

THE REVIEW OFFICER, REVIEWS AND MEDIATION

THE PRIVACY REVIEW OFFICER

The *Personal Health Information Act* defines the “Review Officer” as “the Privacy Review Officer under the Privacy Review Officer Act” (s. 3(z)). In 2009, the *Privacy Review Officer Act* was proclaimed providing for independent oversight of privacy complaints for provincial public bodies subject to the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. Prior to 2009, an individual would not be guaranteed the ability to request a privacy review, as there was no right to make a complaint related to privacy matters under *FOIPOP*.

In September 2009, the *FOIPOP* Review Officer was appointed as the Privacy Review Officer under the *Privacy Review Officer Act*. The appointee to this position will also serve as the Review Officer for *PHIA*.

Prior to *PHIA* coming into force, individuals wishing to request a privacy review in relation to the actions of a health professional or health organization subject to the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)* would lodge their complaint with the federal Officer of the Privacy Commissioner of Canada. Since *PHIA* came into force on June 1st, 2013, individuals with a privacy complaint will have to determine which oversight body – federal or provincial – would be appropriate to review their complaint. Once Nova Scotia receives an order from Industry Canada that *PHIA* has been declared “*substantially similar*” to *PIPEDA*, all complaints would be directed to the provincial Review Officer.¹

REVIEWS UNDER PHIA

There are two streams of review under *PHIA*:

1. reviews under the privacy provisions of *PHIA* (sections 11 – 70); and
2. reviews under the access and correction provisions of *PHIA* (sections 71 – 90).

¹ See Chapter 2: *PHIA* and *PIPEDA*, page 2 for information on “*substantially similar*”.

If an individual feels that a custodian has contravened a provision of *PHIA* or the regulations, or the custodian has refused an individual access to a record or correction of the record as requested, the individual may ask the Review Officer to conduct a review (section 91).

PRIVACY REVIEWS UNDER *PHIA*

A privacy review by the Review Officer can be initiated in three ways:

1. the Review Officer initiates an investigation. This may only be undertaken where the Review Officer has reasonable grounds to believe that a custodian has contravened or is about to contravene the privacy provisions of the *Act*, and the subject matter of the review relates to the contravention (section 92(b));

EXAMPLE

The Review Officer reads about a significant health information privacy breach at a local hospital. The article indicates that the hospital did not notify the individuals affected by the breach, and no one has notified the Review Officer. Under the Review Officer's authority in section 92(b) the Review Officer can initiate an investigation.

2. an individual who receives a decision from a custodian under the custodian's complaints process is not satisfied with the decision may ask for a review by the Review Officer (section 94(1)); or

EXAMPLE

Katarina has noticed that Elizabeth, her family physician, throws improperly completed prescriptions in the garbage, instead of using a secure shredding device. She has made a complaint to her physician (who is the designated privacy contact person), but was assured that all garbage is taken directly to an incinerator.

Katarina is not satisfied with the decision, and has requested that the Review Officer undertake a review.

3. a custodian fails to follow the response timelines in the custodian's own complaints policy, resulting in a deemed refusal to respond to the complaint (section 94(3)).

EXAMPLE

Lexie submitted a request for correction to her personal health record in the custody and control of Elise, her dentist, on January 4th. By April 5th, Elise had yet to respond within the 60 day time period outlined in her Complaints Policy. In this case, Lexie could make a request for a review to the Review Officer.

REVIEW OFFICER INITIATES A REVIEW

Pursuant to section 92(1)(b), the Review Officer may initiate an investigation if there are reasonable grounds to believe:

- that a custodian has contravened a privacy provision of the *Act*; or
- that a custodian is about to contravene a privacy provision of the *Act* (see below for example).

The subject-matter of the review must relate to the contravention of the privacy provision.

This authority under the *Act* includes both past contraventions and contraventions which are about to occur. Past contraventions may include a dentist disposing of patient records in regular garbage or a nursing home selling its resident lists to a commercial enterprise.

Contraventions which are about to occur may include a hospital planning to implement an electronic patient information system with no password requirements. In circumstances like this, it is important for the Review Officer to have the authority to investigate the alleged contravention before it occurs to prevent privacy breaches which could result from the use of the system.

Where the Review Officer initiates an investigation under section 92(2)(b), the process for other reviews should be followed (see below).

AN INDIVIDUAL REQUESTS A REVIEW

An individual may request a review once a custodian has made a decision in respect of a privacy complaint, or has failed to respond to the complaint within its own timelines.

At that point, the individual must file a written request to the Review Officer within:

- a) sixty days of being notified of the decision of the custodian; or
- b) a longer period determined by the Review Officer (section 94(1)(1)).

CUSTODIAN FAILS TO RESPOND TO A COMPLAINT

Pursuant to section 94(3), if a custodian receives a complaint and fails to follow the response timelines in the custodian's own complaints policy, the result is a deemed refusal to respond to the complaint. This would be considered a decision of the custodian against which the individual would be entitled to request a review.

NOTICE OF REVIEW

For all types of reviews outlined above, the Review Officer shall immediately give a copy of the request to the custodian concerned and to any other person that the Review Officer considers appropriate under section 94(4).

REVIEW OFFICER'S DISCRETION NOT TO REVIEW: PRIVACY

Pursuant to section 95, for reviews requested by the individual or where the custodian has failed to respond to a complaint, the Review Officer may decide not to review a privacy complaint for whatever reason the Review Officer reasonably considers appropriate, including if:

- the custodian has responded adequately to the individual's concerns;
- the concerns have been or could be more appropriately dealt with by means of a procedure other than a request for a review;
- the length of time that has elapsed between the date when the subject-matter of the review arose and the date the review was requested is such that a review would likely result in undue prejudice to any person;

***Note:** "Undue prejudice" would include prejudice to the custodian, who, in following their retention and destruction policy, may not have the information available to respond to the complaint or review.*

- the person requesting a review does not have a sufficient personal interest in the subject-matter of the review;

- the request for a review is ‘frivolous or vexatious’²; or
- the request for review is part of a pattern of conduct that amounts to an abuse of the right of review.

If the Review Officer decides not to conduct a review for any of the above reasons, the Review Officer shall give written notice to the custodian and any other person the Review Officer considers appropriate (section 95(2)).

ACCESS AND CORRECTION REVIEWS UNDER PHIA

The requirements and process for an individual to request access to and correction of their records are set out in Chapter 6: *Access to and Correction of Personal Health Information*.

If an individual is not satisfied with a custodian’s decision on an access or correction request, the individual may request a review by the Review Officer. The individual must file a written request to the Review Officer within:

- sixty days after being notified of the decision of the custodian; or
- a longer period determined by the Review Officer (section 94(1)).

REVIEW OFFICER’S DISCRETION NOT TO REVIEW: ACCESS AND CORRECTION

Pursuant to section 95, the Review Officer may decide not to review a privacy complaint for whatever reason the Review Officer reasonably considers appropriate, including if:

- the custodian has responded adequately to the individual’s concerns;
- the concerns have been or could be more appropriately dealt with by means of a procedure other than a request for a review;
- the length of time that has elapsed between the date when the subject-matter of the review arose and the date the review was requested is such that a review would likely result in undue prejudice to any person;

² See Chapter 6: *Access to and Correct of Personal Health Information*, page 2 for more information on “frivolous or vexatious” requests.

- the person requesting a review does not have a sufficient personal interest in the subject-matter of the review;
- the request for a review is “frivolous or vexatious”,³ or
- the request for review is part of a pattern of conduct that amounts to an abuse of the right of review.

If the Review Officer decides not to conduct a review for any of the above reasons, the Review Officer shall give written notice to the custodian and any other person the Review Officer considers appropriate (section 95(2))

MEDIATION

When an individual makes a request for a review relating to a complaint about a custodian’s privacy practices or a response to an access or correction request, the Review Officer may try to settle the matter through mediation. To proceed, mediation would require the consent and participation of both the individual and the custodian.

If the mediation proceeds, the Review Officer has 30 days from the date the request is received by the Review Office to effect a settlement. If the matter is not settled within 30 days, the matter shall proceed to review.

Personal Health Information Act Regulation

Mediation

9 (1) Mediation under subsection 96(1) of the Act must be agreed to by both the individual whose personal health information is the subject of the review and the custodian.

(2) The 30-day period referred to in subsection 96(2) of the Act begins on the date on which the Review Officer contacts the applicant and the custodian to initiate mediation.

(3) The Review Officer must remain neutral and impartial during the mediation process.

(4) If mediation is not successful, the documents that were produced and discussions that took place during the mediation process must not form part of the records of any ongoing review.

See www.novascotia.ca/DHW/PHIA for the official text of the regulation

³ See Chapter 6: *Access to and Correct of Personal Health Information*, page 4 for more information on “frivolous or vexatious” requests.

REVIEWS: GENERAL REQUIREMENTS

The following requirements apply to both reviews of the custodian's compliance with the privacy provisions of *PHIA* and reviews related to the access and correction provisions.

REPRESENTATIONS TO A REVIEW

The following are entitled to make representations to the Review Officer:

- the individual who applies for the review;
- the custodian whose decision or action is the subject of the review; and
- any other person the Review Officer considers appropriate.

The Review Officer may decide whether the representations are to be made orally or in writing, and who may be present at a review or have access to or comment on representations made by another person.

REVIEW OF RECORDS AND INSPECTION OF PREMISES

Pursuant to section 99, the Review Officer may require to be produced and examine any record relevant to the matter that is in the custody or control of the custodian. The exception to this is where documents are protected by solicitor-client privilege.

Solicitor-client privilege applies to communications between a lawyer and client for the purpose of legal advice.⁴ Legal counsel for the custodian should review all documents that have the potential to fall under this exception before records are released to the Review Officer.

If a custodian does not comply with an order to produce documents or make premises available for inspection, the Review Officer may apply to the Supreme Court of Nova Scotia to order the custodian to do so (sections 99(2) – (5)).

REVIEW OFFICER'S REPORT

Upon completing a review, the Review Officer shall write a report with recommendations and the reasons for the recommendations. A copy of the report shall be sent to the custodian and to the individual whose information was the subject of the review.

⁴ *Frequently Asked Questions about Solicitor-Client Privilege and Confidentiality* The Canadian Bar Association Ethics and Professional Responsibility Committee November 2010.

If the Review Officer has requested representations from a third party pursuant to section 98(1)(c), the Review Officer may send a copy of the report to the third party if the report has been de-identified (section 100(2)).

If the Review Officer initiated the review and a class of persons is the subject of review, the Review Officer may make the report available to the public in lieu of notice. For example, if the Review Officer initiated the review of an electronic information system which holds health information on thousands of patients, the Review Officer may make the report public. In practice, all reports of the Review Officer are published on the Review Office website at <http://www.foipop.ns.ca/>.

CUSTODIAN'S RESPONSE TO REVIEW OFFICER'S REPORT

Pursuant to section 101(1), within 30 days of receiving a report of the Review Officer, the custodian shall:

- a) make a decision whether or not to follow, in whole or in part, the recommendation of the Review Officer; and
- b) give written notice of the custodian's decision to the Review Officer and to the individuals who were sent a copy of the Review Officer's report.

If the custodian decides not to follow the recommendation of the Review Officer, the custodian shall contact in writing any person who had been sent a copy of the Review Officer's report, informing them of the custodian's decision and the right of the "applicant" to appeal. Under *PHIA*, only the individual whose information was the subject of the review has the right to appeal.

APPEALS

APPLICANT'S APPEAL TO THE SUPREME COURT OF NOVA SCOTIA

Pursuant to section 102, an applicant may appeal the custodian's decision to the Supreme Court of Nova Scotia. The applicant is required to give notice to the custodian. The Review Officer is not a party to the appeal.

The Supreme Court of Nova Scotia may determine the matter "*de novo*;" this means that the Court may choose to hear the appeal "anew" or from the beginning. If the Court chooses to do this, the Court does not have to rely only on the information contained in the complaint or review. The Court may examine any record in the custody or control of the custodian



notwithstanding any other *Act* or any privilege that is available at law. This means that the Court may examine records including, but not limited to, records subject to solicitor-client privilege.

The Supreme Court shall take every reasonable precaution including, where appropriate:

- a) receiving representations *ex parte*. This means the Court may choose to hear a presentation at the request of or for the benefit of one party to the appeal, without the presence of the other party.
- b) conducting hearings *in camera*. This means the hearing may be held in the judges' chambers without spectators or jurors.

Pursuant to section 103(4), the Court may disclose to the Minister of Justice or to the Attorney General of Canada information that may relate to the commission of an offence.

ORDER OF THE SUPREME COURT OF NOVA SCOTIA

Where the Supreme Court determines that the custodian has contravened the *Act* or is not authorized to refuse to give access to or correct a record, the Court shall make any order it considers appropriate, including ordering that the custodian provide the individual with access to the record.