Competing Forces: Retention and Destruction of Personal Health Information in an Electronic World

Elaine Gibson
Schulich School of Law
Dalhousie University
Overview

- Parameters
- Competing theories: Why retention? Why destruction?
- Who decides?
- Overview of laws and policies in Canada
- Digitization of health information - impact
- Theoretical framework
- Suggestions
Parameters

- Personal health information
  - May include de-identified
  - Not anonymized
  - Not aggregate

- Includes tissue samples, blood

- Covering all health professions
Why Retain Information?

- Treatment and care of individual
- Billing
- Quality assurance
- Research
- Public health
- Litigation
- Economic value
- Relatives’ interest in genetic and social background
- Archival significance
Why Destroy Information?

- Space limitations
- Privacy and confidentiality
- ‘Right to be let alone’
- ‘Right to be forgotten’
Sources of Requirements

- Information legislation
- Professions legislation
  - College standards
- Hospitals legislation
- Limitation periods legislation
- Professional organization policies
Information Legislation - PIPEDA

- Commercial purposes only (interpreted as including physicians and other HCPs but not hospitals)

- 4.5.2 – should develop min. and max. retention periods

- 4.5.3 – no longer required to fulfil identified purposes should be destroyed, erased, or made anonymous
  - organizations shall develop guidelines for destruction
Information Legislation - Provincial

Retention

- Public body legislation: At least one year if addressed
- Most legislation requires development of policies
- Primarily re security

Destruction

- BC PIPA and NS PHIA: Must be destroyed or de-identified once purpose met (and, in BC, if not needed for legal or business purposes)
- Quebec: Public bodies must destroy when purposes achieved
- Remainder of jurisdictions: Not addressed or manner of destruction only
Overview – Professions Legislation

- Sometimes omnibus, sometimes profession-specific
- Creates self-governing College
- Empowers the College to establish and maintain standards of practice
- Can be referred to as regulation, standard, by-law, or guideline
Standards of College

Retention (Physicians)
- BC: 16 years plus age of majority
- Newfoundland/Labrador: 10 years or until age 21 or 10 years after date last seen
- Quebec: 5 years
- Sask: 6 years plus 2 years past age of majority or 6 years after date last seen

Destruction (Physicians)
- BC (& most provinces): No requirement other than manner of destruction
- Newfoundland/Labrador: Must be destroyed
- Nova Scotia: Should be destroyed
Hospitals Legislation

**Retention**
- New Brunswick: 6 years or until patient turns 21; electronic or microfilmed copy 30 years
- Ontario: 10 years plus age of majority
- PEI: 20 years plus age of majority; 5 years after death

**Destruction**
- Not addressed or permissive only in most provinces
- Ontario and PEI: must develop destruction policy
- Quebec: Information banks only – must destroy 5 years after stated use ends
Limitation Periods Legislation

- 2 years most basic
- When plaintiff could reasonably have known
- In some jurisdictions flexible
- Clock suspended for minors and persons under disability
- Ultimate limitation (often 30 years)
Guidance from Professional Organizations

- Canadian Medical Association: Defers to Colleges
- Canadian Medical Protective Association:
  - recommends at least 10 years’ retention; for minors 10 years from age of majority
  - once retention period expired, records should be destroyed in manner that maintains confidentiality
  - remainder is re manner of destruction
Digitization of Health Information

- Space limitations diminish
- Info often with third party vendor
- Multiple copies exist
- Risks of breach involving multiple patients intensify
- Destruction extremely difficult
- Value highly enhanced
The Challenge:

Balancing Interests in Retention and Destruction
Theoretical Framework

- Liberalism
- Communitarianism
- Relational Theory
- Privacy as a Social Good
Proposed Directions