

# The Personal Information Protection and Electronic Documents Act (PIPEDA)

CMA/DR. SUNIL PATEL

The Canadian Medical Association (CMA) has been representing the interests of physicians regarding the issues of privacy and PIPEDA. The *CRA Journal* asked Dr. Sunil Patel, CMA President and physician from Gimli, Manitoba for some advice on this issue and his thoughts are presented herein.

*\*Please note that the following responses should not be interpreted as legal advice.*

*PIPEDA, new federal privacy legislation, impacts all physicians. It appears to be redundant as the provinces and local colleges of physicians and surgeons already had guidelines and guarantees in place for patient privacy rights. Did the federal government consult with the CMA while drafting the legislation?*

In 1998, in anticipation of impending privacy laws across the country, the CMA developed its Health Information Privacy Code, which formulated the desired regime for patient privacy protection. When PIPEDA was introduced, the CMA was present both at the house and senate committee levels to put its perspective forward—in particular, that the legislation was not designed to take into account the health sector and was consequently deficient. The CMA's perspective was largely ignored, partly because there were differences of opinion within the healthcare community as to the appropriate privacy regime.

At the federal level, the CMA has strenuously argued that the current territorial/provincial provisions with respect to the protection of privacy and confidentiality—through the colleges or legislation—are adequate. In some measure, this perspective has been taken into account through the federal government's interpretation of PIPEDA (developed in conjunction with stakeholders, such as the CMA). The interpretation, done in the form of questions and answers, can be found through the CMA website ([www.cma.ca](http://www.cma.ca)) by doing a key-word search for "privacy resources" and clicking on "Health Canada Q & As for Healthcare Providers" under the National subsec-

tion. In addition, I have made a number of statements that point to the fact that physicians are already highly regulated with respect to privacy and confidentiality (e.g., see the letter at the front of the CMA's physician handbook *Privacy in Practice*, which can also be found on the CMA website).

Finally, there is a challenge to the constitutional validity of PIPEDA, which may indirectly give greater clarity with respect to these issues.

*It is unclear to many physicians, especially those practicing outside hospitals, what their responsibilities are under the new PIPEDA regulations. Does the CMA advise physicians to comply with the PIPEDA requirements of having a privacy officer and a standard operating procedure for handling of patient information for each practice?*

Again, I would refer to the CMA handbook *Privacy in Practice*, which takes the approach of "enhancing" physicians' privacy practices. With respect to appointing a privacy officer, the handbook states (in keeping with college requirements) that the physician has ultimate responsibility for his/her patient records. With respect to policies and procedures, the CMA handbook does provide some guidance and also points to advice provided by the Colleges and the CMPA. To assist physicians further in this regard, the CMA is currently developing an online "privacy wizard," which will enable physicians, through answering a series of questions, to customize a privacy policy for their office, in addition to auditing their privacy practices and developing a comprehensive office policy.

*Should physicians obtain written consent from each patient to be in compliance with PIPEDA?*

In so far as the circle of care is concerned (see "Health Canada Q & As for Healthcare Providers" referred to above), it has been clarified that "implied consent" is sufficient—which would not require written consent. As far as the interpretation of implied consent is concerned, this is under the condition that patients are provided with information concerning the uses to which the information will be put. To assist physicians in this regard, the CMA



produced a privacy poster, which was disseminated via the *CMA Journal* to the majority of physicians. The poster is also available online at the CMA website.

*Quebec is challenging PIPEDA in the courts. What can you tell us about this action and how this may affect CMA members?*

The Quebec Government has asked the Quebec Court of Appeal to rule on the constitutional validity of PIPEDA, claiming that the Act is unconstitutional because it operates in areas of provincial jurisdiction. While this challenge brings the Act's validity into question and thereby creates uncertainty, there is no direct affect on members. Ultimately, even if the Act is found to be unconstitutional, given the growing trend to enact privacy legislation across the country and to specifically address health information privacy, it is unlikely that the challenge will make a practical difference to members.

*It will cost physicians working outside of hospitals and universities time and money to meet the current requirements of PIPEDA. This is federal legislation and physician funding is a provincial matter. What is the CMA doing to mitigate the costs of administering the PIPEDA regulations to practicing physicians?*

As noted above, the CMA has produced a number of tools to assist physicians and is in the process of producing the privacy wizard—all of which should assist physicians in enhancing their privacy practices and, if necessary, in demonstrating compliance. In addition, the CMA website contains a clearing-house of privacy materials and links on a jurisdictional basis, which further assists physicians.

*The costs of new computer software for booking, billing and maintaining medical records that are in full compliance with PIPEDA is sometimes staggering. Will the CMA be lobbying the federal government to revise this aspect of the Act as it pertains to doctors?*

PIPEDA does not require the use of electronic means to maintain medical records. PIPEDA covers both paper-

based and computer-based systems. The precise requirements with respect to security safeguards in a computerized setting have yet to be determined.

*Do you see a positive benefit to this new legislation?* PIPEDA has raised awareness of the importance of privacy in all sectors, including the health sector.

#### CMPA/DR. PATRICK CERESIA


The Canadian Medical Protective Association (CMPA) has taken great interest in the implications of the PIPEDA legislation. The *CRA Journal* asked Dr. Patrick Ceresia, Managing Director, Corporate Services of the CMPA for some advice on this important issue and his thoughts are presented herein.

*PIPEDA was passed several years ago. Why is it now (as of Jan 1, 2004) relevant to physicians?*

PIPEDA came into effect on January 1, 2000; however, its application to types of information classes or activities was staged over time. Application of the legislation to personal health information came into effect on January 1, 2004. The healthcare community at large, and physicians in particular, have been long-time champions of the protection of personal health information. Privacy legislation is relevant to physicians because it emphasizes and enshrines in law the principles regarding the protection of personal health information that have been core to the practice of medicine.

*Many physicians still are uncertain if this new Act pertains to them. Are any physicians exempt from PIPEDA? Does PIPEDA apply to all health professionals (dentists, physiotherapists, etc.)?*

PIPEDA is federal legislation and applies to all of Canada, including physicians and other healthcare providers, unless excluded by specific exemption. While the legislation will continue to undergo clarification of its applicability, several exemptions already clearly exist. One example is provincial legislation that has been deemed substantially similar. For



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example, Quebec has had privacy legislation since 1994 and it has been deemed substantially similar by the Privacy Commissioner's office. Also, an exemption under the legislation exists for activities covered by other legislation, such as in the case of legal actions, or investigations by tribunals.

*If a doctor works exclusively in a hospital with no outside clinical practice, is it safe for the doctor to assume that his/her institution meets the requirements for PIPEDA?*

This is a very complicated question.

First, the legislation applies to organizations and individuals, so one or the other cannot assume that the onus of responsibility rests elsewhere. Confusing the situation and in follow-up to the issue of "exemptions" discussed in the second question (above), activities that are not of a commercial nature are exempted from the application of this federal law. There is indication from the limited clarification that has, to date, been provided by the Privacy Commissioner's office, that medical care and treatment provided by a physician (or other healthcare professional) within a hospital is not seen to be commercial in nature while work provided by a physician in a private office or clinic is seen to be commercial. Formal interpretation has not as yet been issued in this regard and it would be premature to surmise that a physician or a hospital, under the circumstances of this question, are exempt from the implications of the legislation.

*For independent practitioners who either run their own clinic or are in an independent clinic with other physicians, what specific requirements must they meet to be in compliance with the Act (clinic privacy officer, clinic privacy standard operating procedure manual)?*

It must be clear that the law must be complied with. In the private or independent clinic environment, the majority of healthcare professional regulating bodies, including the colleges of physicians and surgeons, have taken a position on what compliance means in their jurisdiction. Similarly, the representative medical organizations have interpreted and published compliance recommendations for their members. The Canadian Medical Association (CMA) has taken a

national lead in this regard, as have others, such as the College of Family Physicians of Canada and the Canadian Dental Association. The CMPA strongly encourages its members to refer to the direction of the applicable regulating body and to take advantage of the advice and tools provided by the various representative medical organizations.

*There is some confusion about whether patients should be asked to give written consent to the privacy policies of physicians or their clinics. What is the CMPA's advice regarding verbal or implied consent for PIPEDA?*

There is an evolving opinion that the concept of implied consent in the provision of clinical care and treatment reflects adequate compliance with the legislation. This position seems to have been adopted by the various regulating bodies and is certainly reflected in the compliance measures recommended by the CMA. The CMPA recognizes the appropriateness of this interpretation by the regulating bodies and representative medical organizations and counsels compliance with their advice and direction. We further suggest that if any doubt or concern exists, a documented informed consent should always be considered.

*Quebec may be challenging PIPEDA. Will this alter the way physicians should currently abide by PIPEDA?*

Until such a time that the outcome of the Quebec constitutional challenge of PIPEDA has been determined, PIPEDA is law and should be complied with.

*What other advice/information can the CMPA provide to physicians about patients' privacy rights?*

I would repeat that physicians have historically valued, respected and championed the protection of patient health information. The CMPA expects that the recent attention to privacy will see the understanding and adoption of these important principles extend well beyond the healthcare community. We encourage physicians and other healthcare professionals to look to their regulating bodies and representative medical organizations for advice and direction on compliance issues and engaging patients in understanding their rights.