

PHIA and PIPEDA Dental Practice Guide

4th Draft

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1. Introduction & Background: What are PIPEDA and PHIA? What is a “Custodian”?

PIPEDA and PHIA are both pieces of legislation that establish rules to govern the collection, use and disclosure of personal information. PIPEDA – the Personal Information and Electronic Documents Act – came into force in 2001 and is a federal government initiative. While PIPEDA focuses on the privacy of information, it does not comprehensively cover those actions that are associated with the provision of health care. All NSDA members have been provided with access to “PIPEDA in the Dental Office”, a guide produced by the NSDA to help dentists comply with the legislation (available on the NSDA website www.nsdental.org).

PHIA – the Personal Health Information Act – is the Nova Scotia government’s health privacy legislation that was proclaimed in 2012, and will be enforced on June 1, 2013.

As regulated health professionals in Nova Scotia, dentists are deemed to be “custodians” of personal health information, and those employed under the authority of dentists, are considered “agents” of personal health information.

The Nova Scotia government will be taking steps to apply to the federal government to have PHIA classified as being substantially similar to PIPEDA. When this occurs, PHIA will be the only privacy legislation in Nova Scotia for personal health information, but until that time *both pieces of legislation will be enforced and members must be in compliance with both.*

2. PIPEDA & Differences with PHIA

The Government of Nova Scotia has advised “in most cases, if health professionals are compliant with PIPEDA, they will also be compliant with PHIA. There are a few exceptions where PHIA has added privacy requirements.”ⁱ

These added privacy requirements are:

“PHIA requires that a custodian report to an individual a breach of personal health information if, in the custodian’s opinion, the breach is likely to cause the individual harm or embarrassment.

PHIA requires that a custodian must be able to produce a record of user activity for any electronic information system the custodian uses to maintain personal health information. (see more below on this)

PHIA requires that a custodian receive the approval of a research ethics board for research conducted using personal health information the custodian itself has collected for care purposes.”

Note: this last provision would not affect the majority of Nova Scotia dentists.

Other differences between PIPEDA and PHIA are:

Fees to Access Personal Health Information

Under section 82(1) of *PHIA*, a custodian has the right to charge a fee for access to personal health information that:

- a. does not exceed the prescribed amount; or
- b. where no amount is prescribed, the amount of “reasonable cost recovery” where a record is made available or copied for the individual.

As a custodian, a dentist has the right to waive these fees. Individuals have the right to ask the custodian to waive the fees.

*“13 A custodian who makes a record, or part of a record, of personal health information available to an individual or provides a copy of it to an individual may charge a general fee, **not to exceed \$30.00** per request, as compensation for all of the following:*

- (a) receiving and clarifying the request;*
- (b) locating and retrieving the record, including any record held electronically;*
- (c) providing an estimate of the access fee to the requester as required by subsection 82(1) of the Act;*
- (d) review of the record for no longer than 15 minutes by the custodian or an agent of the custodian to determine whether the record contains personal health information to which access may be refused under subsection 72(1) of the Act;*
- (e) severing of the record if access to part of the record is refused under subsection 72(1) of the Act;*
- (f) preparing the record for photocopying, printing or electronic transmission for no longer than 30 minutes;*
- (g) preparing a response letter to the requester;*
- (h) supervising an individual’s examination of original records for no longer than 30 minutes;*
- (i) the cost of mailing a record by regular mail to an address in Canada.”*

The regulations pertinent to PHIA also permit custodians to charge additional specific fees where appropriate.

“Specific fees

15 In addition to the general fee provided for in Section 14 and any direct costs provided for in Section 16, a custodian may charge up to the maximum fee set out in the following table for the activity specified:

<i>Activity</i>	<i>Maximum Fee</i>
<i>Making photocopies of a record</i>	<i>\$.20 per page</i>
<i>Preparing a record for photocopying, printing or electronic transmission</i>	<i>\$12.00 for every 30 minutes after the first 30 minutes referenced in the general fee under clause 13(f)</i>
<i>Faxing a record</i>	<i>\$.20 per page</i>
<i>Making a compact disk containing a copy of a record stored in electronic form</i>	<i>\$10.00 per request</i>
<i>Making a microfiche copy of a record stored on microfiche</i>	<i>\$.50 per sheet</i>
<i>Making a paper copy of a record from microfilm or microfiche</i>	<i>\$.50 per page</i>
<i>Making a copy of an audio cassette</i>	<i>\$5.00 per cassette</i>
<i>Making and providing a copy of a ¼”, ½” or 8mm video cassette that is</i>	<i>\$20.00</i>
<i>- 1 hour long or less</i>	<i>\$25.00</i>
<i>- more than 1 hour long</i>	
<i>Making and providing a copy of a ¾” video cassette that is:</i>	<i>\$18.00</i>
<i>- 1 hour long or less</i>	<i>\$23.00</i>
<i>- more than 1 hour long</i>	
<i>Producing a record stored on medical film, including x-ray, CT and MRI films</i>	<i>\$5.00 per film</i>
<i>Printing a photograph from a negative or from a photograph stored in electronic form, per print:</i>	
<i>- per 4” x 6” print</i>	<i>\$10.00</i>
<i>- per 5” x 7” print</i>	<i>\$13.00</i>

Direct costs

16 In addition to the general fee provided for in Section 14 and the specific fees provided for in Section 15, a custodian may charge for the following direct costs incurred by the custodian, including any applicable tax:

(a) charges to retrieve a record from and return the record to off-site storage, if an individual requests expedited access to a record for which additional retrieval costs are charged to the custodian;

(b) courier costs, if courier delivery is requested by the individual;

(c) the cost of mailing a record to an address outside Canada;

(d) taxes payable on the services provided.”

Retention & Destruction for Personal Health Information

Under PIPEDA, dental offices are required to “destroy, erase or render anonymous information that is no longer required for an identified purpose or for a legal requirement.” PHIA adds the necessity of having a written retention & destruction schedule for personal health information.

Record of User Activity

PHIA requires that a custodian must be able to produce a record of user activity for any electronic information system the custodian uses to maintain personal health information. In subsection 63(3) of the *Act*, a “*record of user activity related to an individual’s personal health information*” means a report produced at the request of an individual for a list of users who accessed the individual’s personal health information on an electronic information system for a time period specified by the individual. (*PHIA* regulation section 11(1))

Section 63 of *PHIA* gives individuals the right to request a record of user activity for any electronic information system that a custodian uses to maintain the individual’s personal health information. The record of user activity may be generated manually or electronically. It is important to note that the record of user activity must be made available within 30 days and at no charge.

The *PHIA* regulation section 11 (2) provides that the record of user activity “...*must include at least all of the following information*:

- (a) the name of the individual whose personal health information was accessed;*
- (b) a unique identification number for the individual whose personal health information was accessed, including their health-card number or a number assigned by the custodian to uniquely identify the individual;*
- (c) the name of the person who accessed the personal health information;*
- (d) any additional identification of the person who accessed the personal health information, including an electronic information system user identification name or number;*
- (e) a description of the personal health information accessed or, if the specific personal health information accessed cannot be determined, all possible personal health information that could have been accessed;*
- (f) the date and time the personal health information was accessed or, if specific dates and times cannot be determined, a range of dates when the information could have been accessed by the person.*

As per *PHIA* regulation 11(2), a custodian must be able to capture at least the above information within the record of user activity. Given that not all custodians have (or should have) an elaborate electronic information system with robust audit functionality, the regulation allows for a broad response to the specific type of personal health information accessed along with ranges for the dates and times.

Therefore, custodians unable to extract this information electronically from their electronic information system are still able to comply with the regulation by providing a more general description. This information may be captured through the custodians scheduling system (date and

time) along with a detailed list of the personal health information captured by the applicable system. An example of a more general description that would be provided to a patient when the electronic information system cannot accommodate the provision of more detailed information might be:

Dr. X and his/her two staff members Y and Z may have accessed (patient name)'s personal health information contained in the electronic system (demographics, medical conditions, allergies) at any point during the clinic's hours of operation (Monday – Friday, 8 am – 5 pm) during the past 6 months. Both staff members have legitimate work reasons to access personal health information for scheduling appropriate appointment times and for filing any follow-up test results.

3. What You Must Do & When

Because PHIA is similar to PIPEDA, and custodians are being advised that “in most cases, if health professionals are compliant with PIPEDA, they will also be compliant with PHIA”, the first step is to ensure compliance with PIPEDA. The NSDA website www.nsdental.org contains the guide “PIPEDA in the Dental Office”, which walks through the process step by step. This document was produced and distributed by the NSDA when PIPEDA came into effect a decade ago, so dental practices should already be compliant with PIPEDA.

The Nova Scotia Government website contains a “toolkit” to assist custodians with PHIA compliance, and two fact sheets. It is advisable to read over the toolkit and other resources, especially the Compliance Checklist contained in the toolkit. They can be found at:

<http://novascotia.ca/dhw/phia/custodians.asp>

On June 1, 2013, PHIA will come into effect and both pieces of legislation will apply until such time as PHIA is deemed substantially similar to PIPEDA by the federal government. The designation for substantially similar is estimated to take approximately 12 months. In addition to the PIPEDA requirements, dental practices should employ the following PHIA provisions as summarized earlier in this document:

- A. Become familiar with the added privacy requirements, in particular:
 - a. the need to report breaches of personal health information,
 - b. the need to produce a record of user activity for any electronic information system used to maintain personal health information (or, if your electronic system cannot generate this, a broad response to the specific type of information accessed along with ranges for the dates and times)
 - c. the need to receive the approval of a research ethics board for research conducted using personal health information the custodian itself has collected for care purposes

- B. Become familiar with the new fee structure associated with accessing and copying patient personal health information.
- C. Create a written retention & destruction schedule for personal health information.

4. Further Resources

For more information, visit the NSDA website at www.nsdental.org where you can access the document "PIPEDA in the Dental Office". The government of Nova Scotia website PHIA section also contains considerable information <http://novascotia.ca/dhw/phia/custodians.asp>

ⁱ http://novascotia.ca/dhw/phia/documents/PHIA_PIPEDA_Factsheet.pdf