PRACTICE STANDARD

College of Nurses of Ontario
Ordre des infirmières et infirmiers de l'Ontario
THE STANDARD OF CARE.

Confidentiality and Privacy—Personal Health Information

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ORDRE DES INFIRMIÈRES ET INFIRMIERS DE L'ONTARIO

THE STANDARD OF CARE.

VISION
Leading in regulatory excellence

MISSION
Regulating nursing in the public interest

Confidentiality and Privacy - Personal Health Information Pub. No. 41069
ISBN 978-1-77116-052-0
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First published 2004, Reprinted December 2005, May 2008. Updated June 2009. Updated February 2017. Updated April 2019 for references to *Child, Youth and Family Services Act, 2017*. Updated Nov 2021 for consistency of the term personal health information. Updated July 2022 to replace *Long-Term Care Homes Act*, 2007 with *Fixing Long-Term Care Act, 2021*.

Additional copies of this document may be obtained by contacting CNO's Customer Service Centre at 416 928-0900
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Ce fascicule existe en français sous le titre : *Confidentialité des renseignements personnels sur la santé*, n° 51069

Nursing standards are expectations that contribute to public protection. They inform nurses of their accountabilities and the public of what to expect of nurses. Standards apply to all nurses regardless of their role, job description or area of practice.

— College of Nurses of Ontario

Introduction

Nurses[1] have ethical and legal responsibilities to maintain the confidentiality and privacy of client health information obtained while providing care. One way that nurses maintain boundaries and build nurse-client relationships based on trust is by respecting clients' rights around confidentiality and privacy.

Ontario's privacy legislation supports and extends the College of Nurses of Ontario's (CNO's) standards on nurses' accountabilities pertaining to clients' personal health information. This document provides an overview of Ontario's current legislation, clarifies nursing standards for confidentiality and privacy of personal health information, and replaces the *Confidentiality* practice guideline (#41045). It also updates the information on security and confidentiality of personal health information in the *Documentation, Revised 2008* and *Ethics* practice standards.

A. Personal Health Information Protection Act

The *Personal Health Information Protection Act, 2004* (PHIPA) governs health care information privacy in Ontario. Information privacy is defined as the client's right to control how his/her personal health information is collected, used and disclosed. PHIPA sets consistent rules for the management of personal health information and outlines the client's rights regarding his/her personal health information. This legislation balances a client's right to privacy with the need of individuals and organizations providing health care to access and share health information.

PHIPA permits the sharing of personal health information among health care team members to facilitate efficient and effective care. The health care team includes all those providing care to the client, regardless of whether they are employed by the same organization. PHIPA requires that personal health information be kept confidential and secure. Security refers to the processes and tools that ensure confidentiality of information. When using computers, nurses should refer to the *Documentation, Revised 2008* practice standard.

B. Quality of Care Information Protection Act

The *Quality of Care Information Protection Act, 2016* (QOCIPA) is another piece of legislation for the health care sector. This Act provides broad protection to quality of care information produced by a health care facility or a health care entity, or for a governing or regulatory body. Its purpose is to promote open discussion of adverse events, peer review activities and quality of care information, while protecting this information from being used in litigation or accessed by clients. This means that nurses' activities and records associated with the College's Quality Assurance Program cannot be used in legal proceedings.

[1] In this document, *nurse* refers to a Registered Practical Nurse (RPN), Registered Nurse (RN) and Nurse Practitioner (NP).

Understanding the *Personal Health Information Protection Act*

What is personal health information?

Personal health information is any identifying information about clients that is in verbal, written or electronic form. This includes information collected by nurses during the course of therapeutic nurse-client relationships. Such information relates to the following:

- physical or mental health, including family health history;
- care provided (including the identification of people providing care);
- a plan of service (under the *Fixing Long-Term Care Act, 2021*);
- payments or eligibility for health care;
- donation of body parts or substances (e.g., blood), or information gained from testing these body parts or substances;
- a person's health number; or
- the name of a client's substitute decision-maker.

Clients do not have to be named for information to be considered personal health information. Information is "identifying" if a person can be recognized, or when it can be combined with other information to identify a person. Personal health information can also be found in a "mixed record," which includes personal information other than that noted above.

A personnel record containing a note from a physician or an NP supporting an absence from work is not considered personal health information. However, a description of the employee's symptoms and treatment noted by an occupational health nurse (OHN) when providing care is considered personal health information. If the OHN's records contain health and non-health information, then it is a "mixed record." For example, the record contains a note substantiating the absence and the employee's symptoms and treatment. The note substantiating the absence can be shared with the employer only if the health information is separated from the note.

Application throughout the health care continuum

PHIPA applies primarily to personal health information in the hands of health information custodians (called HICs in the legislation, but custodians throughout this standard). A custodian is an organization that provides care within the health care continuum. People providing care can also be custodians under this legislation. Nurses who receive information from custodians are responsible for complying with the legislation. They can only use the information for the purposes they identified when requesting it from the custodian.

In general, nurses who are employees or volunteers, or contracted or credentialed by health care organizations (e.g., clinics, laboratories, CCACs, hospitals and long-term care facilities), are considered "agents" of a custodian. The legislation defines agents as people authorized to act for, or on behalf of, a custodian. An agent cannot act on her/his own behalf with regard to personal health information.

Custodians are responsible for practices and policies that ensure the confidentiality and security of personal health information. Custodians are also responsible for complying with the Act, and ensuring that all agents are informed of their duties under PHIPA.

Nurses in independent practice, or those employed in health services in non-health care settings may be considered custodians. Nurses in these settings are responsible for the personal health information in their custody and control, and must take certain steps to safeguard it. Compliance under the Act includes the following:

- designating a contact person to facilitate compliance with the Act and to respond to requests, inquiries and complaints from the public;
- providing a written public statement generally describing information practices, how to reach the contact person, the process for accessing records or requesting corrections, and the complaint process for clients;

- ensuring information practices comply with the Act and its regulations;
- ensuring information is accurate, complete and up-to-date; and
- ensuring information is secure.

A nurse is responsible for ensuring that she/he uses a client's personal health information only for the purpose(s) for which it was collected. A nurse should ensure that it remains secure within the health care team. Health care providers also have an obligation to ensure that personal health information used by the health care team or disclosed outside the team is as accurate, complete and up-to-date as possible. If a complete record is not transmitted or transferred for any reason, health care providers must communicate this to the person to whom they are sending the record.

PHIPA defines "collection" as the gathering, acquiring, receiving or obtaining of personal health information. Nurses may only collect as much personal health information as is needed to meet the purpose of the collection. Information may be collected indirectly without consent (e.g., from a relative or significant other) when the client cannot provide it (e.g., he/she is unconscious), if there is a question as to the accuracy of the information that the client provides, or when obtaining consent would affect the timeliness of the care. The Act lists provisions that permit collection of personal health information from someone other than the client.

How the *Personal Health Information Protection Act* affects nurses

The legislation does not change nurses' responsibilities to protect their clients' confidentiality and privacy. Nor does it greatly affect their ability to collect and use personal health information to plan and deliver care. In PHIPA, "use" is a defined term. In this context, use means to handle or deal with personal health information in the custody or under the control of a custodian. Sharing information among members of the health care team to provide care is one use of information under PHIPA. Generally, consent to use information to provide care can be assumed by the health care team. A client should be made aware of his/her right to withhold or withdraw consent to the sharing of his/her personal health information with other members of the health care team.

Circumstances in which nurses may have to obtain explicit consent for disclosure of information are outlined in the section on disclosure in this document. The legislation also outlines permitted disclosures that do not require client consent.

A. Implied consent

PHIPA specifies that several conditions must be met to assume a client's implied consent. It is a custodian's obligation to fulfil these conditions by posting a notice or providing a brochure that describes the purposes for the collection, use and disclosure of personal health information. This kind of notice is one way to fulfil the conditions for implied consent.

B. Express consent

PHIPA does not require a specific form of express consent, which may be given verbally or in written form. It may be provided over the telephone or electronically if the nurse is sufficiently able to identify the person; however, express consent that is written helps avoid ambiguity. The content and format of the consent need not be elaborate. Express consent is required in the following situations:

- personal health information is to be disclosed outside of the health care team (e.g., submitting personal health information on a claim form to an insurance company);
- information is to be disclosed (within the health care team) for purposes other than providing, or helping to provide, care;
- personal health information is used for fundraising (e.g., contact information can be provided without express consent); and
- personal information is being collected for marketing research or marketing activities.

C. Substitute decision-makers

If a client cannot provide consent, then a substitute decision-maker may make decisions and provide health information. Rules for who may act as a substitute decision-maker are similar to those in Ontario's health care consent law. For example, a

substitute decision-maker may be a spouse or the parent of a child under 16 who is unable to answer health questions or make decisions about treatment. PHIPA also contains directions for substitute decision-makers when considering decisions of consent; appeal routes for clients found incapable; and means to deal with conflicts between people acting as client representatives.

Personal health information belongs to the client

The legislation recognizes that personal health information belongs to clients and is simply being housed in health care facilities. Clients have the right to give, refuse or withdraw their consent to the collection, use and disclosure of their personal health information.

Clients also have the right to instruct that a part of their personal health information not be shared with other providers. This is referred to as the lockbox provision. If a client instructs a nurse not to release a part of his/her health information to another practitioner, the nurse must advise the practitioner that some relevant information has been withheld at the direction of the client.

Although clients have the broad right of access to their personal health information under PHIPA, they may be refused access. Possible grounds for refusing access include the following:

- the information is Quality Assurance information or that generated for a regulatory college's Quality Assurance Program;
- it is raw data from standardized psychological tests or assessments;
- it may present a risk of serious harm to the treatment or recovery of the client, or of serious bodily harm to another person; or
- access to the information would reveal the identity of a confidential source of information.

Clients also have the right to correct their personal health information. This means clients can request changes if they believe the record is inaccurate or incomplete. Requests for corrections can be made verbally or in writing; however, only those requests made in writing warrant the correction procedures set out in the Act. Clients can only request corrections to their information if access has been provided. They may not restrict the collection, use or disclosure of their personal health information that is required by law or professional standards.

Client requests to correct personal health information may be refused in the following circumstances:

- the request is frivolous, vexatious or made in bad faith;
- the custodian did not create the record and does not have sufficient knowledge, expertise or authority to make the correction; or
- the information is a professional opinion or observation made in good faith.

To comply with this legislation, procedures and policies must be in place to process client requests for access and corrections. Specific procedures for handling access and correction requests are outlined in the legislation.

Clients can complain to an organization's contact person or to the Information and Privacy Commissioner about refusals to access requests or other breaches of PHIPA.

Disclosure

Disclosure is defined as making information available or releasing it to another custodian or person. Express consent is needed when personal health information is disclosed outside of the health care team or is not used to provide health care.

However, PHIPA includes provisions that permit a custodian to use personal health information without the consent of the client. Some of these include use of personal health information for the following reasons:

- to manage risk;
- to support quality of care programs;
- to allocate resources;
- to obtain payment; and
- to do research, if a research plan has been approved by a research ethics board.

The Act also permits practitioners to disclose personal health information without obtaining consent in the following circumstances:

- if disclosure is needed to provide health care, and consent cannot be obtained quickly;
- to contact a relative or friend of an injured, incapacitated or ill client for consent;
- to confirm that a client is a resident or client in a facility, provide his/her location and comment on his/her general health status (unless there is an express request not to do so); or
- to eliminate or reduce a significant risk of harm to a person.

Refer to PHIPA or the Office of the Information and Privacy Commissioner for Ontario for information on disclosure.

Professional misconduct

One of the definitions of professional misconduct in the *Nursing Act, 1991* is "giving information about a client to a person other than the client or his or her authorized representative, except with the consent of the client or his or her representative, or as required or allowed by law."

Standard Statements

Personal health information practices

Nurses share relevant information with the health care team, whose members are obliged to maintain confidentiality. Nurses must explain to clients that information will be shared with the health care team and identify the general composition of the health care team.

Indicators

The nurse meets the standard by:

- seeking information about issues of privacy and confidentiality of personal health information;
- maintaining confidentiality of clients' personal health information with members of the health care team, who are also required to maintain confidentiality, including information that is documented or stored electronically;
- maintaining confidentiality after the professional relationship has ended, an obligation that continues indefinitely when the nurse is no longer caring for a client or after a client's death;
- ensuring clients or substitute decision-makers are aware of the general composition of the health care team that has access to confidential information;
- collecting only personal health information that is needed to plan and provide care;
- not discussing client information with colleagues or the client in public places such as elevators, cafeterias and hallways;
- accessing information for her/his clients only and not accessing information for which there is no professional purpose;
- denying people who are not part of the health care team access to personal health information (e.g., OHNs denying a client's employer access to the client's personal health information);
- safeguarding the security of computerized, printed or electronically displayed or stored information against theft, loss, unauthorized access or use, disclosure, copying, modification or disposal;
- not sharing computer passwords;
- ensuring that explicit consent has been obtained to keep a client's personal health information in the home;
- not using standard e-mail to send personal health information;
- ensuring that security-enhanced e-mail is effective before sending personal health information this way;
- using confidentiality warnings on facsimile cover sheets and in e-mail to instruct those who receive the information in error to destroy it immediately before reading it;
- communicating to the recipient of the information that a particular record is incomplete;
- advocating for policies and practices that ensure confidentiality during storage, transmission or transfer, or disposal of personal health information, whether in hard copy or electronic (e.g., e-mail, facsimile) form;
- complying with retention policies or advocating for these when none exist;
- ensuring that personal health information is destroyed in a way that protects the confidentiality of that information; and
- notifying the contact person within the practice setting when she/he becomes aware that there has been a breach of confidentiality (e.g., personal health information has been stolen, lost or accessed by unauthorized people).

Knowledgeable consent and substitute decision-makers

Nurses ensure that clients are aware of their rights concerning their personal health information and have expressly consented to the collection, use and disclosure of information outside the health care team.

Indicators

The nurse meets the standard by:

- obtaining the client's express consent before disclosing his/her information outside the health team (e.g., to family members or friends of the client);
- ensuring clients are provided with an opportunity to withhold or withdraw consent to disclose their name, location in the facility and general health status;
- ensuring clients are provided with an opportunity to withhold or withdraw consent to disclose their name to a person representing his/her religious organization; and
- seeking consent from the substitute decision-maker when the client is incapable of providing knowledgeable consent.

The client's right to access and amend his/her personal health information

Nurses respect the client's right to see/obtain a copy of his/her health information, to see his/her health file and to request correction to the information. The onus is on the client to prove that the record is incomplete or inaccurate, and any changes to the record must be tracked.

Indicators

The nurse meets the standard by:

- ensuring that the custodian has provided written notice to clients about information practices and that clients are aware of their personal health information privacy rights; and
- facilitating client access to information about care and treatment.

Potential for harm

When a nurse learns information that, if not revealed, could result in harm to the client or others, she/he must consult with the health care team and, if appropriate, report the information to the person or group affected.

Indicators

The nurse meets the standard by:

- considering if any harm may come to a client as a result of a disclosure;
- reporting information as required by law;
- informing the client, as appropriate, when there is a duty to report information to another agency or facility;
- providing the client with the opportunity to take action and report information when appropriate;
- informing the appropriate authority if the client does not take action and report information; and
- consulting with the health care team when there are concerns about harm resulting from sharing information with a client.

Disclosure without consent

Nurses adhere to legislation that requires them to reveal confidential information to others. For example, the* Child, Youth and Family Services Act, 2017, *requires all health care professionals to report suspected child abuse to the Children's Aid Society; the* Health Protection and Promotion Act *permits reporting of certain conditions to the Medical Officer of Health. Additionally, required reporting information may be disclosed to the Workplace Safety and Insurance Board. The information CNO gathers during an investigation and shares with the members under investigation is confidential.

Indicators

The nurse meets the standard by:

- ensuring clients or substitute decision-makers know that information may be used for purposes other than client care, such as for research or improvements to the quality of care;
- ensuring that those seeking access to information have the requisite authority before providing information (e.g., police officers who request information have a court order); and
- seeking the advice of the contact person for privacy of health information before providing information.

Maintaining a Quality Practice Setting

Employers and nurses share the responsibility for creating environments that support quality practice. CNO encourages employers and nurses to use the following strategies to develop and maintain a quality practice setting.

Care delivery processes

These processes support the delivery of nursing care and services related to confidentiality and privacy of personal health information.

Possible strategies include:

- conducting reviews of health information practices with staff to ensure that privacy and confidentiality standards are being met; and
- developing and implementing supportive policies and processes that address privacy, confidentiality and security in the collection, use and disclosure of personal health information.

Policies/processes include:

- giving the client access to his/her health information;
- managing client and/or family requests for changes to the health record; and
- defining the nurse's role in dealing with a client's right to access his/her health record.

Communication systems

These systems support information sharing and decision-making about client care and services. Systems should promote sharing of health information among interprofessional team members while protecting the privacy, confidentiality and access rights of clients.

Possible strategies include:

- ensuring that the electronic systems that support the transmission of client information (e.g., facsimiles, e-mail, intranet) are secure and protect client confidentiality;
- ensuring that written public notice with details on how to access and correct personal health information is available, and gives the name of the contact person who can respond to inquiries and receive complaints;
- establishing a process to help staff deal with issues/conflicts arising from inconsistent practices relating to privacy and confidentiality of personal health information; and
- consulting with front-line nurses, to tap into their expertise and experience, when determining the functional requirements to maintain confidentiality in computerized documentation systems.

Leadership

Leadership is the process of supporting others to improve client care and services by promoting professional practice.

Possible strategies include:

- developing and implementing leadership opportunities, such as involving nursing staff in the development of privacy and confidentiality policies/procedures development and revisions related to the health record;
- establishing systems that ensure health information is collected, used, disclosed and accessed according to PHIPA and QOCIPA; and
- designating someone in the organization to act as the main contact for nurses with questions about confidentiality and security of personal health information.

Professional development systems

Professional development promotes a learning environment. Activities include orientation, education, performance management and professional practice activities related to privacy and confidentiality.

Possible strategies include:

- ensuring orientation to the facility includes addressing matters of privacy, confidentiality, security of personal health information and relevant policies and procedures; and
- providing educational opportunities to support effective compliance with PHIPA and QOCIPA legislation.

Case Scenarios

The case scenarios illustrate how the standards of privacy and confidentiality of personal health information may be applied. They are not all-inclusive. If needed, advice should be sought from the contact person for privacy and confidentiality in your practice setting.

Scenario 1

Your client with an acquired brain injury has been stabilized and is being transferred to another hospital for continuing care. The client is unconscious. Her husband is aware of the transfer, but does not know it is happening today. You tried to reach him by telephone, without success. Before the client is transferred, you want to share information about the care she received and the current plan of care with the nurse who will receive her. The client's cost for this transfer is being covered by private insurance, so you also need to share personal health information with the insurance company. How much information can you share, and with whom, under these circumstances?

There are two issues of consent in this scenario. The first is sharing personal health information with the receiving hospital nursing staff. These nurses are members of the health care team; therefore, there is implied consent for the sharing of information with them to provide health care. You can, therefore, share her personal health information. You may call the nurse and talk about the plan of care, and transmit a copy of the pertinent information from the health record to the receiving facility in a way that ensures the security of the files.

The second is the sharing of the client's personal health information with the insurance company. Express consent is required because this disclosure is not to a custodian and is not required to treat the client. Because the client is incapable of providing this consent, her husband (the substitute decision-maker) must provide express consent either in writing or verbally, before you share information. Since you cannot reach him, you may arrange her transfer. Once you obtain express consent from the husband, you may provide the information to an insurance company staff member.

Scenario 2

A man who received severe facial injuries in a motor vehicle crash arrives in your emergency room (ER). He is unable to communicate. No next of kin has come with him. A woman calls in distress and asks if her husband is a patient in your ER. She provides you with details that match the information on the man's identification. You believe she is the wife of the man with the facial injuries. Can you tell this woman that he is in the ER?

Normally, a client would have an opportunity to request that the hospital not disclose that he is a client in the facility or his location within the facility. This information may be given out in this case, however, because it is reasonably necessary to provide care. Because the law permits disclosure that a person is a client in a facility, and his/her location and general health status, you may provide this information to the woman. PHIPA allows you to contact a friend or relative of an injured client for consent. You may provide more information if the woman indicates she is the person who can act as a substitute decision-maker for consent to treatment.

Scenario 3

Your client has reviewed his health record. You answered his questions to ensure he understood the record, but he wants corrections made to a consulting physician's note.

The issue is correcting a health record made by another health care professional. If the client requested a correction to your note, and you agreed with the correction the client requested, you could have the client write a correction and include it with the record or make the changes yourself. If you did not agree with the correction the client requested, then you can have the client make a note and append it to the record. You can then make a separate note regarding the client's request in the

health record. A client does not have the right to correct an opinion or professional judgment by a health care professional.

Because this is a note by another health care professional (the consulting physician), you cannot be certain about the accuracy of the information that the client wants corrected. You have two options in this case: you can either contact the health care professional who wrote the note and have this physician speak with the client about the corrections; or you can speak with the person responsible for ensuring compliance with PHIPA in your practice setting.

Scenario 4

You are an OHN. The manager of an employee who is your client has asked questions about the client's health condition. The manager has also asked if the client has medical notes to substantiate absences on particular dates. Can you provide this information to the manager?

There are two issues here. The first is what is included in the definition of personal health information; the second is if a manager has access to personal health information.

Medical notes to substantiate the employee's absences may be held in an employee's health file. If the medical note does not contain other personal health information (e.g., symptoms, treatment, diagnosis), then this information can be provided to the manager. Information concerning accommodation for the employee's needs may be given so the employer can make provisions to meet these needs. Accommodation information does not include the nature of the illness or the diagnosis.

If there is personal health information included in the note, then the OHN can only provide the information that there were notes to substantiate the absences on the applicable dates. The manager is not entitled to any personal health information. This includes information about the nature of the illness, the diagnosis, the plan of treatment or any care provided; therefore, you cannot respond to any questions about the nature of the illness(es) or health condition(s).

In this example, the nurse is the custodian and is responsible for maintaining the confidentiality of the client's personal health information. Providing information to the employer without the client's express consent is a breach of PHIPA. However, if a client would like personal health information to be given to the employer, then the client must give express consent to the nurse. In obtaining express consent, the nurse needs to clarify exactly which information the client is requesting be disclosed, and obtain written express consent that includes the employee's specific request.

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JULY 2022
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