN.pdf))
- *Conceptual Privacy Impact Assessment*  
([http://www2.infoway-inforoute.ca/Documents/CHI\\_625\\_PIA\\_rj13.pdf](http://www2.infoway-inforoute.ca/Documents/CHI_625_PIA_rj13.pdf))
- *Infoway's Privacy Mandate*  
(<http://www.canadahealthinfoway.ca/about-infoway/about/privacy-mandate>)

# Resources (5)

24

## From Alberta:

- 1) PIA Requirements - [http://www.oipc.ab.ca/Content\\_Files/Files/PIAs/PIA\\_Requirements\\_2010.pdf](http://www.oipc.ab.ca/Content_Files/Files/PIAs/PIA_Requirements_2010.pdf)
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- 2) HIA Guide - [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)
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- 3) Netcare Investigation Report - <http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2256>
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- 4) AHW Netcare website link - <http://www.albertanetcare.ca/>
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- 5) AHW Guidelines Manual - <http://www.health.alberta.ca/documents/HIA-Guidelines-Practices-Manual.pdf>
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- 6) CPSA – Data Stewardship Framework - [http://www.cpsa.ab.ca/Libraries/Res/CPSA\\_Data\\_Stewardship\\_Framework.sflb.ashx](http://www.cpsa.ab.ca/Libraries/Res/CPSA_Data_Stewardship_Framework.sflb.ashx)
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- 7) CPSA – Secondary Use of Health Information - [http://www.cpsa.ab.ca/Libraries/Res/Secondary\\_Use\\_of\\_Health\\_Information - Final December 2009.sflb.ashx](http://www.cpsa.ab.ca/Libraries/Res/Secondary_Use_of_Health_Information_Final_December_2009.sflb.ashx)

# Resources (6)

25

## From Ontario:

- 1. Toolkit for doctors making the transition from paper-based to electronic records -- <http://www.ipc.on.ca/images/Resources/phipa-toolforphysicians.pdf>
- 2. Order No. 2 -- Ottawa Hospital breach -- [http://www.ipc.on.ca/images/Findings/up-HO\\_002.pdf](http://www.ipc.on.ca/images/Findings/up-HO_002.pdf)

## From British Columbia:

- OIPC Investigation Report F10-02  
([http://www.oipc.bc.ca/orders/investigation\\_reports/Investigation\\_ReportF10-02.pdf](http://www.oipc.bc.ca/orders/investigation_reports/Investigation_ReportF10-02.pdf))

# Questions??

26

- **Saskatchewan Information and Privacy Commissioner**
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  - Fax: (306) 798-1603
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