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Introduction

The requirement for consent for the collection, use and disclosure of Personal health information exists throughout *The Health Information Protection Act (HIPA)*. In particular sections 26 and 27 regarding use and disclosure contain important requirements for trustees to consider regarding consent.

The following overview of consent in **HIPA** will provide the user with a basic understanding of how consent works in the Act.



Using the Act

Understanding the order of the Act is important for understanding how to interpret the consent provisions.

Part II – Rights of the Individual – this part identifies the rights that individuals have under the Act in regard to their own personal health information. Sections 5, 6 and 7 all provide important information regarding consent including what is required to make a consent a valid consent. Part II should be consulted when consent is required in other parts of the Act.

Part IV – Limits on Collection, Use and Disclosure of Personal Health Information by Trustees – this part provides rules regarding the collection, use and Disclosure of personal health information by trustees including describing circumstances where consent is required. In particular Section 26 and 27 provide rules regarding use and disclosure of personal health information. Part IV should be consulted when considering collection, use or disclosure of personal health information or when developing policy for collection, use or disclosure.

N.B.: The Health Information Protection Act and this Overview deal with consent for collection, use and Disclosure of personal health information – not with Consent for treatment or service. Please note that this Overview is provided for reference purposes only. The Overview discusses the intent of specific clauses and should not be considered an interpretation of the law.

 **The Health Information Protection Act should be consulted for interpretations. Trustees should seek the advice of legal council as necessary.** 

Acting on a consent collected by others

See Sections 6 and 27 of HIPA

The Act contemplates situations where a trustee will receive a consent from another trustee and enables that trustee to act on that consent without also seeking to confirm the consent or obtain an additional consent. Section 6(6) of the Act States:

(6) A trustee, other than the trustee who obtained the consent, may act in accordance with an express consent in writing or a record of an express consent having been given without verifying that the consent meets the requirements of subsection (1) unless the trustee who intends to act has reason to believe that the consent does not meet those requirements.

In addition 27(7) states:

(7) Where a trustee has received personal health information by a disclosure made pursuant to subsection(1) or (3), the trustee may disclose that information without the consent of the subject individual for the same purpose as the purpose for which it was collected of for a purpose that is consistent with that purpose.

Consent can be time-limited See Section 6 of HIPA

Section 6 provides for a consent to be “effective for a limited period.”

Consent by Minors See Section 56 of HIPA

HIPA provides guidance for issues of consent regarding individuals less than 18 years of age. Specifically, the Act states that:

56 Any right or power conferred on an individual by the Act may be exercised:

(c) by an individual who is less than 18 years of age in situations where, in the opinion of the trustee, the individual understands the nature of the right or power and the consequences of exercising the right or power;

(d) where the individual is less than 18 years of age, by the individual’s legal custodian in situations where, in the opinion of the trustee, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual;

The intent of (c) is to allow a trustee to accept the consent of an individual less than 18 years of age, provided the trustee believes the individual understands the consequences of the decision.

This is intended to reflect the common practice of providing certain health services to a minor provided he/she understands the nature of the service, without the consent of a parent or guardian.

Similarly, (d) provides guidance for how to respond if a trustee receives consent from the parent or legal guardian

for use or disclosure or personal health information of someone under 18 years of age. Specifically the intent of the section is to allow the trustee to disclose the information only if they believe it would not constitute an unreasonable invasion of privacy. In this case, if there is any doubt or uncertainty as to whether the minor would consent, it is probably not reasonable to conclude it would not be an invasion of privacy. It is probably sensible to seek consent of the minor.

Consent by others See Section 56 of HIPA

The Act anticipates that there will be circumstances in which and individual is not able to exercise their own rights and powers conferred by the Act, this includes the right to consent to the collection, use or disclosure of personal health information. In these circumstances, a trustee should be guided by **Section 56-Exercise of Rights by other Persons.**

The section reads as follows:

56 Any right or power conferred on an individual by this Act may be exercised:

(a) where the individual is deceased, by the individual’s personal representative if the exercise of the right or power relates to the administration of the individual’s estate;

(b) where a personal guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;

(c) by an individual who is less than 18 years of age in situations where, in the opinion of the trustees, the individual understands the nature of the right or power and the consequences of exercising the right or power;

(d) where the individual is less than 18 years of age, by the individual’s legal custodian in situations where, in the opinion of the trustee, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual;

(e) where the individual does not have the capacity to give **(i)** by a person designated by the Minister of Social Services if the individual is receiving services pursuant to *The Residential Services Act* or *The Rehabilitation Act*; or

(ii) by a person who, pursuant to *The Health Care Directives and Substitute Health Care Decision Makers Act*, is entitled to make a health care decision, as defined in that Act, on behalf of the individual; or

(f) by any person designated in writing by the individual pursuant to section 15.

Expressed Consent See Sections 6, 26, 27 & 27 of HIPA

An expressed consent may be oral or written and must be consistent with the conditions laid out in Section 6.

Section 6 of HIPA places emphasis on the process of gaining consent, including the need for an expressed consent to be an informed consent. A consent form should not be the sole focus of the consent process. A consent form should only serve as a record of a valid consent being given. A signed consent form which results from a process that does not comply with Section 6 will not likely be treated as valid.

Implied or Inferred Consent See Sections 26 and 27 of HIPA

The Act places a preference on expressed consent for the collection, use or disclosure of personal health information. However, the Act also contemplates situations where obtaining an expressed consent may not be necessary and may, in fact, interfere with the provision of services. To address this the Act recognizes the ability of a trustee to infer the consent of an individual in limited circumstances. ?? **Section 23(3)** allows for the possibility of a trustee inferring the consent of an individual for the use of personal health information if the use:

- (a) *is for the purpose for which the information was collected by the trustee or for a purpose that is consistent with that purpose;*
- (b) *is necessary to obtain payment for health services provided to that subject individual; or*
- (c) *for a circumstance that may be included in regulations in the future.*

?? **Section 27(3)** provides a similar ability in regard to disclosing personal health information. Specifically the clause states:



27(3) *Consent to the disclosure of personal health information must be express consent, except where it is reasonable for the trustee to infer that the subject individual would consent to the disclosure and where the disclosure is being made:*

- (a) *for the same purpose as the purpose for which the information was collected by the trustee or for a purpose that is consistent with that purpose;*
- (b) *where the subject individual is a patient of the trustee or a patient or resident in a health care facility, to a member of the subject individual's immediate family or to anyone else with whom the subject individual has a close personal relationship, if the disclosure:*
 - (i) *relates to health services currently being provided;*
 - And
 - (ii) *is made in accordance with the ethical practice of a health professional described in subclause(t)(xii);*

- (c) *to the extent that is necessary to obtain payment for health services provided to the subject individual; or*
- (d) *in any cases prescribed in the regulations.*

The intent of these clauses is to enable a trustee to use or disclose information for the purpose the information is collected without having to specifically ask if it is OK to use or disclose the information for that purpose. Yet consent is still considered. The trustee must be able to form the opinion that the individual **would** consent to the use or disclosure if asked.

The ability to infer consent is similar to the concept of implied consent. Many professions have relied on implied consent from the individual for provision of health services in the past. The intent of 26(3) and 27(3) is to enable the practice of implied consent to continue for the use or disclosure of personal health information for the purposes identified in the Act.

 **The Act allows trustees to infer consent provided they believe the individual would give consent if asked and provided the use or disclosure is for the purposes identified in these sections in the Act.** 

Risk Assessment – Trustees will need to consider if there is risk in relying on an implied or inferred consent. If a risk is identified it may be preferable to obtain an expressed consent.

Informed Consent See Section 6 of HIPA

A consent is informed if “the individual who gives the consent is provided with the information that a reasonable person in the same circumstances would require in order to make a decision about the collection, use or disclosure of personal health information.”

Revoking Consent See Section 7 of HIPA

Section 7 of HIPA ensures the right of individuals to revoke a consent already given. It is important to note that the Section does state that “no revocation shall have retroactive effect.” The intent here is to ensure that a trustee is not in violation of the law if they have acted on a consent received and (for example) disclosed personal health information prior to the consent being revoked.

Valid Consent See Section 6 of HIPA

Where consent is required for the collection, use or disclosure of personal health information by the Act, it must be in accordance with Section 6. Specifically, the consent:

- (a) must relate to the purpose for which the information is required;
- (b) must be informed;
- (c) must be given voluntarily; and
- (d) must not be obtained through misrepresentation, fraud or coercion.

Written Consent See Section 6 of HIPA

Section 6 clarifies that a consent can be implied or expressed and that a consent need not be in writing.

I have received and read The Health Information Protection Act (HIPA).

Patient Signature

Date

Witness