

# KEEPING CURRENT

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## The Privacy Breach Protocol: An Essential Tool for all Senior's Homes

By Lad Kucis

### Overview

Although retirement homes and long-term care homes (collectively referred to as “senior’s homes”) are not legally obligated to maintain a formalized privacy breach protocol, it would be highly advisable for all such organizations to do so. Without implementing a privacy breach protocol, it would be challenging for a senior’s home meet its obligations under the Personal Health Information Protection Act, 2004 (PHIPA), which may lead to being found guilty of a privacy offence and the imposition of a corresponding fine. In addition, a failure to implement a privacy breach protocol could also expose a senior’s home to a heightened risk of additional repercussions, including complaints, investigations, regulatory orders, civil lawsuits and reputational injury.

### Legal Framework

Under PHIPA, all senior’s homes are considered “health information custodians” (HICs). As such, they must take reasonable steps to ensure that all personal health information in their custody or control is protected against theft, loss and unauthorized use and disclosure – and that records of personal health information are protected against unauthorized copying, modification or disposal.

HICs are expected to take immediate action if they detect that a “privacy breach” has occurred. Although the term “privacy breach” is not defined in PHIPA, it includes any situation where a person has contravened or is about to contravene a provision of the statute, including where personal health information in the custody or control of a

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HIC is stolen, lost or used or disclosed without authority. With respect to this item, it is also important to recognize that in light of recent amendments to PHIPA, “viewing” personal health information without authorization (i.e. snooping) is now considered a privacy breach.

In addition to adhering to PHIPA, HICs are also required to follow standards established by the Information Privacy Commissioner (IPC), which is the entity responsible for overseeing compliance with PHIPA. In this regard, it is important to recognize that the IPC strongly recommends that all HICs develop a privacy breach protocol and has identified the four key steps of any such protocol.

## Core Elements of a Privacy Breach Protocol

We will now set out the four key steps of a privacy breach protocol, as identified by the IPC, as well as our own input as to the actions which need to be taken by a senior’s home as part of each step. Given the emergency nature of a privacy breach, these steps need to be taken in quick succession and/or simultaneously, depending on the circumstances.

### Step #1: Immediately Implement the Privacy Breach Protocol

- all staff should be aware of their obligation to notify the HIC as soon as a privacy breach occurs, including which person to notify (staff must receive initial and ongoing education/training regarding this item, as well as what constitutes a privacy breach)

- all relevant staff must be notified of the breach, including the “contact person” under PHIPA, senior management, as well as the privacy officer and IT personnel, if applicable
- retrieve and review the privacy breach protocol
- conduct a preliminary investigation regarding the breach
- legal counsel should be contacted

### Step #2: Stop and Contain the Breach

- identify scope and extent of the breach
- immediate steps should be taken to stop and contain the breach
- retrieve any personal health information that has been disclosed
- determine if any personal health information has been lost
- ensure that no copies of personal health information have been made
- determine whether the breach would allow access to other personal health information
- where appropriate, consider shutting down an electronic system, changing logins/ passwords and restricting access to individuals who may be involved in breach

### Step #3: Notify Person(s) Affected by the Breach

- under PHIPA, a HIC must notify the individual whose personal health information was compromised at the first reasonable opportunity. If the individual is “incapable”, as defined in PHIPA, this notification is to be provided to his/her substitute decision maker (SDM)



- in light of recent changes to PHIPA, a HIC must also advise the individual or his/her SDM, if applicable, that they are entitled to make a complaint to the IPC
- PHIPA does not specify the manner in which the above notifications are to occur. As such, the HIC must determine the manner of notification, depending on the nature/extent of the breach and other circumstances
- although PHIPA does not presently require HICs to notify the IPC about privacy breaches, upcoming regulatory changes will require HICs to do so in certain prescribed circumstances, which have not yet been determined

#### **Step #4: Investigate and Remediate**

- ensure that containment and notification have effectively taken place
- conduct an in-depth internal investigation as to what occurred
- determine whether existing systems and/or policies and procedures need to be modified
- provide appropriate follow-up to affected individual(s)
- conduct additional education and training with staff, in consideration of breach
- prepare a privacy breach report, summarizing all aspects of the incident, including follow-up actions. To facilitate this task, it would also be advisable to use a pre-printed privacy breach log to document all steps taken, as they occur

## Benefits of a Privacy Breach Protocol

In conclusion, we believe that implementing a privacy breach protocol provides a number of significant benefits for a senior's home, including but not limited to the following:

- it makes it much easier for the senior's home to effectively respond to a privacy breach
- it demonstrates a commitment to PHIPA and protecting the personal health information of its residents
- it serves as a learning tool to better understand how the breach occurred and to reduce the risk of a similar breach happening in the future
- it mitigates the extent of the damages created by a breach and better positions the senior's home in terms of responding to a potential complaint, investigation or civil lawsuit.

## About the Author

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