

August 27, 2014

Via e-mail: info@parcnl.ca

ATIPPA Review Committee
Suite C, 83 Thorburn Road
St. John's, NL A1B 3M2

Dear Committee Members:

Re: Review of Access to Information and Protection of Privacy Act

The Canadian Medical Protective Association ("CMPA") welcomes the opportunity to comment upon the *Access to Information and Protection of Privacy Act* ("ATIPPA") and, in particular, the distinct issue of the protection of peer review and quality assurance records pursuant to ATIPPA.

As you may be aware, the CMPA is a not-for-profit mutual defense organization operated for physicians by physicians. It is the principal provider of medical-legal assistance to Canadian physicians, including those who practice in Newfoundland and Labrador. In addition to providing legal representation to its members, the CMPA also provides broader advisory services to its members on a magnitude of medical-legal issues including risk management, quality assurance, research and education. Informing physicians about their legal and ethical obligations with respect to the disclosure of adverse events and participation in quality assurance and peer reviews is an important element of the CMPA's advisory services to its members.

Protection of Quality Assurance Records

The reporting of critical incidents or adverse events to hospital quality assurance or peer review committees is generally part of a much broader initiative aimed at identifying and addressing systemic problems and improving patient safety. The ultimate goal of quality assurance activities is to critically review these incidents and to evaluate the effectiveness of the institution's practices and procedures in order to improve patient safety overall.

It is generally accepted that, in order for quality assurance programs to be successful and effective, physicians and other health professionals must have satisfactory assurances that the reporting and subsequent investigation of such information will not be used or disclosed outside of the quality assurance process (either to patients or to other hospital departments or committees). If physicians and other healthcare providers are not confident that quality

assurance information and documentation will be protected, they may be reticent or even unwilling to participate in the process.

The public policy objective of encouraging healthcare practitioners to participate in quality assurance processes is reflected in legislation that protects quality improvement records from being disclosed in legal proceedings. Such legislation has now been enacted in all Canadian jurisdictions. In Newfoundland and Labrador, the *Evidence Act*, *ATIPPA* and the *Personal Health Information Act* (“*PHIA*”) include provisions to limit access to and disclosure of quality assurance and peer review records.

However, as discussed in further detail below, the CMPA believes that amendments to *ATIPPA* are necessary in order to fully protect these records from disclosure. The CMPA is aware the Healthcare Insurance Reciprocal of Canada (HIROC) is also of the view that such amendments are necessary and has made a similar submission to the Review Committee.

The interaction between *ATIPPA*, *PHIA* and *Evidence Act*

The CMPA appreciates that the *PHIA* now takes precedence over *ATIPPA* with respect to the management of personal health information. That being said, we have identified a potential gap in the protection of peer review and quality assurance records due to the interaction between *ATIPPA*, *PHIA* and the *Evidence Act*.

Subsection 6(1) of *ATIPPA* provides that the *Act* trumps other Acts, such that where there is a conflict between *ATIPPA* and another Act, *ATIPPA* will prevail. Notwithstanding this rule, subsection 6(2) of *ATIPPA* provides that, where access to a record is prohibited or restricted by a provision designated in a regulation, that provision will prevail over *ATIPPA*. Section 8.1 of the *Evidence Act* has been designated in the *Access to Information Regulations* for the purpose of subsection 6(2). However, subsection 8.1(3) of the *Evidence Act* is limited in its protection of peer review and quality assurance documents because it only prohibits the disclosure of such records “in or in connection with a legal proceeding”.

More recently, it has been apparent that the protection afforded in the *Evidence Act* may be insufficient to encourage health professionals to participate in quality assurance activities. For example, the recent decision of the Supreme Court of Newfoundland and Labrador in *Eastern Regional Integrated Health Authority and Association of Registered Nurses of Newfoundland & Labrador* called into question the paramountcy of section 8.1 of the *Evidence Act*.

In order to support patient safety initiatives, there must be reassurances for health professionals that the reporting of adverse events and the ensuing investigation by a quality assurance committee will not be used or disclosed outside of the quality assurance process, either to patients, the public, medical regulatory authorities or during legal proceedings. Accordingly, many jurisdictions have included express provisions in their relevant public sector privacy legislation and/or health specific privacy legislation that permits or requires a hospital to refuse any access to quality assurance records.

Such provisions in no way thwart the legitimate reporting and investigation of adverse events by medical regulatory authorities (Colleges) or the courts. The current legislative framework that governs physicians, which includes mandatory reporting to and broad investigative powers of the College, provides for a thorough protection of patient interests and safety.

In Newfoundland and Labrador, section 58 of the *PHIA* provides that broad protection of quality assurance and peer review documents as it expressly prohibits a custodian from providing access to records created or compiled for the purpose of a quality assurance or peer review committee as defined in subsection 8.1 of the *Evidence Act*.

To ensure full protection of quality assurance and peer review committee records, section 58 of the *PHIA* should also be prescribed under the *Access to Information Regulations* for the purpose of section 6 of *ATIPPA*, so there is no doubt that this section takes precedence over any access rights under *ATIPPA*. In the CMPA's view, such an amendment would strengthen the current protection afforded to peer review and quality assurance records in Newfoundland and Labrador and bolster patient safety initiatives.

The CMPA is grateful for the opportunity to provide comments to the Review Committee in respect of *ATIPPA*. We would be pleased to provide additional comments on any amendments made to *ATIPPA* in respect of the protection of quality assurance and peer review records that the government may prepare following the review process.

Yours sincerely,

A large black rectangular redaction box covering the signature of Hartley S. Stern.

Section 30

Hartley S. Stern, MD, FRCSC, FACS
Executive Director/Chief Executive Officer

HSS/lg