



College of
Midwives
of Ontario

Ordre des
sages-femmes
de l'Ontario

Ontario's *Personal Health Information & Protection Act* (PHIPA) governs the collection, use and disclosure of personal health information by midwives and other health information custodians practicing within Ontario.

The purpose of this guide is to assist midwives in understanding their privacy obligations under PHIPA.

While staff at the College is available to answer general inquiries, it is recommended that legal advice be sought with respect to specific issues pertaining to the collection, use and disclosure of personal health information at your place of practice.

College Contact Information

416-640-2252 x. 228

policy@cmo.on.ca

Table of Contents

1. Personal Health Information, Health Information Custodians and Their Agents.....	2
2. Contact Statement & Written Statement about Information Practice.....	3
3. Consent to the Collection, Use and Disclosure of Personal Health Information.....	4
4. Disclosure of Personal Health Information.....	6
5. Access to & Correction of Personal Health Information.....	10
6. Securing & Safeguarding Personal Health Records.....	14
7. Notice & Report to the Commissioner.....	15
8. Consequences of Privacy Breaches.....	16

1. Personal Health Information, Health Information Custodians & Their Agents

The *Personal Health Information Protection Act* (PHIPA) sets out rules for the collection, use and disclosure of personal health information. These rules are applicable to all “health information custodians” that operate within the province of Ontario, which includes midwives.¹

“Personal health information” is defined in PHIPA as identifying information about an individual (i.e. a client) in oral or recorded form that includes, but is not limited to, the following:²

- Information concerning the physical or mental health of the client, including family health history
- Information relating to the provision of health care to the client
- Information relating to payments or eligibility for health care
- Information that identifies the client’s health number
- Any other information about an individual that is included in a record containing personal health information

Administrative and support staff at a midwifery practice who come into contact with personal health information are considered agents under the Act and have the same privacy obligations as the midwives they work for.³ It is important that midwives identify their agents and inform them of their obligations under the Act.

¹ PHIPA, s. 3(1)(a).

² PHIPA, s. 4

³ PHIPA, s. 17.

2. Contact Person & Written Statement About Information Practices

PHIPA requires a midwife to designate a contact person, who is an agent of the health information custodian and is authorized on behalf of the midwife to perform the following functions:⁴

- Help the midwife comply with PHIPA;
- Ensure that all agents are informed of their duties under the Act
- Respond to inquiries from the public about the midwife's information practices
- Respond to requests of an individual for access to or correction of a record of personal health information that is in the custody or control of the midwife
- Receive complaints from the public about potential contraventions of PHIPA by a midwife

If a midwife does not designate a contact person, the midwife must assume the role of a contact person and perform the functions noted above.⁵

While an agent such as an administrative staff member can act as a contact person, the College strongly recommends that a midwife fulfill this role.

In addition, a midwife must make available to the public a written statement that describes the following:⁶

- the midwife's information practices (e.g. how personal health information is protected at a midwife's place of practice);
- how to contact the contact person or the midwife who is acting as the contact person;
- how a client may obtain access to or request the correction of a record of personal health information that is in the custody of a midwife; and
- how to make a complaint to the midwife and the *Information and Privacy Commissioner of Ontario*

Midwives may consider making this written statement available in client brochures, posting it on their website, or posting it in a visible place in their midwifery practice.

⁴ PHIPA, s. 15(3).

⁵ PHIPA, s. 15(4)

⁶ PHIPA, s. 16(1)

3. Consent to the Collection, Use & Disclosure of Personal Health Information

A midwife may only collect, use or disclose personal health information if their client consents or the collection, use or disclosure is permitted or required by the Act.

Consent may be express or implied.⁷ Express consent may be required in certain instances under the Act. For example, if a midwife wishes to disclose information about a client to a person who is not a health care information custodian, express consent must be obtained.⁸

Implied consent exists where a midwife receives personal health information about a client from the client and collects, uses or discloses that information for the purpose of providing or assisting in providing health care to the client, unless the client has expressly withheld or withdrawn the consent.⁹

Under PHIPA, consent must meet the following requirements:¹⁰

- Must be a consent of the client
- Must be knowledgeable
- Must relate to the information; and
- Must not be obtained through deception or coercion

Consent is considered to be that of the client if the client understands the information that is relevant to deciding whether to consent to the collection, use or disclosure and can appreciate the reasonably foreseeable consequences of either providing or not providing consent.¹¹

Consent is considered to be “knowledgeable” if it is reasonable in the circumstances to believe that the client knows the purposes of the collection, use or disclosure and that the client may give or withhold consent.¹² For example, under the Act, it is reasonable to believe that a client knows the purposes of the collection, use or disclosure of personal health information about the client if a midwife posts or makes available a notice describing the purpose in the midwifery practice, if that is the place where it is likely to come to the client’s attention.¹³

It should be noted that if a client consents either through express or implied consent, to have a midwife collect, use, or disclose their personal health information, the client may withdraw their consent by providing notice to the midwife. However, the withdrawal will not have a retroactive effect.¹⁴ For example, if a midwife provided client records to other

⁷ PHIPA, s. 18(2).

⁸ PHIPA, s. 18(3)(a).

⁹ PHIPA, s. 20(2).

¹⁰ PHIPA, s. 18(1).

¹¹ PHIPA, s. 21(1).

¹² PHIPA, s. 18(5).

¹³ PHIPA, s. 18(6).

¹⁴ PHIPA, s. 19(1).

health care professionals prior to the client withdrawing their consent, the midwife does not need to request that those records be returned.

While PHIPA does not require consent to be written, the College strongly encourages members to obtain written consent where possible, as it is more reliable and provides a higher standard of proof in the event there is a dispute about the nature of the client's consent in the future.

4. Disclosure of Personal Health Information

Generally, midwives should only disclose personal health information with the consent of individuals. However, there are instances where PHIPA permits disclosure without consent. As the language of PHIPA suggests that these disclosures are not mandatory, the College suggests that midwives use their best judgment when deciding whether to disclose personal health information in the following instances. In addition, the College encourages midwives to consider these permissible disclosures when developing policies and information practices:

- **Disclosures relating to providing health care.** The following conditions must be satisfied:¹⁵
 - The disclosure is reasonably necessary for the provision of health care;
 - It is not reasonably possible to obtain consent in a timely way; and
 - The individual has not instructed the custodian not to make the disclosure

- **Disclosures by facilities that provide health care.** For example, a midwifery practice or birth centre can disclose personal health information, unless a client specifically requests otherwise. In particular, these facilities can:¹⁶
 - Confirm that an individual is a client
 - The client's general health status
 - The location of the client in the practice or birth centreFor example, a midwife can provide the above information to EMS when a client is being transferred to a hospital from a birth centre.

- **Disclosures about a deceased individual.** This is for the purpose of identifying the individual and informing persons that the individual is deceased.¹⁷

- **Disclosures for health or other programs.** For example, PHIPA allows disclosure of personal health information:¹⁸
 - For the purpose of determining or verifying eligibility to receive health care¹⁹
 - To a person conducting an audit or reviewing an application for accreditation, if the audit review relates to services provided by a midwife and the auditor does not remove any records of personal health information from the premises.²⁰

It should be noted that if a midwife and/or her practice group is subject to an assessment by the College, the midwife is permitted to disclose personal health information, including client records for the purpose of the assessment. The College's authority to conduct such an assessment is derived from the Regulated Health Professionals Act,²¹ Midwifery Act²² and its Regulations and does not contravene PHIPA.

¹⁵ PHIPA, s. 38(1)(a).

¹⁶ PHIPA, s. 38(3).

¹⁷ PHIPA, s. 38(4).

¹⁸ PHIPA, s. 39(1)

¹⁹ PHIPA, s. 39(1)(a)

²⁰ PHIPA, s. 39(1)(b)

²¹ 1991, S.O. 1991, c. 18.

²² 1991, S.O. 1991, c. 31.

- **Disclosures relating to risk of bodily harm.** A midwife may disclose personal health information if there are reasonable grounds to believe that disclosure is necessary to eliminate or reduce a significant risk of serious bodily harm to a person or group of persons.²³ Disclosure is warranted if the following conditions are satisfied:
 - The nature of the potential is grievous;
 - The risk of harm is high;
 - There are reasonable grounds to believe that disclosure is necessary to eliminate or reduce the risk of harm; and
 - The risk of harm must relate to the client or another person or persons²⁴

In addition, PHIPA provides protection from liability, such as being sued, when a midwife acts reasonably and in good faith in such circumstances, including when she/he decides to make a report.²⁵

- **Disclosure for proceedings.** A midwife can disclose personal health information for a proceeding in which the midwife or agent of the midwife is a party or witness. Custodians may also disclose to comply with a summons, order or other similar requirement issued in a proceeding.²⁶

It should be noted that the College may appoint an investigator to issue a summons for accessing midwifery records that may contain personal health information of clients, as part of a complaint, report, or registrar's investigation process. Disclosure may also be required as part of a disciplinary proceeding at the College. The College's authority to order such disclosure is derived from the *Regulated Health Professionals Act*,²⁷ *Midwifery Act*²⁸ and its regulations and does not contravene PHIPA.

- **Disclosure related to care or custody.** A midwife may disclose personal health information to the head of a penal or other custodial institution where a client is being held, for the purpose of arranging health care for the client or making other decisions about the client.²⁹
- **Disclosure to successor.** A midwife may disclose personal health information to a potential successor of the midwife, for the purpose of allowing the potential successor to assess and evaluate the operations of the midwife. However, the potential successor must first enter into an agreement with the midwife to keep the information confidential and secure and not retain any information longer than is necessary for the purpose of the assessment or evaluation.³⁰

²³ PHIPA, s. 40(1).

²⁴ Smith v Jones [1999] S.C.C.

²⁵ PHIPA, s. 71(1).

²⁶ PHIPA, s. 41(1).

²⁷ Supra note 21.

²⁸ Supra note 22.

²⁹ PHIPA, s. 40(2).

³⁰ PHIPA, s. 42(1).

- **Disclosure related to this and other Acts.** Midwives may disclose personal health information if the disclosure is permitted or required by other legislation, such as the *Regulated Health Professionals Act* and the *Child & Family Services Act*, with respect to certain children's aid matters.³¹
- **Disclosure for research.** Midwives may disclose personal health information as long as the researcher submits an application, research plan, and a copy of approval of the research plan by a research board.³²
- **Disclosure for planning and management of health system.** Midwives may disclose personal health information for purposes relating to the planning and management of the health system to entities that are specified in the regulations of PHIPA. However, before the disclosure is made, the recipient of the information must have in place practices and procedures to protect privacy and maintain confidentiality.³³
- **Disclosure for monitoring health care payments.** Upon request of the Ministry of Health and Long-Term Care, a midwife must disclose personal health information for the purpose of monitoring or verifying claims for payment for health care or goods used for health care that are publicly funded.³⁴
- **Disclosure for analysis of health system.** Upon request of the Minister of Health and Long-Term Care, custodians must disclose personal health information to a health data institute approved by the minister for analysis of the health system. However, the minister has to first submit a proposal to the Commissioner for review or comment.³⁵
- **Disclosure with Commissioner's approval.** A health data institute to which a midwife has disclosed personal health information to must, upon request of the Minister, disclose information to the Minister or another Minister-approved person if the Minister is of the opinion that disclosure is in the public interest and the Commissioner approves the disclosure.³⁶

³¹ PHIPA, s. 43(1). Also see the College's Guide On Mandatory Reporting Obligations for instances where personal health information may have to be disclosed to the College when making a mandatory report: <http://www.cmo.on.ca/wp-content/uploads/2015/11/Guide-on-Mandatory-Reporting-Obligations.pdf>.

³² PHIPA, s. 44.

³³ PHIPA, s. 45.

³⁴ PHIPA, s. 46(1).

³⁵ PHIPA, s. 47.

³⁶ PHIPA, s. 48.

5. Access to and Correction of Personal Health Information

A client generally has a right of access to a record of their personal health information that is in the custody or control of a midwife.³⁷ A record is defined under PHIPA as “a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise...”³⁸

PHIPA lists exceptions to a client’s right of access to a record of their personal health information. Examples include if granting access would result in risk of serious harm to the client or another individual³⁹ or another Act or court order prohibits disclosure to the client of the record or the information in the record.⁴⁰ Other examples include information in the record that might be subject to legal privilege⁴¹ or if the midwife believes on reasonable grounds that the client’s request to access the record is frivolous, vexatious or made in bad faith.⁴² Midwives are encouraged to review the exceptions listed in the Act so they are aware of those instances in which they are justified in refusing a client’s access to a record of their personal health information.⁴³

Processing Personal Health Information Access Requests

While there are many considerations that midwives should be aware of in processing personal health information access requests,⁴⁴ the following are some steps they must take upon receipt of an access request from a client:

- A midwife must first be satisfied of the identity of the client making the request.⁴⁵
- A midwife must respond to the client’s written access request within 30 days. This timeline may be extended if it is not reasonably practical to reply within that time.⁴⁶ In this case, a midwife must notify the client of the delay and the reasons for the delay, within the initial 30 day time period.⁴⁷ It should be noted that a midwife can grant a client access to his/her records following a verbal request.⁴⁸
- In responding to the written request, a midwife must do one of the following:
 - Make the record available to the client for examination and at the request of the client, provide a copy of the record of their personal health information

³⁷ PHIPA, s. 52(1).

³⁸ PHIPA, s. 3(1).

³⁹ PHIPA, s. 52(1)(e).

⁴⁰ PHIPA, s. 52(1)(b).

⁴¹ PHIPA, s. 52(1)(a).

⁴² PHIPA, s. 54(6).

⁴³ The PHIPA exceptions are listed in s. 51, 52 and 54(6).

⁴⁴ See PHIPA, s. 54.

⁴⁵ PHIPA, s. 54(9).

⁴⁶ PHIPA, s. 55(3).

⁴⁷ PHIPA, s. 55(4)(a).

⁴⁸ PHIPA, s. 52(6).

and if reasonably practicable, provide an explanation of any term, code or abbreviation used in the record.⁴⁹

- In the event the record cannot be found or does not exist, a midwife must provide written notice to the client of this fact.⁵⁰
- Provide written notice that the request is being refused,⁵¹ including the reason for the refusal and inform the client of their right to make a complaint about the refusal to the *Information and Privacy Commissioner*.⁵²

Processing Personal Health Information Correction Requests

i) Correction Requests

A client generally has the right to request a midwife to correct a record of their personal information if they believe the record is inaccurate or incomplete. ⁵³

The time period for a correction request is the same as the 30 day period described in the preceding section.⁵⁴

The client has an obligation to demonstrate to the satisfaction of the midwife, that the record is incomplete or inaccurate for the purposes for which the midwife uses the information and must provide the information necessary that will enable a midwife to make a correction.⁵⁵

ii) Correcting Record of Personal Health Information

If a midwife is satisfied that the record is inaccurate or incomplete, the midwife must:

- Make the requested correction by either striking out the incorrect information in a manner that does not obliterate the record or if that is not possible, labelling the information as incorrect, severing the incorrect information from the record and storing it separately from the record while maintaining a link in the record to enable a person to track the incorrect information⁵⁶
- In the event the above is not possible, the midwife must ensure that there is a practical system in place to inform a person who accesses the record that the information is incorrect and to direct the person to the correct information⁵⁷

⁴⁹ PHIPA, s. 54(1)(a).

⁵⁰ PHIPA, s. 54(1)(b).

⁵¹ See page 11 for instances where refusal is justified.

⁵² PHIPA, s. 54(1)(c) and (d).

⁵³ PHIPA, s. 55(1).

⁵⁴ PHIPA, s. 55(3) and (4).

⁵⁵ PHIPA, s. 55(8).

⁵⁶ PHIPA, s. 55(10)(a)(i)

⁵⁷ PHIPA, s. 55(10)(a)(ii).

- In either case noted above, give the client notice about the steps that were taken to correct the information⁵⁸
- In either case noted above, give written notice of the requested correction, to the extent reasonably possible, to the persons whom the midwife has disclosed the information, except if the correction cannot reasonably be expected to have an effect on the ongoing provision of health care to the client⁵⁹

iii) Refusing to Correct the Record

A midwife does not have a duty to correct a record of personal health information if any of the following factors are present:

- The record was not originally created by the midwife and the midwife does not have “sufficient knowledge, expertise and authority to correct the record”⁶⁰
- The record consists of a professional opinion or observation that the midwife has made in good faith about the client⁶¹
- The midwife believes on reasonable grounds that the request is frivolous, vexatious or made in bad faith.⁶²

A midwife who refuses to correct a record of personal health information must give the reasons for the refusal and inform the client that he/she is entitled to:⁶³

- Prepare a concise statement of disagreement that sets out the correction that the midwife has refused to make;
- Attach the statement of disagreement as part of the records that it holds of the client’s personal health information and disclose the statement of disagreement anytime the midwife discloses information to which the statement relates;
- Make all reasonable efforts to disclose the statement of disagreement to any person that would have received notice of the correction, had the request been granted
- Make a complaint about the refusal to the Information and Privacy Commissioner

⁵⁸PHIPA, s. 55(10)(b).

⁵⁹PHIPA, s. 55(10)(c).

⁶⁰PHIPA, s. 55(9)(a).

⁶¹PHIPA, s. 55(9)(b).

⁶²PHIPA s. 55(6).

⁶³PHIPA, s. 55(11).

6. Securing and Safeguarding Personal Health Records

Under PHIPA, midwives must take steps that are reasonable in the circumstances to ensure that personal health information in the midwife's custody or control is protected against theft, loss and unauthorized use or disclosure and to ensure that the records containing the information are protected against unauthorized copying, modification or disposal.⁶⁴In addition, midwives must take steps that are reasonable in the circumstances to ensure that personal health information is not collected without authority.⁶⁵

Midwives must also ensure that records of personal health information that they have in their custody or control are retained, transferred and disposed of in a secure manner.⁶⁶

Reporting Requirements to Clients & College

In the event personal health information is stolen or lost or if it is used or disclosed without authority, a midwife that has custody or control over that information must notify the client at the first reasonable opportunity and include in the notice that the client is entitled to make a complaint to the Privacy Commissioner.⁶⁷

Furthermore, midwives acting as health information custodians must give notice to the College if a member of the College employed by them, who holds privileges with them, or who is affiliated with them has committed or is suspected of having committed an unauthorized collection, use, disclosure, retention or disposal of personal health information and if, as a result of such unauthorized action, disciplinary action is taken with respect to the member's employment, privileges or affiliation.⁶⁸ This also applies to cases where a member voluntarily relinquishes their privileges or resigns.⁶⁹

Notice must also be given to the College if the midwife acting as health information custodian is a medical officer of health of a board of health and circumstances similar to those described above arise involving a member of the College who is employed to provide health care for the board of health and is an agent of the health information custodian.⁷⁰

Location of Records

Pursuant to PHIPA, a midwife may keep a record of personal health information about a client in the client's home in any reasonable manner to which the client consents, subject to any restrictions set out in a regulation, by-law or published guideline under the Regulated Health Professionals Act.⁷¹

⁶⁴ PHIPA, s. 12(1).

⁶⁵ PHIPA, s. 11.1

⁶⁶ PHIPA, s. 13(1).

⁶⁷ PHIPA, s.12(2).

⁶⁸ PHIPA, s. 17.1.

⁶⁹ PHIPA, s. 17.1(2.2) and 17.1(5.2)

⁷⁰ PHIPA, s. 17.1(3).

⁷¹ PHIPA, s. 14(1).

In addition, a midwife can keep a record of personal health information about a client in a place other than the client's home if:

- The record is kept in a reasonable manner;
- The client consents;
- The midwife is permitted to keep the record in the place in accordance with a regulation, by-law, or published guideline under the *Regulated Health Professionals Act*;
- And the prescribed conditions, if any, are satisfied⁷²

Please note that the College has developed a *Record-Keeping Standard*, which midwives are encouraged to review.⁷³

There are certain physical, administrative and technical safeguards that midwives may use to safeguard records of personal health information.

Physical Safeguards

These involve implementing physical measures to protect and safeguard personal health information.

- Ensuring that the places used to store personal health information are secure – such as keeping records in locked filing cabinets
- Protecting places in which personal health information is stored from natural hazards such as floods or fire
- Disabling USB ports to prevent the removal of personal health information
- Locking a computer that has personal health information displayed, when a midwife or an agent permitted to view such information is not physically present by the computer
- Ensuring that personal devices (laptop, tablet, phone) used to view personal health information are password protected, encrypted, capable of being traced if lost/stolen and can be erased remotely in the event they are lost or stolen

Administrative Safeguards

These include policies and procedures followed by midwives and their agents to safeguard and protect personal health information.

Examples include:

- Establishing a privacy breach protocol to minimize risk in the event a breach occurs
- Using confidentiality agreements with other persons who might come into contact with personal health information, such as independent contractors, bookkeepers, and cleaning staff
- Creating policies regarding who is permitted to have access to personal health information

⁷² PHIPA, s. 14(2).

⁷³ January 11, 2013. Available online: http://www.cmo.on.ca/wp-content/uploads/2015/07/Record-Keeping-Standard-for-Midwives_JANUARY-2013.pdf

- Creating policies about circumstances in which personal health information can be removed off-site
- Obtaining permission from clients if they will be communicated with via text or e-mail and explaining the risks associated with these methods of communication

Technical Safeguards

This pertains to the use of technology to protect electronic information, including electronic health records and access to them.

Examples include:

- Encrypting electronic records
- Setting up appropriate usernames and passwords to access electronic records
- Ensuring a safe firewall
- Implementing anti-virus and other anti-malware software
- Ensuring that information is not shared over an open network, such as public WI-FI
- Not using personal e-mail accounts, such as gmail and hotmail to send client health information

For more information on protecting the privacy of personal health information in electronic communication, please see the College's webpage: *Midwives and the Use of Electronic Communications*.⁷⁴

⁷⁴ Available online: <http://www.cmo.on.ca/professional-conduct/client-relations/midwives-using-electronic-communications/>

7. Notice & Report to Commissioner

Notice to Commissioner

A midwife is required to notify the Information & Privacy Commissioner in the following instances:

- The midwife has reasonable grounds to believe that the personal health information in their custody or control was used or disclosed without authority by a person who knew or ought to have known that they were using or disclosing the information without authority
- The midwife has reasonable grounds to believe that the personal health information in their custody or control was stolen
- The midwife has reasonable grounds to believe that after an initial loss or unauthorized use or disclosure of personal health information in their custody or control, the personal health information was or will be further used or disclosed without authority
- The loss or unauthorized use or disclosure of the personal health information is part of a pattern of similar losses or unauthorized uses or disclosure of personal health information in the custody or control of the midwife
- The midwife is required to give notice to the College of an event described on page 12 of this document,⁷⁵ including those events involving an agent of the midwife that is a member of the College, in relation to a loss or unauthorized use or disclosure of personal health information
- The midwife has determined that the loss or unauthorized use or disclosure of personal health information is significant after considering all relevant circumstances, including:
 - Whether the personal health information is sensitive
 - Whether the loss or unauthorized use or disclosure involved many individuals' personal health information
 - Whether more than one health information custodian or agent was responsible for the loss or unauthorized use or disclosure⁷⁶

Annual Report to Commissioner

Beginning 2019, on or before March 1st of each year, a midwife is required to provide the Commissioner an electronic report that sets out the number of times in the previous calendar year that each of the following occurred:

- Personal health information in the midwife's custody or control was stolen
- Personal health information in the midwife's custody or control was lost
- Personal health information in the midwife's custody or control was used without authority
- Personal health information in the midwife's custody or control was disclosed without authority⁷⁷

⁷⁵ Also see *PHIPA*, s. 17.1 for reporting obligations to College.

⁷⁶ *PHIPA*, s. 6.3(1)

⁷⁷ *PHIPA*, s. 6.4(1)

8. Consequences of Privacy Breaches

Breaches of obligations under PHIPA can result prosecution by the Attorney General. On conviction for an offence of contravention of PHIPA, a midwife may be liable for a fine of up to \$100,000 and a midwifery corporation up to \$500,000⁷⁸

There can be other consequences for privacy breaches outside of that which is prescribed by PHIPA. These include but are not limited to:

- A midwife becoming the subject of a complaint or report made to the College. Depending on the severity of the breach, a midwife may become the subject of a disciplinary proceeding at the College.
- Discipline by employers
- Review or investigation by a privacy regulatory body, such as the *Information and Privacy Commissioner of Ontario*
- Civil Litigation – a person affected by a privacy breach may sue a midwife for invasion of privacy⁷⁹
 - Wilful or reckless conduct may include an award of up to \$10,000 for mental anguish⁸⁰

⁷⁸ PHIPA, s. 72(2).

⁷⁹ PHIPA, s. 65(1).

⁸⁰ PHIPA, s. 65(3).