

June 18, 2007

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Via Mail & E-mail: phitf@qnb.ca

Personal Health Information Task Force
Department of Health
Health Planning, Policy and Legislation Branch
PO Box 5100
Fredericton NB E3B 5G8

Dear Task Force Members:

Re: Personal Health Information Access and Privacy: Consultation Guide (May 2007)

The Canadian Medical Protective Association ("CMPA") welcomes the opportunity to make submissions on New Brunswick's Consultation Guide.

At the outset we propose to provide an overview of the CMPA and its activities. This overview will provide a background to the section in the submissions that focuses on the issue of physician communication with the CMPA. We have not addressed every question posed in the Consultation Guide, but have focussed our comments on issues that we consider are most significant to New Brunswick physicians, including for example, the protection of quality assurance information.

Since the government of New Brunswick has stated that it plans to eventually introduce legislation specific to the protection of personal health information, we have referred to this initiative as "new privacy legislation" in these submissions. The CMPA sees value in the development of health specific privacy legislation that provides a framework for collection, use, and disclosure of personal information in a healthcare setting.

1. CMPA Background

The CMPA is the principal provider of medical-legal assistance to Canadian physicians. Currently, 1,600 physicians practising in New Brunswick are CMPA members. As a not-for-profit mutual defence organization operated by physicians for physicians, the CMPA recognizes the importance of protecting personal health information from unauthorized collection, use and disclosure. Physicians have long understood the fundamental importance of doctor-patient confidentiality. The CMPA therefore can readily appreciate the impetus that is behind the New Brunswick government's efforts to comprehensively regulate the protection of personal health information.

The most obvious expression of the CMPA's mission is, of course, the provision of legal representation for its members and its payment of legal costs, judgments or settlements to compensate patients with meritorious claims. Equally significant, however, is that the CMPA provides a broader advisory service to its members on a wide range of general medical-legal issues, either directly by the CMPA's physician Medical Officers or through legal counsel. Finally, the CMPA plays a significant and expanding risk management, quality assurance, research and educational role. Identifying common medical errors or other medical-legal pitfalls and educating its membership with a view to improving the quality of care and reducing members' professional liability risks greatly assist in achieving these goals.

It is therefore important, not just for members, but also for other stakeholders, that physicians do not feel that any new privacy legislation prohibits them from contacting the CMPA for the purpose of obtaining legal or risk management advice. This is even more important in the current environment where health care delivery is increasingly complex and measures which inhibit a physician's efforts to obtain medical-legal advice for error reduction and risk management purposes will not serve the public interest because they frustrate efforts underway to improve health care delivery through more proactive risk management programs.

It is worth emphasizing that the CMPA has no commercial interest in any personal health information it may receive from physicians. The CMPA fully appreciates that any personal health information that it receives is exclusively for the purpose of assisting its membership for advisory and risk management purposes. In its 100-plus year history, the CMPA has never and will not in the future use or redistribute personal health information for commercial gain or for any other commercial purposes.

2. Communication with the CMPA

As noted above, it is essential that physicians are not hindered in their ability to contact the CMPA. Clear exceptions that would permit physicians to communicate with the CMPA about medical-legal issues with respect to both day-to-day practice and existing or anticipated legal proceedings are extremely important in legislation of this nature. In fact, the CMPA has already brought this issue to the attention of other provincial governments who have introduced private sector privacy legislation, given that physicians who fear that they may be engaging in a prohibited activity by communicating with their professional liability provider will be much less likely to seek the advice they require. Such an eventuality is clearly not in the public interest. Error and risk management efforts that contribute to a recognized higher quality of care could be seriously curtailed in circumstances where physicians feel that they are not free to seek necessary advice or guidance as the result of privacy legislation.

Physicians therefore have the need to regularly consult with their professional advisors, including the CMPA, in the delivery of health care. The assistance the CMPA provides in this regard can be separated into three important categories:

- (a) advice when proceedings are not necessarily threatened or contemplated;
- (b) assistance/advice when proceedings are contemplated or threatened but not yet commenced; and
- (c) assistance/advice when proceedings have been commenced.

It will be important for New Brunswick's new privacy legislation to expressly recognize the vital role the CMPA's error and risk management services play, not only for physicians, but for the health system as a whole.

(a) Advice When Proceedings Are Not Necessarily Threatened Or Contemplated

The assistance that the CMPA provides to members when proceedings are not necessarily anticipated can take the form of advice from the CMPA's Medical Officers (all of whom are physicians) in the context of existing or potentially adverse patient outcomes. The advice provided also covers a very wide range of scenarios arising from the day-to-day practice of medicine, including new and often difficult medical-legal dilemmas. For example, a member could contact the CMPA for advice with respect to the applicable retention period for medical records or with a question regarding from whom consent should be obtained when a minor patient's parents are separated or divorced.

The CMPA therefore provides a valuable advisory function and views a physician's ability to communicate freely with his or her mutual defense organization as crucial to the practice of medicine. If members cannot seek immediate medical-legal advice based on a full and frank disclosure of the facts, which may necessarily include personal health information, the CMPA anticipates a loss of important opportunities to proactively reduce or eliminate harm or inconvenience to patients. The benefits of this advice to patient care and safety demonstrably support the inclusion of specific exceptions for the use of patient health information in these circumstances.

Similar exceptions are found in both Manitoba's Personal Health Information Act ("PHIA") and Ontario's Personal Health Information Protection Act ("PHIPA"). Subparagraph 22(2)(e)(iv) of Manitoba's PHIA permits trustees to disclose personal health information without consent if the disclosure is required for the purpose of "risk management assessment". Ontario's PHIPA also includes a comparable exception for the use of personal health information without consent, which includes the transfer of such information to an agent for this purpose. Paragraph 37(1)(d) permits health information custodians to use personal health information without consent "for the purpose of risk management, error management or for the purpose of activities to improve or maintain the quality of care or to improve or maintain the quality of any related programs or services of the custodian". The Regulations under Ontario's PHIPA expressly recognize that the CMPA (as well as the Healthcare Insurance Reciprocal of Canada) can be the agent of a physician for the purposes of the risk management exception under subsection 37(1)(d) of the Act. This recognition is found in section 7 of the Regulations.

Manitoba's PHIA and Ontario's PHIPA recognize that privacy legislation should not impede physicians from contacting the CMPA for advice in circumstances where legal proceedings are not necessarily contemplated. It is the CMPA's respectful submission that it would be beneficial to New Brunswick's healthcare system if the new privacy legislation incorporates a similar, express error and risk management exception.

(b) Assistance/Advice When Proceedings Are Contemplated Or Threatened But Not Yet Commenced; AND

(c) Assistance/Advice When Proceedings Have Been Commenced

Every jurisdiction that has enacted privacy legislation specific to personal health information has recognized that custodians should be entitled to disclose personal health information without consent for the purpose of a proceeding to which the custodian is a party.

It is equally important that the disclosure of personal health information by a custodian for the purpose of reasonably contemplated proceedings in which he or she is likely to be a party is also a legitimate disclosure of health information. We note that the legitimacy of disclosing personal health information without consent in these circumstances has been expressly recognized by both Manitoba's PHIA (subparagraph 22(2)(k)) and Ontario's PHIPA (subparagraph 41(1)(a)).

Physicians may become involved in a variety of litigious matters, such as College matters, civil litigation, coroner's inquests, hospital-based proceedings, and human rights proceedings. Like any other individuals, physicians may also find themselves charged with a criminal offence under the Criminal Code. It is therefore important that the term "proceeding" be broadly defined in the new privacy legislation to include civil, criminal and quasi-judicial proceedings.

The CMPA recognizes that regardless of whether the proceedings have actually been commenced or it is anticipated that they will be commenced in the future, personal health information should only be disclosed by the custodian if it is likely to be relevant to an issue in the actual or anticipated proceedings.

The CMPA respectfully submits that any new privacy legislation should expressly permit the use and disclosure of personal health information without consent for the purpose of civil, criminal and quasi-judicial proceedings that have been commenced and that are anticipated.

3. Protection for Quality Assurance Records

In recent years, many hospitals have implemented policies regarding the reporting of critical incidents or adverse events to hospital quality assurance or peer review committees. Effective quality assurance processes are an integral component of patient safety initiatives.

The rationale for protecting quality assurance information from disclosure is based on the objective of encouraging health practitioners to report adverse events and participate in their review and investigation. In this way, the events can be more thoroughly investigated and reviewed and the likelihood of future similar events occurring is reduced.

It is generally accepted that in order for quality assurance programs to be successful and effective, physicians and other participants must have satisfactory assurances that the reporting and subsequent investigation of such information will not be used or disclosed outside of the quality assurance process (either to patients or to other hospital departments or committees). If physicians and other health care providers are not confident that quality assurance information and documentation will be protected, they may be reticent or even unwilling to participate in the process.

The public policy objective of encouraging health care practitioners to participate in quality assurance processes is reflected in legislation that protects quality assurance records from being disclosed in legal proceedings. Such legislation has now been enacted in all Canadian jurisdictions. In New Brunswick, subsection 43.3(2) of the Evidence Act limits the disclosure of information or documents relating to specified regional health authority committees in legal proceedings. Courts have also recognized the importance of protecting quality assurance records at common law.¹ Ontario was the last province to introduce legislative protections, and did so by enacting the Quality of Care Information Protection Act.

i) Disclosure of Facts Relating to Adverse Events

It is important to emphasize that the disclosure of known facts related to adverse events to patients is distinct from the reporting of those events through hospital quality assurance/peer review processes and the investigation and evaluation of those events by quality assurance or peer review committees. Adverse event disclosure to patients is a fundamental aspect of the care of the individual patient.

Individual patients who suffer an adverse outcome in the course of receiving health care may commence civil or College proceedings against the physician(s) and/or other health care provider(s) involved. During the course of any such proceedings, the patient will have a legal right to his or her medical records, both at common law and in some cases pursuant to statute. Where the records are held by a regional health authority, the Right to Information Act ("RIA") and the Protection of Personal Information Act ("PPIA") provide the patient with a right of access to his or her record. It is expected that any new privacy legislation would also give the patient a right of access to his or her medical record. It is also important to note that subsection 43.3(3) of the Evidence Act specifically excludes medical records maintained by attending physicians or records maintained by regional health authorities from the protection from disclosure in legal proceedings.

The CMPA recognizes that it is natural that there may be a desire to provide a patient who has suffered an adverse outcome with as much information relating to the event as possible. However, in many cases the disclosure of quality assurance or peer review records will not necessarily assist the patient and could seriously undermine the laudable societal objectives of quality assurance activities.

ii) Disclosure of Quality Assurance Records under RIA, PPIA and New Privacy Legislation

As discussed above, both the RIA and the PPIA provide individuals with a right of access to personal information held by regional health authorities (under which all public hospitals are included). It is expected that the new privacy legislation will also provide individuals with a right of access to their personal health information held by regional health authorities. Unless there is an applicable exemption prescribed in the legislation, a regional health authority may be required to provide a patient with access to portions of quality assurance records to comply with its obligations under those Acts.

¹ In a 2002 Ontario court decision, *Scott v. Steep*, the court found that quality assurance records should be protected from disclosure.

While the Evidence Act currently prohibits disclosure of committee information and documents in the context of a legal proceeding, it does not otherwise limit disclosure. It could still be possible to obtain access to this information outside the context of legal proceedings. The desired protection for quality assurance records could be achieved if the Evidence Act is amended to prohibit disclosure of committee information and documents generally, not just in the context of legal proceedings. For even greater clarity, the Evidence Act should also be amended to expressly state that the limitations on disclosure apply despite any provision in the RIA, the PPIA or the new privacy legislation.

The Task Force may be interested to learn that this issue was addressed in British Columbia in a similar manner, upon the introduction of the Freedom of Information and Protection of Privacy Act. Subsection 51(5) of the British Columbia Evidence Act strictly limits the disclosure of information or records relating to specified hospital committees. The limits on disclosure apply broadly and not just to disclosure in the context of a legal proceeding. Subsection 51(7) explicitly provides that the limitations on disclosure apply despite any provision in B.C.'s Freedom of Information and Protection of Privacy Act.

The CMPA respectfully submits that amendments to the Evidence Act and specific reference to the amended sections in the Evidence Act will need to be made in the new privacy legislation to ensure that quality assurance records are protected from disclosure in all circumstances.

It is also important that any new privacy legislation specifically state that the custodian can disclose personal health information without consent to a committee that engages in the activities described in subsection 43.3(2) of the Evidence Act. In this regard, it may be of interest that a similar approach has been taken in Alberta's Health Information Act, where it is stated at s. 35(1)(g) that health information may be disclosed without consent "to a committee that has as its primary purpose the carrying out of quality assurance activities within the meaning of section 9 of the Alberta Evidence Act".

iii) Conclusion

Quality assurance activities have, for many years, been a fundamental aspect of improved patient safety and both common law and legislation have recognized that these activities should be afforded special protection from disclosure. The CMPA respectfully submits that efforts undertaken to maintain the protection of quality assurance records from disclosure will improve patient safety in New Brunswick. Amendments to the Evidence Act and express exemptions to disclosure of quality assurance records in the new privacy legislation are likely to provide an appropriate framework for protecting the quality assurance process, while concurrently encouraging the disclosure of facts relating to adverse events to patients. It is the CMPA's submission that these protections are vital to effective quality assurance processes.

4. Consent – Implied vs. Express

The Consultation Guide asks whether "implied knowledgeable consent" should be the "standard" in New Brunswick's new privacy legislation. The CMPA is of the view that subject to certain exceptions, physicians should be able to rely upon implied consent for the collection, use, and disclosure of personal health information for the provision of health care to the individual. In many health care settings, it is far too

onerous to require a physician to obtain explicit patient consent for every collection, use and disclosure of personal health information.

The term "circle of care" is often used to describe the healthcare professionals who may rely upon an individual's implied consent when collecting, using, disclosing or handling personal health information for the purpose of providing health care to an individual. Information may be shared within the "circle of care" based on the individual's implied consent. The "circle of care" generally includes physicians and other health care providers who are treating the patient as well as any other health care professionals referred by a physician or selected by the patient. The "circle of care" also may include hospitals and licensed laboratories. The "circle of care" generally excludes physicians who are not part of the direct or follow-up treatment of an individual.

The Task Force may be interested to know that there are only two exceptions to implied consent found under Ontario's PHIPA, i.e. express consent is required if a disclosure is not to another health care custodian or if the disclosure is to another custodian but not for the purposes of providing health care or assisting in providing health care. These two exceptions seem sufficient to ensure that implied consent is limited to use and disclosure within the "circle of care".

The CMPA respectfully submits that "implied knowledgeable consent" should be the standard in the new privacy legislation, subject to the two exceptions noted above.

5. Mandatory Disclosure of Personal Health Information

As the Task Force is aware, the other jurisdictions that have enacted privacy legislation specific to personal health information all provide certain exceptions to the requirement to obtain consent prior to disclosing personal health information. In these prescribed circumstances, a custodian is permitted to disclose the individual's personal health information. The permissive authority that is granted to custodians is significant as it allows them to use discretion when deciding whether to disclose an individual's personal health information.

This permissive authority is particularly important for physicians, as they must balance the disclosure of personal health information with their legal and ethical obligation to maintain the confidentiality of patient information. Unless an exception to the duty of confidentiality applies, disclosure of patient information by a physician may be grounds for disciplinary proceedings before the College and may expose a physician to a civil action for damages. The duty of confidentiality is intended to ensure public confidence in physicians and to promote a trusting relationship between patients and physicians.

Of particular concern are disclosures of personal health information to the police. An open flow of information between physicians and police services may destroy the trusting relationship and has the potential to discourage individuals from seeking treatment. For example, victims of crime may be reticent to seek medical treatment.

Any provision in the new privacy legislation that would mandate a custodian to disclose personal health information in a prescribed circumstance, e.g. disclosure to police, would place physicians in an untenable conflict of interest. While the CMPA recognizes that physicians are required by law to report certain events to public authorities, e.g. child abuse, fitness to drive, etc., these mandatory reporting obligations are appropriately addressed in other legislation and need not be mandated by privacy legislation.

No other privacy legislation in Canada mandates the disclosure of personal health information in prescribed circumstances. The CMPA expects that the new privacy legislation will include provisions that provide that a custodian may (but is not obligated to) disclose personal health information without consent in circumstances that are clearly delineated.

6. Interaction with PIPA and RIA

We understand that a Task Force on the Right to Information and Protection of Personal Information ("RIPPI Task Force") has been created to review the PIPA and RIA, which govern the access to and protection of personal information held by public bodies and institutions. However, neither the RIPPI Task Force's Discussion Paper nor the Consultation Guide discuss how the public sector privacy legislation and the new privacy legislation are intended to interact. For example, it is uncertain whether a public health authority will be subject to both the new privacy legislation and the public sector privacy legislation.

We note that neither the PIPA nor the RIA contain a paramountcy provision in the event of conflict with another Act. It would be helpful if the New Brunswick government provided clarification of the intersection between these pieces of privacy legislation so that it is clear which one applies in a situation where, for example, access is requested or there is an issue as to permitted collection, use or disclosure.

7. Conclusions

We would like to thank you for the opportunity to make these submissions regarding the Consultation Guide and the new privacy legislation. As a mutual defence organization run by physicians, the CMPA recognizes the importance of promoting and protecting the privacy of personal health information.

As discussed herein, the CMPA submits that there is value in ensuring that physicians have every confidence in their ability to communicate personal health information in appropriate circumstances to receive medical-legal advice and to assist in error and risk management activities performed by the CMPA on their behalf. Proactively minimizing medical error and promoting patient safety are significant policy objectives in the health care system that can be achieved through risk management.

It is essential to the success of patient safety initiatives that quality assurance records receive adequate protection under the new privacy legislation. For this reason, the CMPA has suggested amendments to the Evidence Act to broaden the protections afforded therein and to ensure that those protections continue to prevail despite the new privacy legislation.

Finally, the CMPA has commented on the issues of consent, mandatory disclosure, and the interaction between the new privacy legislation and the public sector privacy legislation. These issues are also of significant concern to our New Brunswick members.

We sincerely hope the CMPA's comments will assist the New Brunswick government in drafting new privacy legislation. Should you have any questions regarding the above or wish to discuss any of the issues raised herein, please do not hesitate to contact the undersigned. The CMPA looks forward to being provided with an opportunity to comment on any draft legislation.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Gray", with a large, stylized initial "J" and "G".

John E. Gray, MD, CCFP, FCFP
Executive Director/Chief Executive Officer

JEG/lg

C: Dr Peter K. Fraser, CMPA President