### Unpacking Consent Professional & Regulatory Obligations for Dietetic Practice

### MODULE 1 Consent for the Collection, Use and Disclosure of Personal Health Information

2017



### PUBLIC PROTECTION



#### Consent is a fundamental right



College of Dietitians of Ontario

### Professional Practice Standard



Standards of Consent to Treatment and for the Collection, Use and Disclosure of Personal Health Information





Section I: Why do RDs need consent?

Section II: Health Information Custodians and Obligations for Handling Personal Health Information

Section III: Obtaining Knowledgeable Consent

Section IV: Express vs. Implied Consent

Section V: Scenarios



### Section I

## Why do RDs need consent?





# Safe, ethical and competent dietetic practice

## **Professional Mindset**







### Personal Health Information Protection Act, 2004 (PHIPA)

### Professional Misconduct Regulation under *Dietetics* Act, 1991



## **Professional Misconduct**

12. Giving information about a client to a person other than the client or his or her authorized representative except with the consent of the client or his or her authorized representative or as required or allowed by law.



### **Professional Misconduct**

5. Failing to maintain a standard of practice of the profession.

22. Failing to keep records as required.







## Section II

## Health Information Custodians Obligations for Handling Personal Health Information





### Personal Health Information Protection Act, 2004 (PHIPA)

- Sets requirements Health Information Custodians (HICs) & their agents
- HIC are individual health care practitioners or a person who operates a health care facility listed under PHIPA who have custody or control of personal health information



### Personal Health Information Protection Act, 2004 (PHIPA)

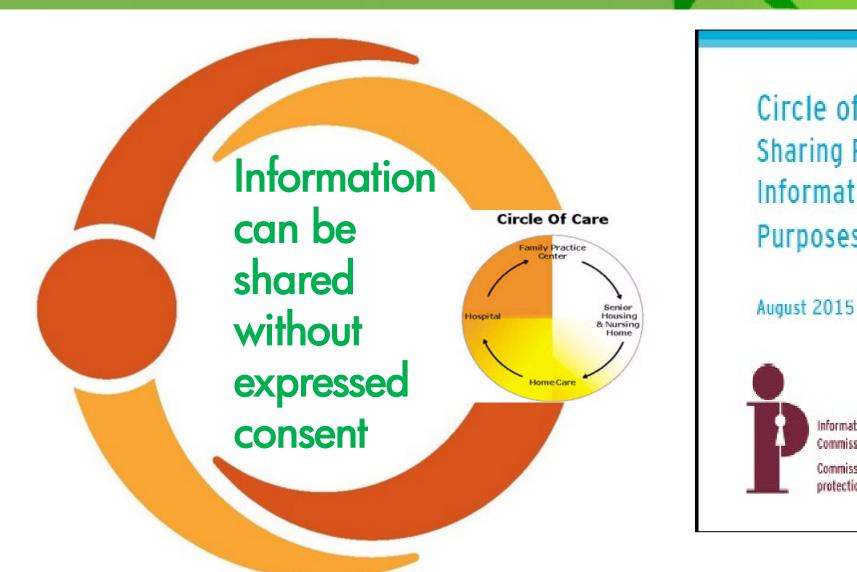
HICs are responsible for:

- Obtaining knowledgeable consent
- Retaining and securely destroying personal health information









Circle of Care Sharing Personal Health Information for Health-Care Purposes





### Six Conditions for Circle of Care

- 1. HIC **permitted to rely on** assumed implied consent (e.g. health care practitioners, CCACs or persons who operate hospitals and long-term care homes).
- 2. PHI collected, used or disclosed was **received** from the client, SDM or another HIC.
- 3. HIC received the PHI that is being collected, used or disclosed for the **purpose of providing health care** to client.
- 4. Purpose of the collection, use or disclosure of PHI by HIC for **providing health care** to client.
- 5. Disclosure of PHI by a HIC must be to another HIC (or authorized agent).
- 6. HIC that receives PHI not aware that client/SDM has **withheld** or withdrawn consent to collection, use and/or disclosure.



Individual Fines for looking = \$100,000 Corporation Fines for looking = \$500,000



# Ensure clients knowledgeably consent to share personal health electronically



## **Disclosure Without Consent**

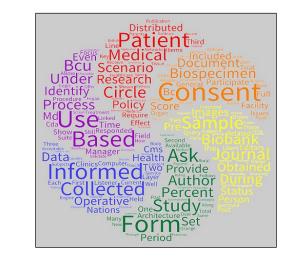
Permitted under PHIPA for:

- Confirmation that an individual is a client
- Determining eligibility for services
- Audits/accreditations
- To eliminate or reduce a significant risk of serious bodily harm
- Compliance with a summons for a court proceeding
- Disclosure to the College



# Section III

# **Obtaining Knowledgeable Consent**





# Process for Obtaining Knowledgeable Consent





# **Knowledgeable Consent Process**

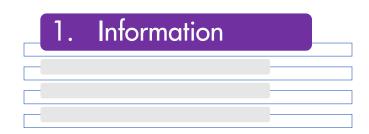
### 1. Information

### 2. Client Understanding

3. Respect Choice & Decision

4. Collaborative Processes



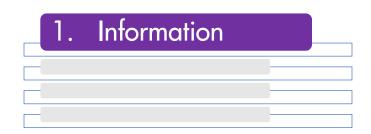


# **Required Elements of Consent**

Consent must:

- 1. Be given by the client or substitute decision-maker
- 2. Relate to the information collected or shared
- 3. Be knowledgeable
- 4. Be voluntary, not be obtained through deception or coercion





# **Knowledgeable Consent**

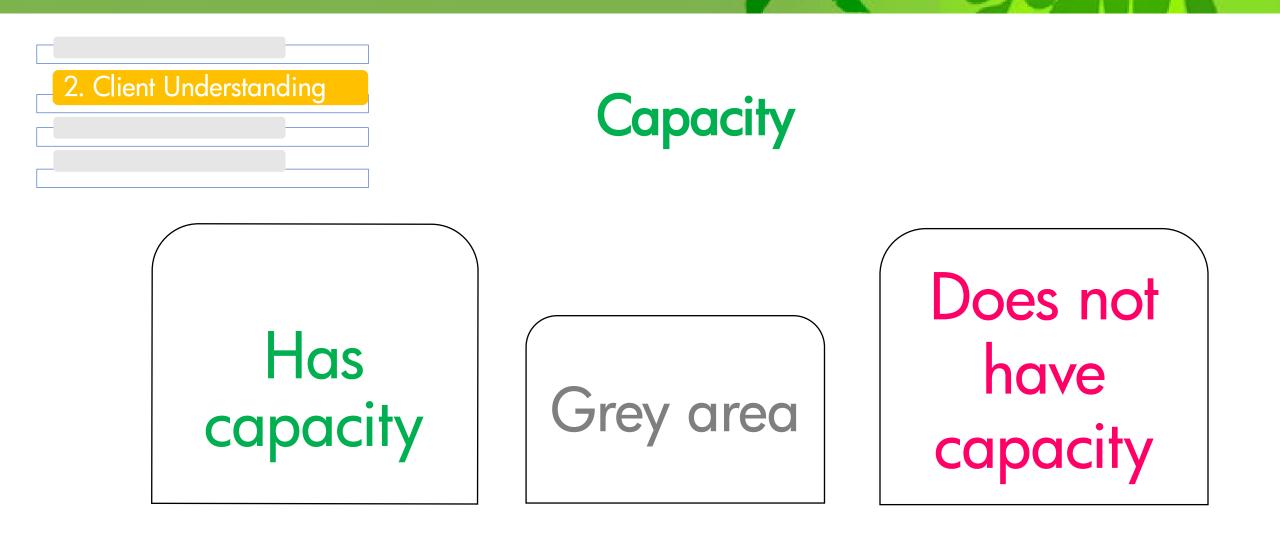
- 1. The purposes of the collection, use or disclosure are clearly communicated to the client; and
- 2. The client knows that they may give or withhold consent.

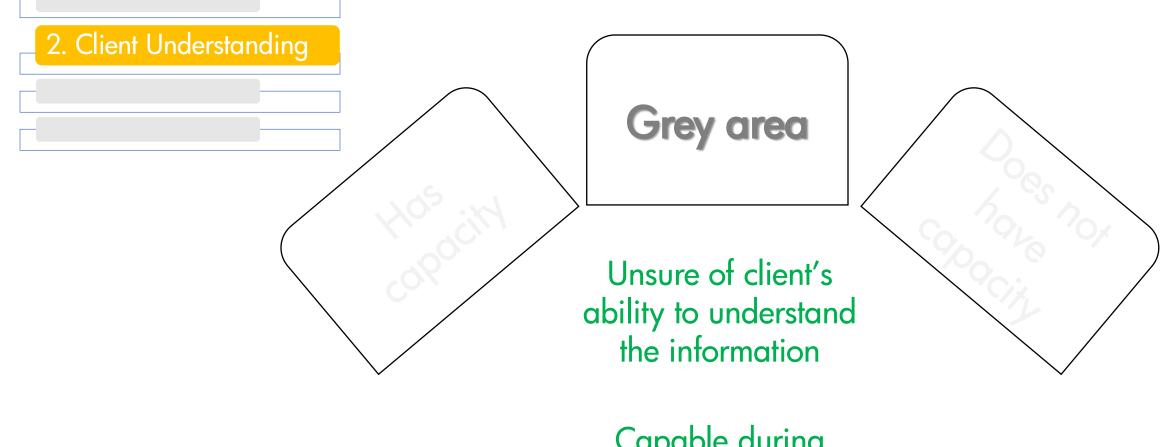


## **Informed Consent Process**



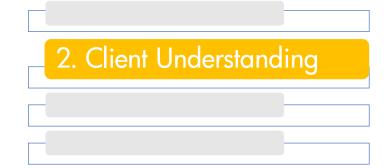






Capable during some periods and not at others





# **Definition of Capacity**

A person is able to understand the information that is relevant and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.





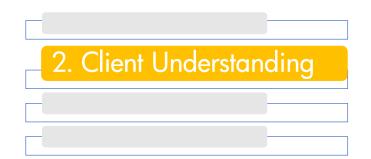
# Able to Understand

Refers to a person's cognitive abilities to factually grasp and retain information.

A person must demonstrate understanding through communication.

(Capacity Assessment Office, Ministry of the Attorney General of Ontario)





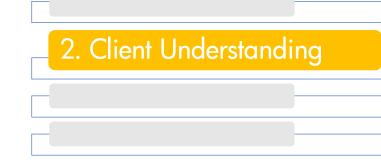


Refers to the ability to attach personal meaning to the facts in a given situation.

Appreciation focuses on the reasoning process.

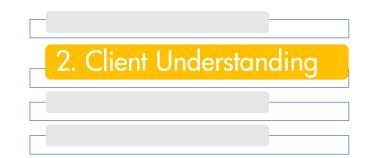
(Capacity Assessment Office, Ministry of the Attorney General of Ontario)





Consent is based on capacity

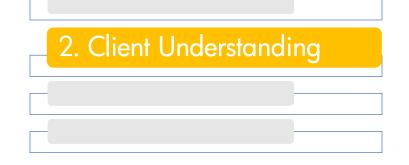




# Who Determines Capacity?

- RD are responsible for determining a client's capacity to provide knowledgeable consent related to nutrition care
- Based on observations, not assumptions, generalizations or stereotypes
- RDs are not responsible for assessing general capacity
- Refer to another health care practitioner when overall capacity is in question



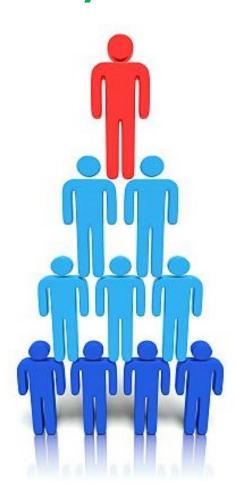


If a client is not capable, a substitute decisionmaker must decide





### Who May Give Consent





Involve the Client

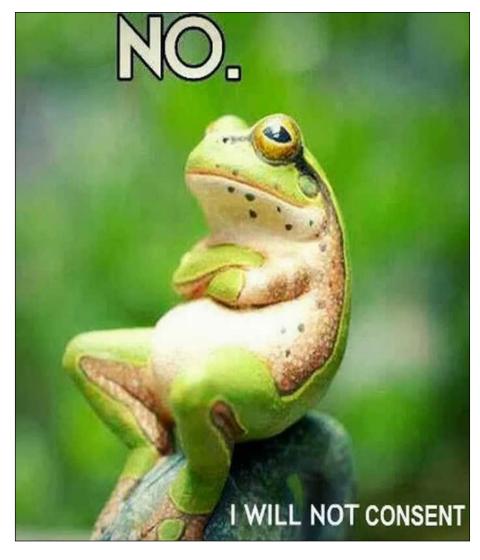
## **Informed Consent Process**













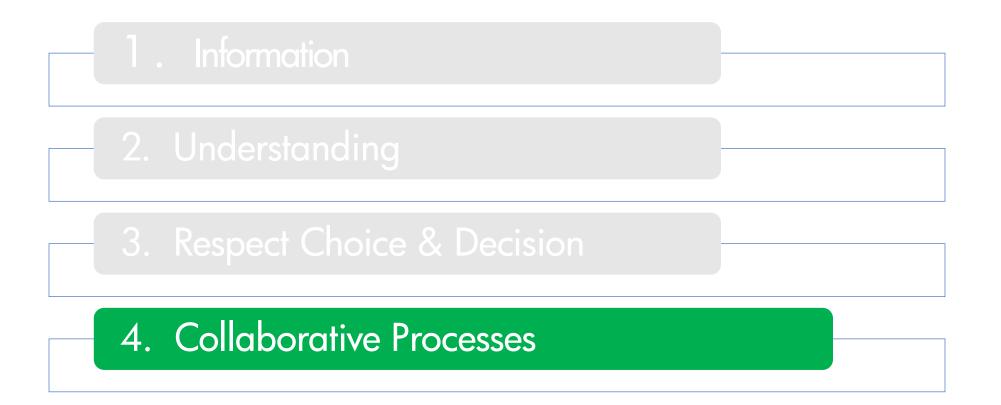
3. Respect Client Decisions

## Respect knowledgeable refusal or withdrawal

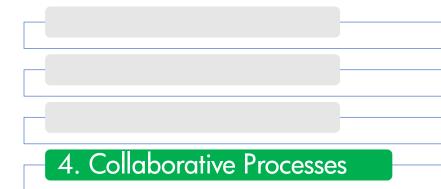




#### **Informed Consent Process**









One health care team member may obtain consent for others on the team for the collection, use and disclosure of personal health information



#### Section IV

## **Express vs. Implied Consent**





# **Knowledgeable Consent**









#### **Documenting Consent**

- Document express consent and the refusal or withdrawal of consent
- Exercise professional judgment to determine when implied consent should be documented













# In Summary:

- Consent is required by law:
  - ✓ Personal Health Information Protection Act, 2004
  - ✓ Professional Misconduct Regulation, under *Dietetics Act, 1991*
- Health Information Custodians are responsible for protecting the privacy of client health information.
- Knowledgeable consent is at the heart of client-centred care.
- Consent can be express or implied and must always be knowledgeable.



# Section V Scenarios

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- 1. Custodial vs. Access Parent
- 2. <u>Circle of Care</u>
- 3. <u>Should You Look?</u>
- 4. Chart Reviews
- 5. Disclosing Info to Children's Aid Society (CAS)
- 6. Electronic Communication
- 7. <u>Right to Refuse vs. Capacity</u>





## Scenario 1 – Custodial vs. Access Parent

Robert wants you to see his six year old daughter Kate right away who is with him for the day and has to be returned to her mother in the morning. He is concerned that Kate is not being properly fed by her mother and wants you to do a nutrition assessment. Robert is not the custodial parent.

How should you as the RD proceed?



## Scenario 1 – Considerations

- Determine who is the custodial parent
- Custodial parent is <u>ranked higher</u> than access parent
- RD must obtain consent from Kate's mother
- Good practice to know who the SDM is for children
- Mindful of mandatory reporting obligations





# Scenario 2 – Circle of Care

A client is transferred from hospital to you as the RD in long-term care. You need more information, however the client is not capable and the substitute decision-maker is currently unavailable. You notice that a former classmate is the RD who treated the client at the hospital. You call your classmate to see if they can provide a more detailed history.

Has the RD done anything wrong?



#### Scenario 2 – Considerations

- Circle of Care applies if all six conditions are met
- Express consent is not required
- Only barred if client's substitute decision-maker refused
- Circle of care can cross institutional boundaries
- Refer to organizational policies





## Scenario 3 – Should You Look?

Beyoncé is in town filming her latest video and is suddenly rushed to hospital. This news has sent mainstream and social media into a frenzy. Liz, an RD who works in the surgery unit of the hospital where Beyoncé was taken, gets word of this VIP. Being a huge fan, Liz looks up Beyoncé's chart in the hospital's electronic medical record system.

Has Liz done anything wrong?



## Scenario 3 – Considerations

- RDs should only view client/prospective client records when needed for their practice
- Audit systems in place to track access
- Fines for inappropriately viewing under PHIPA
- Inappropriate access is professional misconduct
- Good practice to record purpose for accessing a record in the client health record





# Scenario 4 – Chart Reviews

An unconscious client is admitted to a hospital unit and the RD has been asked to assess for nutrition intervention. Upon visiting the client, there is no family/SDM present in the room.

Does the RD require consent to conduct a chart review on this client?



#### Scenario 4 – Considerations

- RDs can rely on implied consent to conduct chart reviews
- Permitted under PHIPA
- Referred to as circle of care
- Inform clients/SDMs, as necessary





# Scenario 5 – Disclosing Information to CAS

An RD who works in a Family Health Team receives a call from a Children's Aid Society (CAS) requesting nutrition assessment and care plan info about a client for an investigation they are conducting. The client's MD initiated the report on suspected child abuse.

Does the RD require consent to disclose such information?



## Scenario 5 – Considerations

- PHIPA permits the disclosure to CAS
- RDs must follow organizational policies
- Ensure they have authority as agent
- Document the disclosure in client health record
- Use discretion when information is sensitive
- Indicate if information is kept elsewhere to ensure access





## Scenario 6 – Electronic Communication

An RD has been contacted by a client through email asking specific questions about her nutrition care plan. The client also asks a question on the RD's professional Facebook page.

What are the RD's obligations for obtaining consent to communicate electronically with this client?



#### Scenario 6 – Considerations

- Often contain personal health information
- RDs must obtain knowledgeable consent and explain the risks
- Take the conversation offline as warranted
- Communicate any safeguards





# Scenario 7 – Right to Refuse

You are an RD working in a diabetes education centre (DEC). One of your poorly-glycemic-controlled adult clients recently informed you that he stopped taking his insulin but doesn't want you to tell the DEC's endocrinologist. The client's progress is up for review at your next team meeting.

What do you do?



#### Scenario 7 – Considerations

- Clients/SDMs have the right to refuse disclosure
- RD should explain risks and consequences
- Sharing of information under circle of care would not apply
- Clarify the extent of refusal and respect client's wishes
- Keep information in lock-box
- Notify MD of client's lock-box request, as applicable
- Clients should be well-informed of lock-box protocol
- Refer to IPC Fact Sheet #8



#### Resources

- <u>Jurisprudence Handbook for Dietitians in Ontario</u>. (2015). Chapter 6 & 7
- résumé newsletter articles:
  - Sharing of Personal Information Within the Circle of Care (2016)
  - What is the Lock-Box Provision? (2006)
  - <u>Documenting Consent</u> (2009)
  - Cultural Competence & Informed Consent (2013)
  - Are You a Health Information Custodian? (2013)
  - <u>Privacy Toolkit (</u>2015)
  - Pause Before You Post (2013)
  - Privacy Commissioner's Email Fact Sheet (2016)
  - Privacy Commissioner's Yes You Can Share Info with CAS (2016)



#### References

- Personal Health Information Protection Act, 2004. https://www.ontario.ca/laws/statute/04p03?search=personal+health+information+ protection+act
- Dietetics Act, 1991, Professional Misconduct Regulation. https://www.ontario.ca/laws/regulation/930680
- College of Dietitians of Ontario. (2017). Standards of Consent. <u>https://www.collegeofdietitians.org/Resources/Standards/NormesConsentmentFevrier2016.aspx</u>
- College of Dietitians of Ontario. (2017). *Standards for Record Keeping*.
  <u>https://www.collegeofdietitians.org/Resources/Standards/Record-Keeping.aspx</u>
- Capacity Assessment Office, Ministry of the Attorney General of Ontario.
  <a href="https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php">https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php</a>





Please feel free to contact the College's Practice Advisory Service:

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