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April 4, 2022

Law Amendments Committee
c/o Office of the Legislative Counsel
Legc.office@novascotia.ca

//via email//

Dear Law Amendments Committee:

Re: *Bill 118 – Personal Health Information Act (amended)*

I write today to contribute to the public debate of *Bill 118, Personal Health Information Act (amended)* (*Bill 118*) as introduced by the Minister of Health and Wellness on March 31, 2022, and passed at second reading on April 1, 2022.

My Office was neither informed nor consulted on *Bill 118* prior to its introduction in the legislature. Last Thursday, we discovered it only by our own diligence in monitoring bills as they are tabled in the house. I want to thank my staff for working all weekend to assist with preparing this submission.

Nevertheless, the drafting of this submission was extremely rushed and not as comprehensive as I would have wished. Our unique oversight role gives us specialized expertise on privacy issues, as well as on provincial and national trends and best practice. Our knowledge can help improve bills brought forward to the legislature. With that in mind, I urge the Committee to send this Bill back to the Minister, with a recommendation to consult with my Office to ensure that Nova Scotian's access and privacy rights are respected and protected.

If the Committee is not willing to take that step, the remainder of this submission sets out recommendations about specific provisions of the Bill.

The Department of Health and Wellness' (DHW) press release[1] about this Bill says that these amendments are meant to ensure the *Personal Health Information Act* (*PHIA)* remains current

[1] Department of Health and Wellness "Amendments to the Personal Health Information Act" (March 31, 2022), online: <https://novascotia.ca/news/release/?id=20220331006>.

and reflects modern practices. The press release also references the findings[2] of the first three-year review of *PHIA* (three-year review). My submission is focused on highlighting where these proposed amendments are inconsistent with modern practices and diverge from the findings of the statutory review.

I identify the following five concerns with Bill 118:

1. **Auditing of records of user activity should be mandatory, not discretionary**

PHIA is currently silent on the practice of auditing records of user activity to detect and investigate privacy breaches. Section 5 of *Bill 118* would give custodians a discretionary authority to do so.

Although *PHIA* is currently silent on the authority of a custodian to audit records of user activity to detect and investigate privacy breaches, in practice, the lack of explicit language has not been problematic. This is because industry standards as well as case law have established that auditing is a mandatory information practice, under s.62(1)(b) of *PHIA*. In other words, it is expected that custodians are auditing when detecting and investigating of privacy breaches.

Most provinces require auditing of digital health information systems to detect and deter unauthorized access to personal health information by relying on provisions like s. 62(1)(b) to ensure reasonable safeguards. A more recent trend is to explicitly mandate audits in standalone statutory provisions and regulations, as is the case in Manitoba[3], Ontario[4], Alberta[5] and the Northwest Territories.[6] There are no provinces or territories who make auditing permissive or discretionary in their statutes or regulations. This is because permissive or discretionary language can be interpreted as meaning auditing is not mandatory.

This proposed amendment spells out a custodian's authority to audit. However, it also could be interpreted as meaning that auditing in the context of privacy breaches is no longer mandatory, because it is phrased as being discretionary. In our view, auditing for privacy breaches should be mandatory. Making auditing discretionary rather than mandatory in Nova Scotia is inconsistent with *PHIA*'s current legislative requirements, legislation in other Canadian provinces, and industry standards for privacy protection.

I urge the Committee to change the word" may" to "shall" in s. 5 of *Bill 118* before it is returned to the House of Assembly. Alternatively, I urge the Committee to remove s. 5 of the Bill, as s. 62(1)(b) of *PHIA* provides a stronger statutory basis for regulatory protection and flexibility than the proposed amendment.

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[2] https://novascotia.ca/dhw/publications/PHIA-Three-Year-Review-Findings.pdf.
[3] *Personal Health Information Regulation*, Man Reg 245/97, s. 4(4) - 4(6) < https://canlii.ca/t/557dw>.
[4] *Personal Health Information Protection Act*, 2004, SO 2004, c 3, Sch A, s. 10.1 <https://canlii.ca/t/552kj>. I would note this provision is not yet in force.
[5] Alberta's auditing requirement applies to their electronic health care record, entitled Netcare. *Alberta Electronic Health Record Regulation*, Alta Reg 118/2010, s.7, <https://canlii.ca/t/533p0>.
[6] *Health Information Regulations*, NWT Reg 089-2015, s. 13.(1)(h) < https://canlii.ca/t/52wz4>.

2. **Missed opportunity to strengthen privacy protections as anticipated by the first three-year review of *PHIA***

My Office made a number of recommendations when it was consulted on the three-year review. Disappointingly, none are addressed in Bill 118. The most significant missing recommendation centers on privacy breach reporting to my Office.

In the event of a privacy breach, *PHIA* currently mandates notification to affected individuals when there is a potential for harm or embarrassment. It does not require notification to the Information and Privacy Commissioner (Commissioner) in such circumstances. It is only when there no potential for harm or embarrassment that *PHIA* requires notification to the Commissioner.

The three-year review concluded:

> The findings support amendment of *PHIA* regarding the notification of breaches to (a) include the Commissioner when individuals are notified of breaches with a real risk of significant harm and (b) bring the Act into alignment with requirements in similar legislation across Canada.[7]

A mandatory requirement for custodians to notify the Commissioner of serious privacy breaches when they occur is standard in similar legislation across Canada. Nova Scotia is now one of only three jurisdictions in Canada that do not have mandatory reporting of health privacy breaches to their Commissioner.[8]

When there is no requirement to notify the Commissioner of serious privacy breaches, my Office does not receive reliable or comprehensive information about how often they occur, nor what their nature is. The lack of mandatory notification to my Office frustrates our ability to fulfill our mandate, which requires us to monitor how privacy provisions are administered and to initiate investigations of compliance.[9] The reporting of privacy breaches is an important accountability tool to keep Nova Scotians' personal health information safe.

I urge the Committee to take advantage of this opportunity to strengthen *PHIA* and bring it into alignment with most other Canadian jurisdictions by making notification of serious privacy breaches to my Office mandatory.

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[7] Department of Health and Wellness, Personal Health Information Act Three Year Review Findings (2018), p.38, online: <https://novascotia.ca/dhw/publications/PHIA-Three-Year-Review-Findings.pdf>.
[8] The other two jurisdictions are British Columbia and Saskatchewan.
[9] *Personal Health Information Act*, SNS 2010, c 41, s.92 (2)(a)(b), <https://canlii.ca/t/52pkj>.

3. The fettering of substitute decision-makers' ability to access the personal health information of the subject individual is problematic

PHIA explicitly states that individuals do not need to give reasons to access their own personal health information.[10] *Bill 118* requires a substitute decision-maker (SDM) to meet a burden of proof that their request for the individual's health information is in the individual's best interest.

While it is of course desirable that an SDM acts in the individual's best interest, another effect of this proposed amendment is that an individual's SDM would now have to provide reasons for requesting access to medical records. By adding this requirement for an SDM, it subjects individuals who rely on them, to an extra hurdle under *PHIA*. Furthermore, determining whether the access request a SDM makes on behalf of the individual is in the individual's best interest is subjective. Custodians may find it challenging to operationalize this threshold and it adds an extra administrative step to the process.

Finally, it is unclear why this amendment was required. It is not related to the three recommendations for legislative change in the three-year review. In fact, it has the opposite effect of what was proposed in the third recommendation for legislative change, which stated that PHIA should be amended to: "...permit substitute decision-makers to exercise any right or power conferred on an individual in circumstances where the substitute decision-maker is authorized to act."[11]

I urge the Committee to review the recommendations for legislative change surrounding SDMs as set out in the three-year review.

4. Rules around the disclosure of personal health information for accreditation purposes need additional clarification and safeguards

Section 3 of *Bill 118* addresses interactions with "authorized persons" conducting audits or accreditation. Section 3(2) of *Bill 118* requires these authorized persons to not disclose any personal health information received through their auditing or accrediting functions, except as required to accomplish the audit or review. It is not apparent to me why or to whom the accrediting body would need to disclose identifiable personal health information.

I urge the Committee to seek additional information from the Minister on what kind of situations would require such a disclosure. It may be advisable to require the consent of the custodian for any further disclosure by the auditor or accreditor.

Lastly, the accrediting body should be required to notify custodians of any privacy breach involving the custodian's personal health information.

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[10] *Personal Health Information Act*, SNS 2010, c 41, s.78 <https://canlii.ca/t/52pkj>.

[11] Department of Health and Wellness, Personal Health Information Act Three Year Review Findings (2018), p.25, online: <https://novascotia.ca/dhw/publications/PHIA-Three-Year-Review-Findings.pdf>.

5. The rules for mandatory five-year reviews of *PHIA* require clarification

Section 7 of *Bill 118* states "Within five years of completing the initial review of this Act, and every five years thereafter, a full or partial review of this Act must be undertaken at the discretion of the Minister." It is unclear to me when the initial review of *PHIA* was completed, given that the Minister's report was generated in 2018, and given that most of the recommended legislative changes have never been introduced.

With the current proposed amendment, the reader is left wondering whether the Minister's discretion includes whether or not to conduct a review at all or whether it is limited to determining if the review will be a full or partial review. To avoid ambiguity, this section of the Bill should better articulate the scope of the Minister's discretion.

In conclusion, *Bill 118* contains proposed amendments that are inconsistent with modern practices and diverge from the recommendations of the three-year review. The amendments I discussed represent a deterioration of the protections provided to Nova Scotians and Bill 118 is a missed an opportunity to strengthen those protections. Nova Scotians deserve modern privacy protections that address digital health care in today's environment.

Yours truly,

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

cc: The Honourable Michelle Thompson, Minister of Health and Wellness