

PRIVACY LEGISLATION SUMMARY

As of January 01, 2004, new legislation affecting many privacy and confidentiality requirements came into effect. The Alberta College of Optometrists (ACO) has been researching this new legislation for the past few months and is pleased to send you the attached series of templates and documents for use in your optometry practice. These templates and guidelines are intended to guide you through the various pieces of legislation in a user-friendly manner to ensure that you comply with the legislation.

We wish to advise you that the attached templates and documents are being provided for information purposes only and are not intended as legal advice. The ACO recommends that each recipient obtain their own independent legal advice regarding privacy matters and legislation.

If one word describes all the pieces of legislation in effect today, it is 'reasonableness'. Reasonableness results from thinking about the situation, being fair and possibly putting yourself in the other person's shoes. All the pieces of legislation attempt to balance an individual's right to have his or her personal information protected, and an organization's need to collect, use and disclose that personal information for purposes that are considered reasonable.

A. Summary of Privacy and Confidentiality Legislation in Canada

- a) PIPA – Personal Information and Protection Act
PIPA covers the collection, use and disclosure of personal information by the private sector in Alberta
- b) PIPEDA – Personal Information Protection and Electronic Documents Act
PIPEDA covers the collection, use and disclosure of personal information by the private sector in Canada
- c) HIA – Health Information Act
The HIA covers health information in the custody or control of designated custodians and their affiliates in Alberta
- d) HPA – Health Professions Act
Sections 119 to 122 of the HPA deals with access of information about regulated members
- e) FOIP – Freedom of Information and Protection of Privacy Act
FOIP covers the collection, use and disclosure of personal information by the public sector in Alberta
- f) FPA – Federal Privacy Act
The FPA protects the privacy rights of individuals for personal information that is held by a federal government institution

Of the six pieces of legislation, only the first four apply to optometric practices and their patients. Unfortunately, much overlap exists between these various pieces of legislation. If a conflict arises over which legislation applies, the conflict is settled by “rules of paramountcy”. Simply put, paramountcy rules establish hierarchies among different types of law based on their source or subject matter. As such:

- * specific provisions are paramount over general provisions
- * statutes are paramount over regulations
- * legislation is paramount over the common law

B. The Personal Information Protection Act

PIPA is an Alberta Act about privacy in the private sector that helps protect the personal information of your patients and your employees. It is not applicable to information used, collected or disclosed inter-provincially. Rather, it only applies to information that is used, collected or disclosed in Alberta. Personal information is defined as:

- * name, address, phone number, fax, email address
- * age, weight, height, gender, family members
- * employment and financial history
- * place of birth, ethnic origin, ID numbers
- * opinions, evaluations and comments

The definition of personal information does not include business contact information such as:

- * business address, phone or fax number, e mail address or job title

(as long as that information is only used to contact the person in that person’s capacity as an employee or official of that business)

Consent is normally required to collect personal information. PIPA does not apply to personal information gathered on or before December 31, 2003. Consequently, you do not have to obtain “retroactive” consent from your patients and employees for information in patient files and employee records that was collected before December 31, 2003. For all new patients and employees or a new use of previously obtained information, consent may be given orally, in writing or implied. Consent is deemed implied if an individual gives his or her personal information voluntarily and it is reasonable that the person would voluntarily provide the information for that purpose (such as when someone drops off a resume for a position at your office).

Personal information should only be collected from the individual directly, unless the individual provides consent for collection from other sources. You cannot, as a condition of providing a service, require an individual to consent to the collection, use or disclosure of personal information beyond what is necessary to provide a service to him/her.

You must also use reasonable safeguards to protect personal information. The safeguards should be appropriate to the sensitivity of the information.

C. The Personal Information Protection and Electronic Documents Act

PIPEDA is federal legislation that came into effect on January 01, 2001 for Federal undertakings and January 01, 2004 for all other organizations. Its purpose is to establish rules which govern the inter-provincial collection, use and disclosure of personal information, recognizing both individual's privacy rights as well as organizations' need to collect, use and disclosure personal information for appropriate purposes.

It is hoped that PIPEDA and PIPA will be considered substantially similar pieces of legislation in the future. As of March, 2004, the Federal Privacy Commissioner is refusing to recognize PIPA until the Federal Government declares that it is substantially similar; even though PIPA was drafted according to the same ten general principles originally listed in PIPEDA. Once that declaration occurs, PIPEDA will affect personal information that crosses Alberta's borders, while PIPA will affect information that remains in Alberta.

D. The Health Information Act

HIA is Alberta legislation which establishes strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information. The HIA also enables health information to be shared and accessed, where appropriate, to provide health services and to manage the health system.

Optometrists (as well as other health providers) are considered "custodians" under the HIA. Your staff and others you might release health information to are considered "affiliates". Affiliates are bound by the same rules as custodians. When you release information to another custodian or affiliate, it is considered "disclosure". When a patient wishes to see their personal clinic record, it is considered "access".

Interestingly enough, the HIA does not apply to all our patients. It only applies to those patients who have received a service that is paid by Alberta Health and Wellness. Therefore, you would be considered a custodian for patients under the age of 19 and over the age of 65 that you have billed Alberta Health and Wellness for their eye examination. PIPA would cover those patients in the middle age group.

The easiest way to understand the HIA is to review the following series of questions and answers specifically related to the practice of optometry:

1. Are Optometrists Considered Custodians For All Our Patients?

NO – We are considered a custodian for children under the age of 19 and seniors over the age of 65 since these two age groups receive services that are paid for by Alberta Health and Wellness. The interesting quirk in all of this is that if a mother and her young daughter come in for an eye examination, you are considered a custodian for the daughter, but not the mother.

2. Are All Your Staff Entitled to See Patient Information Records?

NO – Staff who are employed to clean exam rooms should not have access to any diagnostic or treatment care information. Finance personnel are also not likely to view such information. Pre-testing and other staff directly involved with the care of the patient should have full access to the patient record. It is up to the optometrist to determine what information can be accessed by what staff.

3. Do Optometrists Require Written Consent From a Patient Under The Age of 19 or Over The Age of 65 To Release Information?

NO – Since the HIA applies in this case, custodians may release information (such as contact lens specifications or spectacle prescriptions) to another custodian, without patient consent, for the purpose of providing a health service to a patient.

4. Do Optometrists Require Written Consent For Patients Aged 19 To 65 In Order To Release Information?

YES – Since PIPA applies in this case, written consent is required.

5. Are Optometrists Required to Release Patient Information to Parents About Their Child?

MAYBE – Although, parents do not have an automatic right to information about their child, it can be argued whether a child has the mental capacity to declare consent. If your professional judgment is that the release of this information is essential for the proper treatment of the child, then you probably would be within your full rights to release that information to the parent.

6. Are Optometrists Required to Release Patient Information to Other Family Members About Their Aging Parents?

MAYBE – If the aging parent requests that no information be released to other family members, and is of sound enough mind to declare this, you must abide by their wishes. If, however, your professional judgment is that proper care and treatment of the parent would be compromised and that by disclosing such information to the family would improve the treatment outcome, you would probably be within your full rights to release such information.

7. Do Patients Have Unrestricted Access to Their Personal Health Information?

YES AND NO – Normally, patients would have full access to copies of their health record in an optometrist's office. The HIA does specify that you can refuse such access if such release would pose a threat to public safety, pose a threat to the patient themselves or result in immediate and grave harm to the patient's mental or physical health. This is very unlikely to happen in an optometrist's office.

8. Can Optometrists Charge a Patient For Access to Their Personal Information?

YES – The HIA does spell out maximum fees that can be charged – for example \$0.25 per page of photocopying in addition to the basic fee of \$25.00 for receiving consent, locating and retrieving the record, preparing the response letter, postage and shipping. I would suspect that common sense and event circumstances would apply in determining whether or not you would charge a patient.

9. Can Optometrists Charge Another Custodian for Disclosure of Patient Information?

NO – While the HIA specifies access and possible fees billable to individuals, it does not specify fees for disclosure to other custodians. It would be considered a professional courtesy for custodians to release information to other custodians freely so that patient care would not be compromised.

E. The Health Professions Act

Numerous provisions, including Sections 119 to 122 of the HPA, deal with access to and disclosure of information relating to the regulated members of all health professions. More specifically, they contain provisions regarding access to and disclosure of information relating to professional conduct proceedings (including cancellation, suspension and restrictions on a regulated member's practice permit) and information relating to incapacity assessments of regulated members under the HPA.

If a reprimand or other order (relating to an improper billing by a regulated member) is made, the registrar must provide the relevant information to the Minister and/or any member of the public who requests such information. The College is required to keep a copy of all ratified settlements, admissions of unprofessional conduct, records of investigations and hearings, reviews and complete registration applications for a period of ten years.

F. Freedom of Information and Protection of Privacy Act

FOIP came into effect on October 01, 1995. This Act deals extensively with the collection and disclosure of personal information in Alberta by public bodies. Public bodies include a department, branch or office of the Government of Alberta. It also includes agencies, boards, commissions, corporations or other offices designated as a public body, as well as educational bodies (such as universities, technical institutes, school boards and charter schools), health care bodies (such as RHA's, provincial health boards, nursing home operators and hospital boards) and local government bodies (such as police services and commissions, libraries and municipalities). It does not apply to professional colleges created under the HPA or to private individual optometrist offices.

FOIP sets out processes for accessing records held by the above bodies about you as well as your right to request that such personal information be corrected if it is not accurate.

G. Federal Privacy Act

The FPA protects the privacy rights of individuals and provides individuals with a right of access to personal information that is held in the hands of a federal government institution about themselves. Government institutions are defined as any department or ministry of state of the Government of Canada. Again, provincial regulatory authorities like the Alberta College of Optometrists or individual optometry offices are not caught by the FPA.

Although, much overlap exists between these pieces of legislation, the one Act that has more impact on your optometric practice is PIPA. As such, we have included a short PIPA summary from the Office of the Information and Privacy Commissioner of Alberta for your review. Further information can be downloaded from their website:
www.psp.gov.ab.ca