



COMMUNIQUÉ

for the Health Industry

November 2005

A publication of Miller Thomson LLP's
Health Industry Practice Group

PAN-CANADIAN HEALTH INFORMATION PRIVACY AND CONFIDENTIALITY FRAMEWORK REPORT

Health Canada released a 2005 report called the *Pan-Canadian Health Information and Confidentiality Framework*. This Framework was the result of a Federal/Provincial Conference of Deputy Ministers of Health and the work of its Advisory Committee on Information and Emerging Technologies. The objective of this Framework is to establish a set of harmonized core provisions across Canada for the collection, use and disclosure of personal health information to assist legislative development and implementation in both the private and the public sectors. It is important to note that Framework was intended by its drafters to be used only as a guide or tool to inform and influence any privacy legislative processes within the Provinces and is not a prescription. Its goal is to protect the privacy and confidentiality of individuals' health information while at the same time enabling the flow of information where appropriate to support effective health care.

The report sets out a number of core concepts, the purpose of which are to ensure uniformity of the scope, intent and spirit of the Framework. For example, the report provides definitions for key terms such as "custodians", "agent/affiliate", "personal health information", "information manager", "record", "research", "use" "circle of care" and "implied knowledgeable consent".

The provisions set out in the Framework emphasize two important principles. The first being that the collection, use and disclosure of health information should be limited to a need-to-know basis and be treated with the highest degree of anonymity which is possible in the circumstances. The second principle is that the right of privacy is founded in consent and unless otherwise provided for in legislation, an individual's consent regarding the collection, use and disclosure of their health information must be obtained. In terms of gaining an individual's consent for use and disclosure within the circle of care (i.e. the individuals and activities directly related to an individual's health care and treatment), the Framework utilizes a concept of "implied knowledgeable consent". This form of implied consent is present where it is reasonable in the circumstances and based on the individual's behaviour that the individual knows a) the purposes of the collection, use or disclosure and how the information will be disclosed and b) that the individual may provide or withdraw consent. The Report further provides for fifteen core provisions, a few of which will be briefly canvassed below.

Note:

This *Communiqué* is provided as an information service and is a summary of current legal issues of concern to Health Industry Clients. *Communiqués* are not meant as legal opinions and readers are cautioned not to act on information provided in this *Communiqué* without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome. Please direct them to: MTHealthLaw_AB@millerthomson.com

Core Provision #1 - Duties and Obligations of Custodians to Protect Personal Health Information

Pursuant to this provision a Custodian must conduct privacy impact assessments for any new or altered collections, uses and disclosures of personal health information as well as whenever personal health information systems or communication technologies are created or modified. A Custodian must also put in place and comply with information practices, policies and procedures which satisfy the requirements of their jurisdiction's legislation and associated regulations. Additionally, a Custodian must take reasonable steps to establish

and maintain safeguards which are sufficiently up-to-date to protect personal health information from security threats as well as to protect such information when it is ready for disposal to prevent unauthorized access following the disposal.

Core Provision #3 – Collection of Personal Health Information

When a Custodian collects personal health information directly from the individual, all reasonable steps must be taken in an effort to inform the individual of the purpose and legal authority underlying the collection.

Core Provisions #4, #5 and #6 – Elements of Consent, Consent for Collection, Use and Disclosure of Personal Health Information for Purposes of Care and Treatment, and Express Consent

An individual must give express consent for the collection, use or disclosure of personal health information for purposes outside the circle of care. Consent must be provided by the individual to which the information relates or by a substitute decision-maker. Consent must also be with full knowledge and must be able to be withheld or withdrawn by the individual.

In cases involving consent for the collection, use and disclosure of personal health information for the purposes of care and treatment, a custodian may assume that the individual has impliedly consented if this assumption is reasonable in the circumstances, unless that individual has explicitly withheld or withdrawn consent.

Core Provision #9 – Disclosures without Consent

This provision allows for the disclosure of an individual's personal health information without consent in three situations: if the custodian has reasonable grounds to believe that disclosure will eliminate or reduce a significant risk of serious harm to a person or group, if the disclosure is authorized by law or where the custodian is forced to comply with a subpoena, warrant or court order.

Alberta's Health Information Act

Alberta's *Health Information Act*, R.S.A. 2000, c.H-5 ("*HIA*") already encompasses many of the provisions proposed by the Framework. For example, s.64 requires a custodian to conduct a privacy impact assessment on proposed administrative practice and information systems relating to the collection, use and disclosure of individually identifying health information. Another example is found in s.22(3) of the *HIA* which requires a custodian who is collecting individually identifying to make reasonable steps to inform the individual of the purpose for which the information is collected, the specific legal authority for collection as well as the title, business address and telephone number of an affiliate custodian who can answer the individuals questions regarding collection.

If you are interested in seeing the report, it can be found at:

http://www.hc-sc.gc.ca/hcs-sss/pubs/ehealth-esante/2005-pancanad-priv/index_e.html or by contacting Health Canada.

We would be pleased to assist you with the development and implementation of your privacy policies or to assist with education for your organization. Please contact Brian Curial or Heather Crockett-Loughlin for more information about our services.

ABOUT THE AUTHOR

The article was written by Danielle Hoffman, an associate in our Edmonton office, and was edited by Heather Crockett-Loughlin.

Our National Health Industry Practice Group is dedicated to providing comprehensive and integrated legal services to health industry clients. For more information about our group, visit our website at www.millerthomson.com or contact one of our regional contacts listed below.

REGIONAL CONTACTS

Toronto/Markham

Joshua Liswood
jliswood@millerthomson.com

Kathryn Frelick
kfrelick@millerthomson.com

Calgary

Bryan R. Ede
bede@millerthomson.com

Edmonton

Brian Curial
bcurial@millerthomson.com

Heather Crockett-Loughlin

hcrockettloughlin@millerthomson.com

Vancouver

David Martin
dmartin@millerthomson.com

Waterloo-Wellington

Gregory P. Hanmer
ghanmer@millerthomson.com

Note:

On January 1, 2004 privacy legislation came into force across Canada governing the collection, use and disclosure of personal information by organizations. Miller Thomson respects the privacy of persons who receive our newsletters and other information that we provide as a service to them. We wish to take this opportunity to confirm that we hold personal information about you in the form of the contact information we possess. We wish to confirm that you consent to our maintaining this information and continuing to use it for the purposes of providing our newsletters and similar mailings to you. All recipients of our newsletters also receive notices of firm seminars and other events that may be of interest to you or your organization as well as information respecting marketing of our firm and relevant legal developments from time to time. In addition, we may send you holiday cards and other greetings on occasion. We only use your information for these purposes and do not disclose it to any third parties outside of our firm's employees and independent contractors.

If you consent to our possessing and using your personal information for the above purposes, you need not take any further steps. If, on the other hand, you do not wish us to have your personal information for these purposes, please notify us by return e-mail and we will remove your personal information from our newsletter database and cease forwarding the above-noted communications to you.

Your comments and suggestions are most welcome. Please direct them to: MTHHealthLaw_AB@millerthomson.com