



Collection, Use and Disclosure of Personal Health Information in Mental Health Context

Canadian Institute
Managing Legal Risks and Responsibilities
in Mental Health Care

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Agenda

1. General Principles
2. *Personal Health Information Protection Act*
3. *Mental Health Act* exceptions to *PHIPA*

1. General Principles

RULE:

All personal health information is confidential and can only be collected, used or disclosed with the patient's or substitute decision maker's (SDM) consent

EXCEPTION:

Collection, use or disclosure, without consent: only if permitted by law



General Principles

Statutory sources for principle:

- *Regulated Health Professions Act*
- *Public Hospitals Act*
- *Mental Health Act*
- *Personal Health Information Protection Act, 2004*
- **Plus case law dealing with breaches of confidentiality and rulings of provincial Privacy Commissioner**



General Principles cont.

GENERAL RULE:

No collection, use or disclosure of personal health information unless you have:

- a) consent of patient or SDM; OR**
- b) authorization by law**

→ Rule applies generally to all situations in mental health care context with some exceptions that are expressly permitted by law

2. *Personal Health Information Protection Act, 2004* (“PHIPA”)

What is “personal health information”?

- Everything that you know about your clients that relates in anyway to their physical or mental health care, including family history
- Doesn’t matter if it is recorded or not -
Can be verbal or written
- Identifying information that can be linked to the patient or patient’s SDM

PHIPA – rules governing disclosure

Who can give consent to collect, use or disclose personal health information?

■ Capable Patient

■ Substitute Decision Maker

- Person authorized to make treatment decisions for incapable patients
- Person authorized by POA for personal care
- NOT person authorized to make property decisions for incapable patient



Exception to the General Rule

- ***Except as permitted by law***
- **Duty to warn – HCPs may disclose “for the purpose of eliminating or reducing risk to an individual’s health or safety if there are reasonable grounds to believe the risk is significant”**
- **Now codified in s. 40(1) of *PHIPA***



3. *Mental Health Act* Exceptions to General Rules of Privacy

- **Pre-PHIPA section 35 and 36 (now repealed) set out specific rules governing privacy of clinical records in psychiatric facilities**
- **Post- PHIPA section 34.1 provides:**

“Where there is a conflict between PHIPA and section 35 or 35.1 of [the MHA] or any provision of [the MHA] relating to a ... community treatment order ... the provisions of [the MHA] apply.”

Mental Health Act exception - proceeding without consent

■ Section 35 of *Mental Health Act*:

The Officer in charge may collect, use and disclose phi about a patient, *with or without* the patient's consent, for the purposes of,

(a) examining, assessing, observing or detaining the patient in accordance with MHA; or

(b) complying with Part XX.I (Mental Disorder) of the *Criminal Code (Canada)* or an order or disposition made pursuant to that Part.

Applying section 35(2) of MHA to collect, use or disclose without consent

- **In s. 35 of MHA: “patient” includes former patient, out-patient, former out-patient, and anyone who is or has been detained in a psychiatric facility**
- **35(2)(a) “examining, assessing, observing or detaining the patient in accordance with MHA”**
 - Applies to involuntary patients – Forms 3 and 4; what about Form 1 subjects?
 - Does it also apply to voluntary and informal patients?

Applying section 35(2) cont'd

- **section 35(2)(b): “complying with Part XX.I (Mental Disorder) of the *Criminal Code* or an order or disposition made pursuant to that Part.”**
- **Forensic psychiatric patients**
 - Under court ordered assessments
 - Detained under dispositions of the Ontario Review Board
 - Trumps patient refusal to consent to contact with family or other treating facilities

On the receiving end of request for PHI under s. 35(2) of MHA

- **PHIPA provides that: A health information custodian may disclose PHI to a psychiatric facility or custodial institution, for the purpose of assisting decision-making about:**
 - (a) the health care to the individual; or
 - (b) placing the individual into custody, detention, release, conditional release, discharge or conditional discharge under Part IV of the *Child and Family Services Act*, or the *Mental Health Act*, the *Ministry of Correctional Services Act*, the *Corrections and Conditional Release Act* (Canada), Part XX.1 of the *Criminal Code* (Canada), the *Prisons and Reformatories Act* (Canada) or the *Youth Criminal Justice Act* (Canada).

Other MHA exceptions permitting disclosure without consent

- **Disclosure to CCB:** Officer in charge shall, at the request of any party, disclose to the Board the patient's record of phi.

- **Discretionary disclosure re CTO's**

Officer in charge may disclose to

- (a) issuing physician of a CTO
- (b) a substitute physician appointed by issuing physician to act in his absence re CTO
- (c) another person named in the person's CTP upon the written request of physician or other named person; or
- (d) rights advisors.



Exceptions to consent for disclosure: community treatment orders

- **Physician issuing or renewing CTO may consult with other health care professionals, if they are named in the CTP, re making decision to issue or renew**
- **BUT – no person may disclose fact that a person is being considered for or is subject to a CTO without consent of person or SDM**

Other MHA exceptions mandating disclosure without consent

- Officer in charge shall disclose phi to the PGT who is conducting an investigation under the *Substitute Decisions Act* (person at risk)
- Officer in charge shall disclose phi pursuant to a summons or order in respect of a matter before the courts or under any Act – unless the attending physician states that disclosure is harmful to the treatment or recovery of the patient or is likely to result in mental or physical harm to a third party → requires hearing



Sorting out what can and cannot be collected or disclosed without consent

- **Section 35(2): “with or without consent” implies both are permissible and that it is a matter of weighing impact of proceeding without consent against need for information**
- **Look to the legislation – “shall” disclose v. “may” disclose**
- **Special rules recognize the unique challenges of psychiatric care**



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Thank You!