

The Personal Health Information Act Amendments

Questions and Answers – December 2021

Note to reader: *The Personal Health Information Act (PHIA) and the regulations made under it establish the rules governing the collection, use, disclosure, retention, destruction and protection of personal health information in Manitoba. Amendments to the Act and to the Personal Health Information Regulation made under the Act will come into force on January 1, 2022.*

This Questions and Answers document is designed as a reference tool to help trustees and other stakeholders, and is intended to explain the amendments made to legislation and to offer guidance on approaches, procedures and best practices. The information contained in the document is not meant to present binding rules and is not legal advice. Any examples used are illustrative only and should not be used as authority for any decisions made under PHIA.

Trustees should refer to PHIA and the Personal Health Information Regulation made under the Act in applying the provisions of the Act and the Regulation. To access a copy of PHIA and the Personal Health Information Regulation made under the Act go to: <https://www.gov.mb.ca/health/phia/index.html>

1. Why are these amendments being made?

PHIA requires the Minister of Health and Seniors Care to conduct a periodic review, of the Act, including public consultations, to ensure that it continues to meet its objectives and reflect contemporary needs.

The most recent statutory review of PHIA has been completed and the amendments to the Act are based on the review. The amendments to the Personal Health Information Regulation under PHIA are required in order to implement the amendments to the Act. To learn more about the PHIA review, please go to:

<https://www.gov.mb.ca/health/phia/review.html>

2. Which sections of PHIA are impacted by these amendments?

Amendments to the following sections are detailed in this document:

- Subsections 6(1.1), 7(2): Duty to provide explanation
- Subsections 7(1): Trustee's response
- Subsection 7(1.1): Information about right to make a complaint **NEW**
- Section 7.1: Psychological tests and data **NEW**
- Section 10: Fees

- Section 10.1: Trustee may determine that the request has been abandoned **NEW**
- Section 11.1: Trustee may disregard certain requests **NEW**
- Subsection 12(3): Trustee's response to a request for correction
- Subsection 12(3.1): Information about right to make a complaint **NEW**
- Subsection 19.0.1: Privacy Breaches **NEW**
- Subsection 19.1(4): Exception (consent)
- Section 21: Restrictions on use of information
- Subsection 21(2): Employees' information **NEW**
- Subsection 24(2): Who may give an approval (health research)
- Subsection 24(3): Conditions for approval (health research)
- Subsection 27.1: Notice of unauthorized activity **NEW**
- Subsections 49(2) and (3): Appeal to court
- Section 59: Research approval committee
- Subsection 60(1): Exercising rights of another person
- Subsection 63(1): Offences
- Subsection 63(6): Prosecution within two years
- Section 65: Protection from adverse action
- Subsection 66(1): Regulations
- Subsection 67(1): Review of Act in five years

Effective January 1, 2022, the Ombudsman will be authorized under PHIA to:

- Exchange information with counterparts in other Canadian jurisdictions for the purpose of coordinating activities and handling complaints that involve two or more jurisdictions
- Disclose information to prevent or lessen a risk of serious harm to any person's health or safety
- Require the provision of records and information when conducting audits of PHIA compliance by trustees

2.1. Explanation Provided As Soon As Reasonably Practicable

PHIA states that an individual has a right, upon request, to examine and receive a copy of his or her personal health information maintained by a trustee within a specified timeframe, or to authorize another individual to exercise these rights on his or her behalf.

The current requirement in PHIA for a trustee to explain any term, code or abbreviation used in personal health information accessed by an individual upon request under PHIA does not provide for a timeframe in which this explanation must be provided. However, an explanation of term, codes or abbreviations used in personal health information may be important to ensure that person accessing the information understands it.

Amendments to subsection 7(2) will clarify that trustees must provide an explanation of any term, code or abbreviation used in personal health information as soon as reasonably practicable after the person accessing the information requests such an explanation. The amendment to **subsection 6(1.1)** clarifies that this requirement applies to an inpatient accessing their hospital chart.

2.2. Information About Right to Make a Complaint

Individuals who have requested access to personal health information have the right to make a complaint to the Manitoba Ombudsman on any matter relating to the request, including:

- when the individual is refused access to examine or receive a copy of the information,
- when a correction to an individual's personal health information is not made,
- an unreasonable delay by the trustee in responding to the request,
- an unreasonable or unauthorized fee charged by the trustee.

Individuals have the right to make a complaint to the ombudsman if they believe their personal information:

- has been collected, used or disclosed contrary to the act,
- has not been protected in a secure manner as required by the act.

PHIA empowers the ombudsman to handle such complaints.

Effective January 1, 2022, the new **subsections 7(1.1), and 12(3.1)** will add a requirement for trustees to notify an individual of their right to make a complaint under s. 39(1) of PHIA if the trustee advises them that the personal health information they have requested access to cannot be found or does not exist. This will enable the Ombudsman, for example, to review whether a trustee conducted a reasonable search for the information requested.

2.3. Information Related to Psychological Tests and Data

Effective January 1, 2022, the new **subsection 7.1(1)** of PHIA will provide that trustees are not required to provide a copy of information related to psychological tests or data if conditions set out in this subsection are met. Specifically, giving copies of information related to psychological tests or data is not required if the information concerns procedures or techniques relating to psychological tests or assessments, details of psychological tests or assessments, or raw data from a psychological test or assessment, and doing so could reasonably be expected to prejudice the use or results of the particular psychological tests or assessments.

However, trustees must still permit a person to examine information related to psychological tests or data, and under **subsection 7.1(2)** the trustee may require that the trustee (if a health professional), or a health professional chosen by the trustee, be present to provide an explanation of the information concerning psychological tests or data.

2.4. Fees for Access to Personal Health Information

PHIA allows trustees to charge a reasonable fee for permitting a person to examine the person's personal health information maintained by the trustee and providing a copy of the information.

Currently, there is no limit on the amount trustees may charge for providing access to personal health information, but the fee must be reasonable.

Section 10 will be amended to provide further clarity that trustees have authority, but are not required to charge a fee for permitting a person to examine the person's personal health information and providing a copy of the information.

See item **2.5** of this document for more information about fee estimates.

2.5. Limited Authority to Make a Determination that a Request Has Been Abandoned

Under **section 10.1**, a trustee may require an individual to provide additional information in relation to their request, including additional information that is necessary to respond to the request, and to indicate if the individual accepts the estimate of the

amount of the fee that may be charged. An individual has up to 30 days from the day the request is given to provide the additional information or accept the estimated fee. When a request is given to an applicant under this section, the time within which the trustee is required to respond to the access request is suspended until the applicant provides the required information. If the additional information or acceptance is not provided by the individual within 30 days, the trustee may determine that the request has been abandoned.

A determination by a trustee to consider a request abandoned pursuant to section 10.1 must be made on a case-by-case basis. As with all decisions by trustees, there should be documentation supporting the determination and setting out the underlying rationale for the determination that a request for access has been abandoned. If a trustee determines that a request for access to personal health information has been abandoned under section 10.1, the trustee must notify the individual in writing of the determination and the reasons for it, and of the individual's right to make a complaint about the determination to the Ombudsman.

For more information, please review the *Guideline on Limited Authority to Make a Determination that a Request for Access Has Been Abandoned*.

2.6. Limited Authority to Disregard Certain Requests for Access

PHIA provides individuals with a right, on request, to examine and receive a copy of their personal health information maintained by a trustee, subject to certain limitations provided for in PHIA depending on the circumstances and the nature of the request.

Section 11.1 will permit a trustee to disregard a request if the trustee reasonably believes that the request is for information already provided to the individual who made the request, or the request amounts to an abuse of the right to make a request because it is unduly repetitive or systematic, or otherwise made in bad faith

A decision by a trustee to disregard a request pursuant to section 11.1 must be carefully considered on a case-by-case basis. As with all decisions by trustees, there should be documentation supporting the decision and setting out the underlying rationale for the decision to disregard a request for access. If a trustee disregards a request for access to personal health information under section 11.1, the trustee must notify the individual in writing of the decision and the reasons for it, and of the individual's right to make a complaint about the decision to the Ombudsman.

For more information, please review the *Guideline on Limited Authority to Disregard Certain Requests for Access*.

2.7. Privacy Breaches

Effective January 1, 2022, PHIA will be amended to add **section 19.0.1**, which will provide that a trustee who maintains personal health information about an individual must notify the individual about a privacy breach relating to the information if, after considering the relevant factors prescribed in the regulations, the breach could reasonably be expected to create a real risk of significant harm to the individual.

Section 8.7 of the Personal Health Information Regulation will set out the list of factors that trustees must consider in determining if a privacy breach could reasonably be expected to create a real risk of significant harm to an individual, including:

- (a) the sensitivity of the personal health information involved;
- (b) the probability that the personal health information could be used to cause significant harm to the individual;
- (c) any other factors that are reasonably relevant in the circumstances.

Where a trustee provides notice of a privacy breach to an individual under section 19.0.1 of PHIA, the trustee must notify the Ombudsman of the privacy breach at the time and in the form and manner that the Ombudsman requires.

For more information, please review the *Guideline on Privacy Breaches*.

2.8. Use of Employees' Personal Health Information

Trustees, depending on their function, sometimes maintain the personal health information of their employees that they have collected for the purpose of providing health care or other services to them. For example, an employee of a hospital may have visited that hospital as a patient prior to becoming an employee of the hospital, or even during the course of their employment.

Effective January 1, 2022, **subsection 19.1(4) and the new subsection 21(2)** will explicitly provide that personal health information of an employee or prospective employee, which was collected or received for a purpose unrelated to their employment, cannot be used by a trustee for a purpose related to their employment without first obtaining the consent of the employee or prospective employee.

2.9. Use of Personal Health Information to Prevent or Lessen Harm

Section 21 restricts the use of personal health information by a trustee for purposes other than for which it was collected or received. Effective January 1, 2022, section 21 will be renumbered as subsection 21(1).

Clause 21(1)(c) is being amended to permit a trustee to use personal health information where necessary to prevent or lessen

- (i) a risk of harm to the health or safety of a **minor**, or
- (ii) a risk of serious harm to the health or safety of **the individual the information is about or another individual**, or to **public health or public safety**.

The amendments are consistent with the authority under PHIA for trustees to disclose personal health information for these purposes.

2.10. Use of Personal Health Information to Educate

Before January 1, 2022, PHIA did not permit the use of personal health information for training of staff or students without the consent of the individual. For example, hospitals have extensive training programs for students that are studying at an educational institution but who are taking their practicum at the health facility. While PHIA authorizes a physician employed by the hospital to check a patient's chart for the purpose of providing health care to that patient, the authorization for that physician to share the patient's health information with students who are learning how to provide care was not so clear.

Amendments to **subsection 21(1)** of PHIA will add a new clause (d.1), which will clarify that trustees may use personal health information for the purposes of educating individuals respecting the provision of health care, including

- (i) employees and agents of the trustee
- (ii) students training to be health professionals, and
- (iii) health professionals who have been granted privileges to provide services at a health care facility operated by the trustee.

For clarity, this section applies only to the use of personal health information as part of a formal education process by the trustee. Random patient chart access, including for the purposes of self-education, is not authorized under this subsection.

2.11. Disclosure for Health Research

Health research has played a significant role in efforts to provide safe and effective health care services. It depends largely on information that includes personal health information. PHIA authorizes certain trustees to use or disclose personal health information for research and planning related to providing health care and payment for health care by the trustee.

In addition, sections 24 and 24.1 of PHIA authorize disclosure of personal health information by trustees to third party researchers for health research, if certain conditions are met. Before January 1, 2022, these conditions included that the research had been approved by:

- the health information privacy committee established under section 59 of PHIA, when personal health information maintained by the government or a government agency is required,
- an institutional research review committee formally established by a health care facility, university or similar body, if the information is maintained by a trustee other than the government or a government agency.

Effective January 1, 2022, in order to streamline the process for approval of health research proposals, PHIA will no longer provide that research proposals requiring the disclosure of personal health information by a trustee must be approved by the health information privacy committee or an institutional research review committee. Rather, it will require such proposals to be approved by the following two new committees:

1. **The Committee for Harmonized Health Impact, Privacy, and Ethics Review (CHIPER)** - established by Research Manitoba.
2. **The Health Research Privacy Committee** – consists of 8-12 members appointed by the Minister for a period of no more than six years, or until re-appointed. Sits in panels of three members.

On receiving the information about the proposed research project, Research Manitoba will forward the application to both the health research privacy committee and CHIPER for consideration.

After receiving satisfactory confirmation that the proposed research project has been approved by CHIPER, the health research privacy committee may grant or refuse to

grant an approval of the project, and must advise the research applicant in writing of its decision.

More details on this topic are available at <https://www.rithim.ca/rithimlaunchfaq>

2.12. Notice of PHIA Contraventions

Amendments to subsection 27.1(1) and section 65 of PHIA will explicitly provide that employees, officers and agents of a trustee, who believe in good faith that the trustee is collecting, using, disclosing, retaining, concealing, altering or destroying personal health information in contravention of PHIA, may notify the Ombudsman of the contravention. They may also disclose personal health information to the Ombudsman in providing this notice, but only if the Ombudsman requests this information.

An individual providing such notice may request that their identity be kept confidential, and the Ombudsman must take reasonable steps to protect their identity. The individual will also have protection from liability for disclosing personal health information requested by the Ombudsman, and amendments to subsection 65(1) provide protections from adverse employment action for, in good faith, giving notification or disclosing personal health information to the Ombudsman under section 27.1.

2.13. Appeal within 30 days

Individuals who have requested access to personal health information have the right to make a complaint to the Ombudsman on any matter relating to the request. After receiving a complaint, the Ombudsman must investigate it in accordance with PHIA. The Ombudsman may initiate investigations independently where circumstances warrant.

Following the completion of an investigation, if the Ombudsman supports the position of the complainant, the Ombudsman may make recommendations under section 47 of PHIA for changes to policy or practice. Complaints regarding a denial of access under PHIA can also be appealed to the Court of Queen's Bench.

Amendments to subsection 49(3) of PHIA will clarify that, if the Ombudsman's report under section 47 does not contain recommendations respecting the individual's complaint, an appeal may be made within 30 days after receiving the Ombudsman's report.

2.14. Exercising the Rights of Another Person

Currently, under subsection 60(1) of PHIA, a person may exercise the rights granted to another individual under PHIA – namely the right of access to, and the right to consent to use and disclosure of, the other individual’s personal health information in specific circumstances. PHIA also enables a family member to act as an individual’s representative when the individual lacks the capacity to exercise his or her own rights under PHIA, and the trustee reasonably believes that none of the representatives listed in subsection 60(1) exist or are available. This is meant to increase the likelihood that someone will be available to exercise an individual’s rights under PHIA if the individual lacks the capacity to do so.

Subsection 60(1) will be amended to provide that an attorney acting under a power of attorney granted by an individual can exercise the rights of that individual under PHIA, if the exercise of the right or power relates to the powers and duties conferred by the power of attorney.

For example, where an attorney is arranging payment for health care, or preparing a tax return in which the individual may qualify for certain medically related tax benefits, the attorney may need to access information related to prescription drugs and payment for health services for the person that they represent.

2.15. Expanded List of Offences

PHIA lists the offences for which a person or trustee may be found guilty, with penalties up to \$50,000.00. These potential consequences contribute to health information privacy. A list of offences appears in subsections 63(1) to 63(3) of PHIA.

Subsection 63(1) of PHIA will be amended to add the following new offences:

- failing to comply with section 19.0.1 (notification of privacy breach);
- willfully concealing, altering or falsifying personal health information with the intent to evade an individual’s request to examine or copy the information;
- knowingly helping another person, or counseling another person, to contravene clauses 63(1)(a)-(g).

Subsection 63(6) will be amended to extend the limitation period for commencing prosecutions under PHIA, from two years after the commission of the alleged offence, to two years after the day on which evidence sufficient to justify a prosecution for the offence came to the knowledge of the Ombudsman. **More information will be provided by the Ombudsman’s Office in this regard in early 2022.**