Information and Privacy Commissioner of Ontario
Commissaire à l'information et à la protection de la vie privée de l'Ontario

VIA ELECTRONIC MAIL

November 4, 2020

Policy Department
College of Physicians and Surgeons of Ontario
80 College Street
Toronto, ON M5G 2E2

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) draft policy on *Third Party Medical Reports* and the accompanying draft advice to the profession document. The IPC has the following recommendations with respect to the draft policy.

(1) Add References to *PHIPA* to Footnotes 19 and 22

(a) Footnote 19

In the draft policy, footnote 19 states:

> In most cases, physicians who participate in the third party processes will be subject to *PIPEDA*, the legislation which establishes requirements for the collection, use and disclosure of "personal information" about individuals in the course of commercial activities. "Personal information" is defined broadly as "information about an identifiable individual" and includes "personal health information".

The IPC recommends that this footnote refer to both the *Personal Information Protection and Electronic Documents Act, 2000* (*PIPEDA*) and the *Personal Health Information Protection Act, 2004* (*PHIPA*) without suggesting that one is more likely to apply than the other. This can be accomplished by making the following amendments (indicated by underlining) to the footnote:

> ~~In most cases~~ Depending on the circumstances, physicians who participate in the third party processes will be subject to *PHIPA* and/or *PIPEDA*, the legislation which establishes requirements for the collection, use and disclosure of "personal information" about individuals in the course of commercial activities. "Personal information" is defined broadly as "information about an identifiable individual" and includes "personal health information".

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It is true that in the context of a physician performing an independent medical examination (IME), the physician is not a health information custodian because they are not providing health care. The collection, use, and disclosure provisions in *PHIPA* that apply to health information custodians would not apply to the physician in that context. However, *PHIPA* does apply to physicians who participate in third party processes in two ways.

First, treating physicians are subject to *PHIPA*. The draft policy defines "third party processes" to include conducting IMEs and providing "third party medical reports and testimony." In the draft policy's definition of "third party medical reports and testimony," there is a footnote stating that "[b]oth treating and non-treating physicians may provide third party medical reports and testimony. For example, treating physicians may complete forms on behalf of their patients…" A treating physician who has gained custody or control of personal health information about their patient as a result of or in connection with providing health care (and is now contemplating using or disclosing that information as part of preparing a third party medical report or testimony) is a health information custodian (or agent) with respect to that information.

Second, even non-treating physicians can be subject to some provisions of *PHIPA*: the restrictions on recipients.[1] IMEs are defined in the draft policy to include "a file review and/or examination of the subject." For the file review portion of an IME, if the non-treating physician is reviewing personal health information in a file that they had received from a health information custodian, then the non-treating physician would be a "recipient" under section 49 of *PHIPA*.

(b) Footnote 22

In the draft policy, footnote 22 states:

> See Division 1, Section 7 of *PIPEDA* for circumstances in which physicians are permitted or required by law to collect, use and disclose personal information, and the College's *Protecting Personal Health Information* policy and *Mandatory and Permissive Reporting* policy for circumstances in which disclosures of personal health information are permitted or required by law.

The IPC recommends that the following amendments (indicated by underlining) be made to the footnote:

> See Division 1, Section 7 of *PIPEDA* for circumstances in which physicians are permitted or required by law to collect, use and disclose personal information, and ~~the College's *Protecting Personal Health Information* policy and *Mandatory and Permissive Reporting* policy~~ Part IV of *PHIPA* for circumstances in which collection, use and ~~disclosures~~ disclosure of personal health information are permitted or required by law. See also the College's *Protecting Personal Health Information* policy and *Mandatory and Permissive Reporting* policy.

[1] See section 49 of *PHIPA*.

The IPC makes this recommendation in order to address the footnote's two inconsistencies between how personal information is discussed and how personal health information is discussed.

First, the footnote's discussion of personal information refers to collection, use, and disclosure, but the footnote's discussion of personal health information refers to only disclosure. For the sake of completeness and consistency, the discussion of personal health information should refer to collection and use as well as disclosure.

Second, the discussion of personal information refers to legislation (*PIPEDA*), but the discussion of personal health information refers to CPSO's policies rather than legislation. It is *PHIPA*, not CPSO policy, that is the authority on the collection, use, and disclosure of personal health information in Ontario, so the footnote should refer directly to the *PHIPA*.

(2) Provide Guidance on How to Proceed When Consent to Share A Clinically Significant Finding is Not Obtained

Section 36 of the draft policy sets out the obligations of physicians who "are conducting an IME and become aware of a clinically significant finding that may not have been previously identified." Sections 36.a.ii and 36.b.ii of the draft policy both state that the physician must, "if the subject has a primary health-care provider, communicate the finding to them after obtaining the subject's consent to do so and determine who will be responsible for providing any necessary care and follow-up…"

The IPC recommends that the draft policy provide guidance on how to proceed if the physician seeks but does not obtain the subject's consent to communicate the finding to the primary health-care provider.

IMEs are defined in the draft policy to include "a file review and/or examination of the subject". Regarding the file review portion of an IME, if the physician discovers a clinically significant finding while reviewing personal health information received from a health information custodian, then the physician is a "recipient" under *PHIPA* and the *PHIPA* rules for recipients apply.[2] If the physician instead discovers the clinically significant finding during the examination portion of an IME, then *PHIPA* would not apply to this physician, although other laws such as *PIPEDA* might.

Thank you for providing the IPC with the opportunity to participate in this consultation process.

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