Ontario Medical Association

Submission to the College of Physicians and Surgeons of Ontario re: Preliminary Consultation – Medical Records Policy

October 2017

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The OMA appreciates the opportunity to provide feedback regarding the CPSO's current policy, Medical Records. This submission is based on the OMA's initial consideration of the policy. Additional comments, questions, and/or concerns may be raised during the next phase of consultation.

Concerns about Physicians' Responsibilities for Medical Records When the Physicians are not the Health Information Custodians (HICs)

The Medical Records policy identifies the physician as having the ultimate responsibility for safeguarding patient medical records during various stages, including the collection, use, security, storage, disclosure and destruction of patient information. However, there are some instances where this responsibility is impractical or unfeasible.

For example, there are instances when physicians are not the health information custodians (HICs), such as in hospitals or clinics. In many clinics, the owners assert custodianship over patient medical records. Under these circumstances, physicians who are not HICs will not be able to meet certain policy expectations regarding medical records as the records are not under their jurisdiction. For example:

- On page 4, section 2. Security and Storage, the policy indicates that medical records must be stored in a safe and secure environment to ensure physical and logical integrity and confidentiality. Physicians must develop records management protocols regarding access to records and ensure that patient records are readily available and producible when legitimate use is required. They are also required to take reasonable steps to ensure that records are protected from theft, loss and unauthorized use or disclosure.

  The OMA asserts that a physician who is not the HIC should not have the ultimate responsibility for ensuring medical records are stored and maintained according to the legal requirements of the policy. While physicians can conduct their practice in a way that facilitates adherence to the policy requirements, the legal responsibilities of the policy belong to the clinics. As well, physicians do not always have the authority to develop records management protocols in situations where the clinic owns the Electronic Medical Records (EMR) system or is the HIC, making this aspect of the policy challenging.

- Page 5, section 3. Electronic Records indicates that the all the principles of the CPSO policy apply equally to electronic records, and that physicians should research the available EMR products and choose EMRs that meets their needs. It also states that, "Physicians have

ultimate responsibility for meeting all legal and regulatory requirements with respect to electronic records."

Again, the OMA asserts that a physician who is not the HIC should not have the ultimate responsibility for meeting the legal and regulatory requirements regarding electronic records, especially if the EMR system is owned by the clinic. Physicians can conduct their practice in a way that facilitates adherence to the policy requirements, however, legal responsibility for the policy belong to the clinic.

- Page 6, section 4. Retention, Access and Transfer of Medical Records, outlines the requirements for physicians to keep medical records, the obligations relating to providing patients with copies of their records, and the responsibilities to transfer patient records in a timely fashion when requested by the patient. These requirements can be difficult for the physicians to achieve when the clinic is the HIC. If the clinic is the HIC, the original records belong to the clinic, not to the physician, and often the clinic will refuse to provide physicians with copies of the records to give to their patients. Furthermore, some clinics refuse to transfer patient files when a physician relocates.

- On page 8, under Destroying Medical Records, the policy indicates that medical records may be destroyed when the obligation to maintain them comes to and end, so long as they are disposed of in a secure manner that maintains confidentiality and such that "the reconstruction of the record is not reasonably foreseeable". The policy states that EMRs must be permanently deleted and hard drives crushed or wiped clean, with back-up copies destroyed. When the clinic is the HIC and owns the medical records, physicians cannot be required to fulfill this responsibility.

The OMA asks the CPSO to consider these circumstances and to provide guidance/clarification as to what physicians' responsibilities would entail when they are not the Health Information Custodian.

Other Areas of The Policy Where Clarification is Necessary

There are other areas of the policy that warrant clarification:

- Page 6 – Retaining Medical Records, outlines the legal responsibility for physicians to retain medical records for 10 years from the date of the last entry in the record (for adult patients) and for 10 years after the day on which the patient reached or would have reached the age of 18 years (for patients who are children). However, the CPSO recommends in its policy that records be maintained for a minimum of 15 years due to a provision in the *Limitations Act* which states that some legal proceedings against physicians can be brought 15 years after the act or omission on which the claim is based took place. As well, physicians may be required to

retain records for a longer period if a request for access to personal health information under *PHIPA* is made before the retention period ends.

- The OMA interprets the regulatory requirement regarding retention of medical records by physicians as a separate legal requirement from the *Personal Health Information Protection Act* (PHIPA) requirement re retention where the physician is the HIC. The Office of the Information and Privacy Commissioner of Ontario (IPC) claims that if a physician is the HIC, this provision is in contravention to PHIPA. Medical record requirements are different under PHIPA and the *Medicine Act*. The *Medicine Act* requires physicians or their agents to retain the records for a prescribed amount of time. This is regardless of whether or not the physician is the HIC under PHIPA. The IPC believes that where the physician is not the HIC, if they continue to maintain the medical records according to the *Medicine Act* and CPSO policy, they are in contravention of PHIPA because only the HIC should have access and responsibility for the record. It is critical that the CPSO and IPC work together with physicians to reconcile this issue.

- Page 7 – Physician Relocates, outlines the responsibilities pf physicians to meet the records retention requirements for their patients when they are relocating, whether or not they will be providing ongoing care to their patients.

  Clinics often claim custodianship over patient medical records. As well, they often put in place provisions that prevent physicians from informing their patients they are relocating. This can make the continuity of patient care challenging, and is unfair to patients who have built trusting relationships with their physicians and want to remain in their care. It would be of great help to physicians and their patients if the CPSO would add a requirement that physicians must inform their patients prior to relocation and that patients should be given the option to have their medical records transferred with the physician.

- On page 9 - Ask the Patient, the policy indicates that when a group practice dissolves, patients should be asked whether they would like to continue care with the physicians from the dissolved practice. If patients are following a physician to a different practice location, the records should be transferred. However, the policy is silent on what should be done with patients' records if patients do not respond to this inquiry. Clarification is required as to who keeps the records and who is responsible for storing and/or destroying them if the patients don't respond to this inquiry.

- Page 5 – Security, outlines the security requirements for medical records with an emphasis on electronic medical records. For example, physicians are required to implement data sharing agreements incorporating the requirements in this policy, they must be aware of who is using

the data (both medical and non-medical staff) and ensure the individuals are bound by confidentiality agreements, they must ensure that the EMR data is strongly encrypted.

As well, the policy states that "If a physician becomes aware that personal health information over which he or she has custody and control has been stolen, lost, or accessed by unauthorized persons, requirements under PHIPA state that the physician must notify the patient at the first reasonable opportunity".

Under s. 12(3) of PHIPA, there is also a requirement for physicians to notify the Office of the Information and Privacy Commissioner of Ontario (IPC) in seven prescribed circumstances (enforced in regulation effective October 1, 2017). Perhaps it would be worthwhile to consider referencing this PHIPA obligation in the policy, either in the main body or as a footnote.

- Page 6 – Scanning Documents, outlines indicates that physicians who use Optical Character Recognition (OCR) technology to convert records into searchable and editable files must retain either the original record or a scanned copy. This raises concerns regarding the electronic server space or physical space that would be required to comply with this requirement. This may not be practical, affordable, or even necessary in instances where other organizations are also maintaining original documentation, for example, laboratory tests, or referrals to specialists from general family physicians.

- Page 8 - Physician Ceases to Practise, the policy states that where a physician ceases to practise but is not transferring records to another physician, the physician must notify each patient that their medical records will only be held for two years. In all other situations, the rule requiring record maintenance for a minimum of 10 years will apply. It would be helpful to have some clarification regarding this requirement and the two year timeframe. Perhaps it would be appropriate for retired physicians to maintain their records for 10 years rather than two to ensure that patients have access to their files for longer that two years when their physician retires. If this is the intent of this section, then additional clarification seems to be warranted.

The OMA appreciates the opportunity to participate in this preliminary consultation, and would welcome the opportunity to work more closely with the CPSO to make improvements to the Medical Records policy where necessary.