



Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

VIA ELECTRONIC MAIL

January 17, 2020

Policy Department
College of Physicians and Surgeons of Ontario
80 College Street
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To Whom It May Concern,

Re: Feedback from the Information and Privacy Commissioner of Ontario

The Information and Privacy Commissioner of Ontario (IPC) has reviewed the College of Physicians and Surgeons of Ontario's (CPSO) policies on *Third Party Reports* and *Medical Expert: Reports and Testimony* (the Medical Expert Policy), as well as the CPSO's *Advice to the Profession: Medical Expert: Reports and Testimony* (Advice to the Profession). The IPC has the following recommendations.

(1) Add a Reminder that Personal Health Information Includes Identification of Provider

Third Party Reports Policy

The IPC recommends that section 4 contain an endnote stating that identification of a previous treating relationship constitutes personal health information, so physicians who seek to disclose this information without patient consent must first ensure that they are permitted or required to do so by law.

Medical Expert Policy

The IPC recommends that Section 6 contain an endnote stating that personal health information includes the identification of a person as a provider of health care to the individual.

(2) Be Internally Consistent on Documenting Consent

Third Party Reports Policy

Section 6 states: "In discussing their role, physicians **must** explain to patients that ... (b) where required, consent will be obtained and documented." However, the "Consent for Disclosure of Information" part (in section 14) and the "Consent for Medical Examination" part (in section 19) each state: "Physicians are strongly **advised** to document that consent has been obtained." The IPC



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recommends changing “are strongly **advised** to” to “**must**” in sections 14 and 19 in order to make these sections consistent with section 6.

(3) Clarify When Consent is Required

Third Party Reports Policy

Section 12 states: “Physicians **must** obtain appropriate consent for disclosing personal health information to the third party.” However, the *Personal Health Information Protection Act, 2004 (PHIPA)* permits certain disclosures of personal health information to a third party without the individual’s consent. This concept is reflected in the Medical Expert Policy, whose section 10 requires physicians to ensure that proper consent has been obtained unless they are permitted or required by law to use and disclose the information. The IPC recommends that in section 12 of the Third Party Reports Policy, the phrase “, where required,” be added after “Physicians **must** obtain appropriate consent.”

Medical Expert Policy

Section 10 states: “Where physicians are asked to review the personal health information of a specific individual, they **must** ensure that proper consent has been obtained to use to use [*sic*] and disclose that information in their report and/or testimony, unless ...” The IPC recommends adding the phrase “and/or to obtain personal health information by performing a medical examination” after the word “individual” and deleting the second “to use.” Additionally, we recommend that in the second sentence of endnote 6, “disclosure” be changed to “collection, use, and disclosure” in order to match the first sentence of the endnote, which refers to when physicians may “collect, use and disclose” personal health information.

Advice to the Profession

The IPC recommends that, in the final sentence in the section on “When will consent for obtaining, using or disclosing personal health information be required?”, the phrase “use and disclose” be changed to “collect, use, and disclose.”

(4) Add References to Substitute Decision-makers

Third Party Reports Policy

Section 41 discusses what the independent medical examiner must do “before disclosing the findings to the examinee” when the examination is in the context of a legal proceeding in particular. The IPC recommends adding the phrase “or their substitute decision maker” to the end of section 41 in order to make this section consistent with section 38.

Medical Expert Policy

Endnote 6 states in part: “Where personal health information is reviewed or obtained, physicians may only collect, use and disclose personal health information with the consent of the individual

to whom the personal health information relates ...” The IPC recommends adding “or a substitute decision maker” after “relates.” Similarly, in section 28(b)(i), we recommend changing “the individual’s consent” to either “consent” or “the individual’s or the substitute decision maker’s consent.”

(5) Clarify the Meaning of “Access”

Medical Expert Policy

Under the heading “Records Retention & Access,” the policy states: “Generally speaking, physicians are required to retain records and provide access to that information with appropriate consent, where applicable.” It is unclear whether this access refers to access by the individual who is the subject of the records (which is how the word “access” is used in *PHIPA*) or access by other parties (which would be “disclosure” in *PHIPA* terminology). The IPC recommends that the policy clarify whether it refers to access by the individual or access by others. If the former, consent is not needed, and endnote 21 should be revised so that “the disclosure of” is changed to “access to.” If the latter, in the body text, “access to” should be changed to “disclosure of” in order to be consistent with *PHIPA* terminology.

(6) Modify How the Policy Refers to the Individual

Third Party Reports Policy

The IPC recommends adding “or examinees” after “patients” in section 6 in order to maintain consistency with how the rest of the policy refers to the individual.

Medical Expert Policy

The IPC recommends changing “patient’s” to “individual’s” in section 28(b) in order to maintain consistency with how the rest of the “Suspicious Findings” part refers to the individual.

(7) Address Suspicious Findings Discovered While Reviewing Information

Third Party Reports Policy

Section 38 of this policy states: “If, in the context of an examination, the independent medical examiner discovers a suspicious finding ...” The analogous section of the Medical Expert Policy addresses this context and an additional one, stating: “When examining an individual or reviewing the personal health information of an individual whom they are not treating, a physician may become aware of a suspicious finding ...” The Third Party Reports Policy should also address this second context, given that the policy requires physicians to “take steps to obtain and review all available clinical notes, records and opinions relating to the patient or examinee that could impact the findings of the report ...”

Therefore, the IPC recommends that in the Third Party Reports Policy’s section 38, the phrase “or in the context of a review of the examinee’s personal health information” be added after the “If, in

the context of an examination.” Similarly, we recommend that in section 41, the phrase “or review of personal health information” be added after “conducting the examination.”

(8) Provide Guidance on How to Proceed When Consent to Share Suspicious Finding is Not Obtained

Both policies indicate that when non-treating physicians believe they should alert the treating physician to a suspicious finding, they are advised to seek the individual’s consent to do so. However, neither policy addresses how to proceed if the non-treating physician seeks but does not obtain consent to share the information.

If the non-treating physician discovered the suspicious finding while reviewing personal health information received from a custodian, then the non-treating physician is a “recipient” under *PHIPA* and the *PHIPA* rules for recipients apply.¹ If the non-treating physician discovered the suspicious finding while conducting an examination of the individual, then *PHIPA* would not apply to this non-treating physician, although other laws such as the *Personal Information Protection and Electronic Documents Act, 2000* might.

Third Party Reports Policy

The IPC recommends adding the phrase “When consent is obtained” at the beginning of section 40 (“Independent medical examiners are **advised** to convey the findings in written form . . .”). We recommend that the policy then supply guidance on how to proceed when consent to share the suspicious finding is not obtained.

Medical Expert Policy

The IPC recommends that the policy supply guidance on how to proceed when consent to share the suspicious finding is not obtained.

(9) Revise the Example of a Suspicious Finding

Medical Expert Policy

The text preceding section 28 provides this example of a suspicious finding: “including an unexpected significant clinical finding or condition that raises serious concerns or may require essential intervention.” The IPC recommends changing this example to “such as an unexpected significant clinical finding, a condition which raises serious concern or a symptom or condition which requires essential intervention” in order to match the phrasing in the Third Party Reports Policy’s section 38.

¹ Note that these rules do not prohibit the recipient from disclosing information pursuant to a valid consent.

(10) Make Various Corrections/Updates

The IPC recommends addressing the following issues.

Third Party Reports Policy

- In section 7, which states in part, “Physicians are also **advised** to convey that the final outcome (for instance, decisions regarding eligibility for benefits) are not made by the physician,” the phrase “are not made” should be changed to “is not determined”.
- In section 18, there should be a space in “entail.This”.
- In endnote 1, “c.18., Sched. A. *Patient criteria*, O. Reg. 260/18)” should be “c. 18, Sched. 2) and *Patient Criteria Under Subsection 1 (6) of the Health Professions Procedural Code*, O. Reg. 260/18”.
- In endnotes 5, 7, and 10, the second period in “Sched. A.” should be removed.
- In endnote 7, “*Medicine Act, 1991* S.O. 1991. C.30.” should be “*Medicine Act, 1991*, S.O. 1991, c. 30”.
- In endnote 8, there should be a comma after “1(1)” and “*Regulation*” should be “regulation”.
- In endnote 15, there should be a space between “856/93,” and “*Professional*”.
- In endnote 18’s first reference to O. Reg. 114/94, the second period in “c. 30.” should be removed.
- Endnote 18’s second reference to O. Reg. 114/94 should be changed from “O.Reg. 114/94, General, enacted under the *Medicine Act, 1991*, S.O. 1991, c.30., Part V., Records, s.18” to “O. Reg. 114/94, *General*, enacted under the *Medicine Act, 1991*, S.O. 1991, c. 30, Part V, Records, s. 18”.

Medical Expert Policy

- There should be a period at the end of endnote 6.
- In endnote 9, there should be a comma inserted before “unless” in order to match the punctuation in Rule 33.05.

Advice to the Profession

- There should be a period after the sentence that ends with “unless you are permitted or required to do so by law” (9th Q&A).
- In the 12th Q&A, the first three resources in the bulleted list are not available where one would expect to find them on the Canadian Medical Protective Association website (Advice & Publications > Browse articles > Legal and regulatory proceedings).² However, this website does have a document published June 2019 titled “Treating physician reports, IME reports, and expert opinions: The way forward.”³
- In endnote 5, “Professional Misconduct” and “Medicine Act, 1991” should be italicized.

² https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/legal-and-regulatory-proceedings?topic=*

³ <https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/2019/treating-physician-reports-ime-reports-and-expert-opinions>

Thank you for considering our recommendations.