Dr. Graham Hudson
Associate Professor
Faculty of Law
Ryerson University
Jorgenson Hall - 350 Victoria St.
Toronto, ON,
M5B 2K3

Personal Health Information and Privacy in a Sanctuary City

Overview

This document provides information on how Ontario's public sector and health information privacy laws apply to the personal health information ("PHI") of non-status and precarious status migrants living in Ontario. It surveys the conditions under which health care providers and institutions can disclose PHI that could reveal an individual's immigration status to the Canada Border Services Agency ("CBSA") and other law enforcement agencies.

Strong privacy laws are essential for ensuring equitable access to healthcare in Ontario, including COVID vaccines. As part of its response to COVID crisis, the Government of Ontario opened access to public healthcare to all people in Ontario, including those without OHIP cards. This includes access to vaccines and testing. However, not all hospitals or clinics have complied with provincial policy. Many continue to ask for OHIP cards while others collect personal information that is not directly relevant to, or required for, vaccines and other healthcare. For many non-status and precarious status migrants, getting tested for COVID or getting vaccinated means they face a realistic chance of being detained and deported. Strong privacy laws are essential to ensure the human right to health is protected.

On April 30th, 2021, the City of Toronto announced it is partnering with FCJ Refugee Centre and Access Alliance to help people without an OHIP card get the COVID-19 vaccine in Toronto. This initiative draws form Toronto's experi-

ence as a sanctuary city, which includes strong laws that prohibit the unjustified sharing of personal information with the CBSA. But because health is a provincial policy arena, and hospitals and clinics don't answer to the city, access to vaccines for migrants is contingent on strong provincial privacy laws.

This document outlines the privacy laws governing personal health information in the context of immigration status, race, and sanctuary city policies. It answers common questions and forwards recommendations for strengthening privacy laws and procedures. It is intended as a brief, exploratory and plain-language rendering of the law in this area for migrants, healthcare practitioners, and media.

Disclaimer: This document provides general legal information and does not provide legal advice. Please consult a lawyer or legal aid clinic for legal advice specific to your situation.

Where is Personal Healthcare Information Protected?

An individual's personal healthcare information (**PHI**) is protected by two statutes:

(i) the *Personal Health Information Protection Act, 2004*[9] ("**PHIPA**"); and.
(ii) the *Freedom of Information and Protection of Privacy Act*[10] ("**FIPPA**")/ *Municipal Freedom of Information and Protection of Privacy Act*[11] ("**MFIPPA**").

These laws jointly govern how health care providers and health care institutions collect, use, and disclose the PHI of individuals.

Who Does the PHIPA Apply To?

The PHIPA governs (among others), the following "health information custodians":

- Regulated health care professionals who directly deliver health care services; and,
- Hospitals, public health agencies, pharmacies, ICES (formerly known as the Institute for Clinical Evaluative Sciences), ambulance services, the Canadian Institute for Health Information, Ontario Health, and the Ontario Ministry of Health

PHIPA does not govern the private sector.

Is the Personal Healthcare Information of Non-Status/Precarious Status Migrants Protected?

Yes. PHIPA and FIPPA/MFIPPA do not restrict "individual" to mean a Canadian citizen or permanent resident.

These laws apply equally to the personal information of non-status and precarious status migrants.

Is Immigration Status Considered "Personal Healthcare Information"?

Immigration status can be considered PHI if collected, used, or disclosed in the context of health care. An individual's immigration status can be obtained by directly asking for this information, or indirectly by asking for another type of PHI from which immigration status could be inferred. Section 4 of the PHIPA defines PHI as, among other things, information about an individual in **oral** or **recorded** form that:

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family…

(d) relates to payments or eligibility for health care, or eligibility for coverage for health care, in respect of the individual,

A likely example of indirectly obtaining immigration status would be in the context of payment or eligibility for health care. Non-status migrants are not eligible to receive coverage under OHIP or to receive a health card, and so they do not have an individual health number. Currently, the Government of Ontario compensates physicians for the provision of medically necessary care in the community through the use of temporary Fee Service Codes. Compensation for all hospital based care (including payment to MDs as well as to the hospital) is done via a spreadsheet, which links services to particular individuals. In either case, the provision of services could also generate inferences about a patient's lack of status. Details of immigration status could be considered "PHI" under the PHIPA if it arises in these or other contexts of health care, whether in oral or recorded form.

The FIPPA/MFIPPA provides additional protection of information related to:

> the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual.

This list would likely include immigration status. Information that is not considered PHI, but is under the control of a "health information custodian", is protected under FIPPA/MFIPPA in this context. The FIPPA/MFIPPA also applies directly to local public health units tied to municipalities, such as Toronto Public Health.

When Can Immigration Status be Disclosed to the CBSA?

The PHIPA states health information custodians **may** disclose information for the purposes of complying with a court order e.g. a summons, production order, a warrant. Disclosure is **discretionary** in the absence of a court order, but is still only authorized if it aids in an "investigation".[1] This means that the CBSA must request **specific information** in the context of a **specific investigation**. The law does not allow for discretionary disclosure in the context of "[m]ere suspicion, conjecture, hypothesis or 'fishing expeditions'".[2]

The Information and Privacy Commissioner of Ontario (the "IPC") recommends that an "institution should not disclose without a court order" if the disclosure appears likely to intrude on a reasonable expectation of privacy.[3] This would clearly include PHI or personal information protected under FIPPA/MFIPPA. The weight of privacy increases with the sensitivity of the information and the number of individuals information relates to.

In sum, if the CBSA doesn't have a court order, an individual or institution should not disclose PHI and personal information.

How Can I Tell if Information has been Disclosed?

Under the PHIPA, there is no right of access to information about the PHI handing policies or disclosure procedures of health information custodians, which could include information about how the custodian responded to disclosure requests from law enforcement.

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[1] See s. 42(1)(g) of the FIPPA and s. 32(1)(c) of the MFIPPA

[2] *R v Sanchez*, 1994 CanLII 5271 (ONSC), 93 CCC (3d) 357

[3] See Information and Privacy Commissioner, "Disclosure of Personal Information to Law Enforcement", online: https://www.ipc.on.ca/wp-content/uploads/2018/11/fs-privacy-law-enforcement.pdf.

FIPPA and MFIPPA both permit an individual to make a request for information about policies for responding to disclosure requests from law enforcement or with respect to specific types of information like immigration status. The right of access to records held by FIPPA or MFIPPA institutions applies to existing records that fall within that institution's custody or control.

However, records containing law enforcement information (i.e. correspondence about an ongoing investigation involving an individual) or records that could prejudice intergovernmental relations (e.g. memorandums about an institution's plans to cooperate with the CBSA) cannot be released.

Recommendations

Given the uncertainty of aspects of privacy law, a number of policy changes are warranted. These include:

1) Public institutions should draft and implement a formal "Don't Ask, Don't Tell" policy, which discourages direct or indirect questions about immigration status, and which clearly outlines a narrow range of conditions under which information may be disclosed. This policy should draw on the Privacy Commissioner's recommendation that data should not be disclosed to law enforcement agencies in the absence of court order. The policy should be clearly articulated to staff and volunteers.

2) Requests for large numbers of records, records relating to entire categories of persons (e.g uninsured patients), and access to an institution's electronic data systems should be denied in the absence of a court order. In all instances, such requests should be decided upon by senior staff in consultation with privacy officers and/or legal counsel.

3) There should be a record of each instance of disclose of PHI or other information to a law enforcement authority, including the CBSA. These records should be made available through ATIP/FOI once an investigation has concluded. Overly-broad interpretations of exceptions to ATIP/FOI requests should be discouraged.

4) There should be ongoing review of disclosure practices to the police and to CBSA by an independent review body such as the Privacy Commissioner of Ontario.

5) All of these recommendations should be considered in tandem with the government's responsibility to identify, prevent, and protect against systemic racism and other forms of discrimination.