

Investigation Process: Access complaints

Section 69 of the *Personal Health Information Privacy and Access Act*

Summary and purpose

The purpose of the Commissioner's authority to accept and investigate complaints about how a custodian has handled an applicant's access request for his or her own personal health information is to provide for an independent review and resolution of complaints made in respect to personal health information under the *Act*.

"Custodian" is defined in s. 1 of the *Act* as "an individual or organization that collects, maintains or uses personal health information for the purpose of providing or assisting in the provision of health care or treatment or the planning and management of the health care system or delivering a government program or service". This means the *Act* applies to health care providers in both the public and private sectors in New Brunswick.

The *Act* is premised on the principle that personal health information belongs to the individual, rather than the health care provider ("custodians" under the *Act*), and presumes that people will be granted access to their own personal health information held by custodians upon request. Under the *Act*, custodians may only refuse to grant a person access to his or her own personal health information in the limited circumstances set out in s. 14.

If a person is not satisfied with a decision, act or omission of a custodian in relation to his or her access request, including a failure to respond to an access request in a timely fashion, he or she can make a complaint with our Office asking the Commissioner to investigate.

Complaints to our Office must be made in writing and filed with our Office within 60 days after a person receives notice of the custodian's decision or the date of the custodian's act or omission with respect to the access request, as the case may be. The Commissioner may allow a longer period for filing a complaint in appropriate circumstances.

If the custodian fails to respond to an access request within its time limit to do so, a complaint must be filed with our Office within 120 days after the access request was made to the custodian.

Investigation process

The Commissioner's powers to address access complaints are found in s. 69 of the *Act*:

69(1) On receiving a complaint the Commissioner shall, in accordance with this Act and the power, authority, privileges, rights and duties vested in the Commissioner under the *Right to Information and Protection of Privacy Act*, investigate the matter referred to the Commissioner or shall take steps to resolve the complaint informally under subsection (2).

69(2) The Commissioner may take any steps the Commissioner considers appropriate to resolve a complaint informally to the satisfaction of the parties in a manner consistent with the purposes of the Act.

69(3) If the Commissioner cannot resolve a complaint within 45 days after the commencement of the informal resolution process referred to in subsection (2), the Commissioner shall review the decision of the custodian and shall prepare the report referred to in section 73.

Upon receipt of an access complaint, we will first review the information provided to verify whether we have jurisdiction to investigate the complaint (i.e., that the complaint involves a custodian under the *Act*), whether the complaint documentation is complete, and whether the complaint was made to our Office in a timely fashion.

Once we have determined our authority to investigate the complaint, we will send a copy of the access complaint to the custodian in question. At that time, we will also ask the custodian to provide us with a response to the complaint, which may include asking for explanations as to why access to certain information was refused and what steps the custodian took to locate the relevant information. As a general rule, we do not ask custodians to submit copies of personal health information for our review during this process, unless we determine it is necessary to do so under the circumstances.

Informal resolution

Our Office will take any steps we consider appropriate to informally resolve the complaint through discussions with both the custodian and the person who filed the complaint. The informal resolution process begins once we have received the custodian's response to our notice of complaint, following which we have 45 days to resolve the complaint informally.

During the informal resolution process, our goal is to ensure that the person who filed the complaint receives all of the requested personal health information, or, in the event that the custodian could lawfully refuse access to some or all of the personal health information under s. 14 of the *Act*, that helpful explanations as to why are provided with a view to resolve the complaint.

If, based on our review and discussions with the custodian and the person who filed the complaint, both parties to the complaint are satisfied with the informal resolution, the matter is successfully resolved and we will close our file.

If not informally resolved, matter is remitted to the Commissioner

If the complaint is not informally resolved within 45 days from the start of the informal resolution process, the matter will be remitted to the Commissioner for final disposition. The Commissioner will review the matter with a view to determine if a formal investigation is merited or whether it would be appropriate to refuse or cease to investigate under s. 70 of the *Act*. For example, the Commissioner may refuse to or cease to investigate a complaint if, having regard to all the circumstances of the case, further investigation is unnecessary (which will often be the case where our Office is satisfied that the custodian has responded adequately to the complaint through the informal resolution process).

If the Commissioner decides to proceed with a formal investigation, the Commissioner will review the matter and allow the parties to the complaint, as well as any other person the Commissioner considers appropriate, to make representations. On completing an investigation, the Commissioner will prepare a report with the Commissioner's findings and may recommend to the custodian:

- to grant in whole or part the request for personal health information, or
- to reply to the request or deny the request.

The Commissioner's investigation is to be completed and a report made under s. 73 of the *Act* within 90 days after a complaint is filed with our Office, although the Commissioner has the authority to extend the time limit to do so of his or her own accord so long as the Commissioner notifies the parties and anyone who has made representations of the anticipated date for providing the report.

Upon completion, the Commissioner must provide a copy of the report to both the person who filed the complaint and the custodian.

Complying with the recommendation

If the Commissioner's report contains a recommendation to the custodian, the custodian must decide whether it will accept the Commissioner's recommendation or not and notify the person who made the complaint of its decision, with a copy to our Office.

If the custodian accepts the recommendation, the custodian shall either comply with the recommendation or make another decision that the custodian considers appropriate, within 15 days after receiving the Commissioner's report.

If the custodian decides not to accept the Commissioner's recommendation, the person who made the complaint has the right to appeal the matter to a judge of the Court of Queen's Bench under s. 75 of the *Act* and in accordance with the Regulations under the *Act*.

If the custodian fails to notify the individual of its decision within 15 days after making his or her decision, the failure is to be treated as a decision not to accept the Commissioner's recommendation, thus triggering the appeal rights under s. 75 of the *Act*.

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