

## ***Personal Health Information Privacy and Access Act*** **Privacy and the circle of care**

Health care providers use and share an individual's personal health information based on the need to pursue additional care or treatment for the individual on the basis of the concept of *circle of care*. In some cases, circle of care is referred to when health care providers use the individual's personal health information even when the individual has not specifically consented to the additional care or treatment. As such, health care providers refer to the *circle of care* as the implied consent of the individual to pursue treatment beyond that to which the individual initially consented.

The expression *circle of care*, however, has not been identified or codified in the *Act*.

We believe the reason for this is that the legislation instead sets out instances where *implied consent* of the individual can lawfully be said to exist, in contrast to referring to the *circle of care* as permission to use personal health information without first ensuring that consent exists.

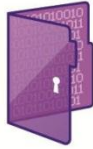
### ***Codified right to privacy***

The law as it exists today in New Brunswick grants the right of privacy to all individuals. The right to privacy is based on the notion that personal health information belongs to the individual rather than for someone else to decide with whom and when to share it in order to attain a result. The individual's right to privacy is, in turn, based on the lawful principle of individual's RIGHT TO KNOW.

### **AN INDIVIDUAL'S RIGHT TO KNOW**

In our health care system today, an individual has a RIGHT TO KNOW:

- why his or her personal health information must be collected (for what purpose);
- what will be done with the information once it has been collected;



- whether the information will be shared with others in order to accomplish the purpose:
  - If it is to be shared, must inform:
    - with whom it will be shared,
    - why (for what purpose),
    - when and how much of the information will be shared.

This right to know has been codified in the *Act* and for health care providers to respect a patient or client's right to know (and thereby protect privacy), health care providers must obtain *knowledgeable consent* before collecting, using or disclosing an individual's personal health information.

### *Knowledgeable consent*

Knowledgeable consent means that the individual:

- a) understands why his or her information is being (and will be) collected, used or shared, as well as with whom it will be shared;
- b) is aware that his or her consent can be refused or withdrawn; and,
- c) is able to appreciate the reasonably foreseeable consequences of giving, refusing or withdrawing consent.

With knowledgeable consent, the individual feels secure in the notion that his or her personal health information will be given and shared only with those who need to know, and the patient or client is likely more confident in providing accurate and complete health history that is so essential to providing the best care possible.

An individual's right to provide knowledgeable consent before the handling of his or her personal health information is a fundamental cornerstone of the right to privacy.

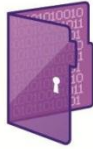


For instance, a patient suffered an injury and will need a knee replacement surgery. At admission to hospital, the patient is asked to sign a form for him to provide consent to receive the care that is related to that injury, i.e., for the surgery and the physiotherapy that will be necessary after the surgery. This is explained to the patient, who can be said to have provided express and knowledgeable consent at the outset that his information will be collected, used and shared with only those directly involved in the treatment at that point. It is reasonable to say that the patient would know that his consent did not extend to those clearly not involved in his care, such as those working in the pediatric ward.

Therefore, in this hospital setting, the patient's consent extends to those health care providers who will be involved in his care which is related to the knee replacement surgery and rehabilitation, despite not knowing exactly who they are. Those would include the employees responsible for the pre-operation arrangements, nurses assisting in the operating room, the surgeon, the anesthesiologist, etc., as well as the physiotherapist to whom the patient will be assigned for therapy related to his knee surgery. All of these health care providers are considered part of the patient's circle of care and can share the patient's personal health information among themselves.

The circle of care, however, would not extend to other nurses or other physiotherapists or physicians in the hospital who were not part of that care. For instance, a nurse on the maternity ward or a physician in oncology, who both know the patient personally but are not involved in the patient's care are not permitted to access the patient's information or records because they are not part of the treatment team. The patient did not consent for them to know his information as they are not linked to the care related to the knee surgery; these health care providers could not rely on the implied consent of the patient simply due to the fact that they too work in that same hospital and they know the patient.

To respect privacy, health care providers must therefore respect the parameters of the individual's knowledgeable consent obtained throughout the course of the individual's care (circle of care), i.e., within the parameters of the individual's ***circle of consent***.



## *Consent in relation to protection of privacy*

Health care providers can protect an individual's privacy at all times by following the simple rule of *NEED TO KNOW*. To render a health care service, providers need to know the information before using all or part of the individual's personal health information, or in other words, they must:

- collect only as much personal health information as they need to know;
- use only as much as they need to know in order to do their tasks;
- share the information only with those who need to know (those authorized to receive it and use it).

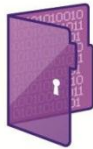
The *Act* explains the types of situations in which health care providers can lawfully rely upon the individual's implied consent.

### **IMPLIED CONSENT, CIRCLE OF CARE, AND CIRCLE OF CONSENT**

First, the *Act* states that implied consent can only exist with the essential element that the consent first obtained is knowledgeable (*as indicated above, only when the individual has understood why, how and with whom the personal health information will be used and shared, and has given consent to its use within those parameters - i.e., within the individual's circle of consent*).

Second, health care providers can only rely on implied consent for a purpose related to the initial knowledgeable consent. In other words, the use or sharing of information must be tied to the purpose for which the individual initially consented in order for the health care provider to rely on implied consent.

Third, if the health care provider relies on implied consent, it must be reasonable to infer, given the circumstances, that the individual's consent is continuing. That is, the health care provider must reasonably believe that the individual's knowledgeable consent would extend to cover the use or sharing in question.



To recap, the health care provider may correctly assume to have the individual's implied consent if all three elements are present:

- 1) knowledgeable consent already exists,
- 2) the use or sharing of the information relates to the purpose for which the knowledgeable consent was originally obtained, AND
- 3) it is reasonable to infer in the circumstances that the consent would *continue* to include the use or sharing in question.

We provide below a scenario that illustrates when it is reasonable to rely upon implied consent.

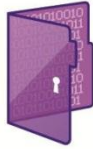
### Scenario

A patient has constant pain in her abdomen and consults her family physician. The family physician orders tests, and the results reveal that the patient has an ulcer but also a high blood cell count. Without discussing the results with the patient, the family physician immediately orders that new tests be performed then sets up a follow up visit with the patient to explain to her what has taken place.

In this case, the patient consulted her family physician in the first place to obtain answers and seek care for an ailment and she consented to the first round of tests in that regard. For his part, the physician is concerned the tests results may show the presence of cancer and given that time is of the essence, he decides to order another series of tests without asking the patient for her consent to do so.

The family physician can be said to have relied on the patient's implied consent to order more tests because he *reasonably believed*, based on the facts before him at that time, to share her information again and make arrangements for more tests, despite the patient not having specifically consented to those additional exams.

The family physician, however, could not have relied on her implied consent to order more tests if, during the first consultation, she had specifically indicated to him that she did not want any additional tests unless she spoke to him first.



As we can see, what is reasonable will depend upon the facts of each case.

Reliance solely upon circle of care without reflection about consent may be problematic. A health care provider should not assume to have the implied consent of the patient or client where the facts show it was not reasonable to make this assumption or to have such a belief, even where this is done solely with the best interest of the patient in mind.

Based on facts that exist at the time and more importantly, their good judgement, health care providers should pause whenever they are uncertain about consent before they share patient information, and the *Act* requires them to proceed in this manner.

It is necessary for physicians to be reasonably sure that patients have been or are informed of the reasons why their personal health information may be used and/or shared before physicians can go ahead and share that information. This ensures that physicians protect patient privacy and respect individuals' *circle of consent*.

## **SUMMARY**

The *Act* protects the privacy of the patient or client in establishing unequivocally that personal health information belongs to the individual -- not to the individual's health care providers. Patients and clients must know and understand why their information is being collected, used, and with whom it will be shared in the health care sector in order for them to understand the situation they find themselves in and before they can give - or refuse consent.

The notion of *circle of care* has not been codified in the *Act*; instead, health care providers must place their reliance upon the knowledgeable consent of the individual and to only reply upon implied consent where the facts demonstrate it is reasonable to believe it exists. Having to respect and apply the rules set out in the *Act* that protect privacy can unmistakably be difficult in the complex day-to-day world of health care.

The suggested best default approach must be to obtain **knowledgeable consent** of the individual both at the outset, and whenever using or sharing the information in a manner that may not have been discussed when the initial consent was obtained. An individual's right to provide knowledgeable consent about the handling of his or her personal health information is a fundamental cornerstone of the right to privacy.



To respect that right, health care providers must respect the parameters of the consent that was obtained from the individual throughout the course of the individual's care, i.e., in respect of the individual's ***circle of consent***.


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