

ACCESS TO AND CORRECTION OF PERSONAL HEALTH INFORMATION

ACCESS TO PERSONAL HEALTH INFORMATION

The general principle under *PHIA* is that an individual has the right to access a record of personal health information about him/herself that is in the custody or under the control of a custodian (section 71). This provision is consistent with the long-standing principle stated by the Supreme Court of Canada that a patient is entitled, upon request, to examine and copy all information in their medical records.¹ Under *PHIA*, this includes the right to request to examine a record or ask for a copy of a record (section 75).

REFUSAL TO GRANT ACCESS TO PERSONAL HEALTH INFORMATION

There are exceptions to the individual's right of access. Under section 72(1); a custodian may refuse to grant access to all or part of the individual's personal health information if it is reasonable to believe that:

- a legal privilege restricts disclosure.

EXAMPLE

Talia is requesting that her dentist, Jamie, provide a copy of her full dental record. However, there is a letter in Talia's record from Jamie's lawyer providing advice on a potential lawsuit threatened by Talia. Under section 5(3) of *PHIA*, Jamie is not required to disclose the letter to Talia because it would be protected by solicitor-client privilege.

- another law prohibits disclosure;

EXAMPLE

Kyle was born in 2006, and placed for adoption by his birth mother.

¹ *McInerney v. MacDonald*, [1992] 2 S.C.R. 138

If Kyle requested access to information related to his birth under his rights in *PHIA*, the hospital could sever the information, as the *Adoption Information Act* would be the appropriate legislation under which he would request this information.

- the information in the record was collected or created primarily for the purpose of ensuring quality or standards of care within a quality review program in the custodian's organization;
- the information in the record was collected or created in anticipation of or for use in a proceeding, and the proceeding, together with all appeals or processes resulting from it, have not been concluded;
- the information was collected or created in the course of an inspection, investigation or similar procedure not yet concluded;

Note: The previous two exemptions related to ongoing proceedings are a codification of "litigation privilege". This privilege allows a custodian to maintain a level of privacy over information which forms part of an ongoing proceeding or investigation. However, the custodian is not required to sever the information, and may provide it to the individual requesting it.

- access could result in a risk of serious harm to the treatment or recovery of the individual or to the mental or physical health of the individual;

EXAMPLE

Taryn has been diagnosed with chronic leukemia, and is receiving regular cycles of chemotherapy in the hospital's cancer centre. In a discussion with Taryn's mother, Taryn's physician indicates that he believes Taryn is showing signs of early dementia. The physician suggests that Taryn's mother not mention the concern to Taryn in the short-term, as he is concerned it will have a negative impact on her recovery.

If Taryn requested her medical records from the hospital, the hospital could consider refusing access to the portion of the record related to the discussion about Taryn's dementia if they reasonably believed it would impact her recovery from leukemia.

- access could result in a risk of serious harm to the mental or physical health of another individual;

EXAMPLE

Kerry, a continuing care co-ordinator at a hospital, is carrying out an assessment on David to determine if he needs placement in a long term care facility. As part of her assessment of David, she interviews David's mother, who tells Kerry that when David stops taking his medication, he becomes aggressive towards her and she is afraid of him.

If David requests a copy of his assessment, Kerry would be justified in refusing to release his mother's statements to him if she reasonably believes that David's knowledge of his mother's comments would cause him to become more aggressive towards her.

- access could lead to the identification of a person who provided information in the record to the custodian in circumstances in which confidentiality was reasonably expected;

EXAMPLE

Robert is seeking medical assistance from Helen, a counseling therapist, for his addiction to painkillers. His ex-girlfriend told Helen in confidence that Robert had been abusing painkillers for several years, which led to the break-up of their relationship.

If Robert requested a copy of his personal health information Helen could consider severing the information provided by his ex-girlfriend if Helen believed that his ex-girlfriend expected the conversation to be kept confidential.

- access could result in the release of another individual's personal health information.

EXAMPLE

Jeannine is receiving treatment for breast cancer from her oncologist, Jose. In a private discussion with Jose, Jeannine's husband Jim discloses that her condition and treatment has caused him to seek counseling for depression, but he does not want Jeannine to know. Jose could consider severing this information from any request made by Jeannine for her records in the interest of protecting the privacy of Jim's personal health information.

A custodian may only deny access to all or part of an individual's personal health information on reasonable grounds. The onus is on the custodian to justify the decision to deny access.

An individual has a right of access to personal health information that can reasonably be severed from the part of the record to which the individual does not have access given the above-noted reasons (section 72(2)).

“FRIVOLOUS OR VEXATIOUS” REQUESTS TO ACCESS PERSONAL HEALTH INFORMATION

A custodian may refuse to grant access to some or all of an individual’s personal health information where the custodian believes on reasonable grounds that the request for access is either frivolous or vexatious or is part of a pattern of conduct that amounts to an abuse of the right of access (section 81(1)).

It should be rare that this justification for refusal is used. As with other refusals, the onus is on the custodian to justify the decision to deny access.

If the custodian refuses to grant access, section 81(2) requires that the custodian:

- give written notice to the individual setting out the reasons for the refusal; and
- state that the individual has the right to make a complaint about the refusal to the Review Officer.

EXAMPLE

Jason has filed six requests for information with his dentist, Harland, within a two-day time frame. Jason has also has filed 20 similar requests within the same year and he is starting to use abusive language.

Harland believes that the frequent requests and abusive language are part of a pattern of conduct that amounts to an abuse of the right of access. He may refuse to grant Jason’s request. In doing so, he is required to write to Jason outlining the reasons why the request is not being granted, and advise him of his right to ask the Review Officer to review the dentist’s decision.

REQUIREMENTS FOR A REQUEST TO ACCESS PERSONAL HEALTH INFORMATION

Generally, an individual must meet three basic requirements for making a request to access their own personal health information:

1. the request for access must be made in writing [See Template 6-1 *Request for Access to Personal Health Information*] to the custodian that has the custody or control of the information (section 75(a));
2. the request for access must specify the subject matter of the record requested with sufficient information to enable the custodian to locate the record (section 75(b)); and
3. the individual must pay any required fees (section 75(c)).

There are exceptions to the requirement that the request be in writing. The custodian has the discretion to grant access to an oral request where either the individual has a limited ability to read or has a disability or condition that impairs his/her ability to make a request in writing (section 77). The custodian also has the discretion to grant informal access to personal health information without the stated requirements (section 80).

PURPOSE FOR REQUESTING ACCESS TO PERSONAL HEALTH INFORMATION

The individual does not have to provide the reasons or purposes for which they are requesting the information (section 78).

FEES FOR ACCESS TO PERSONAL HEALTH INFORMATION

Under section 82(1) of *PHIA*, a custodian has the right to charge a fee for access to personal health information that:

- a. does not exceed the prescribed amount; or
- b. where no amount is prescribed, the amount of “reasonable cost recovery”

where a record is made available or copied for the individual.

Personal Health Information Act Regulation

14 A custodian who makes a record, or part of a record, of personal health information available to an individual or provides a copy of it to an individual may charge a general fee, not to exceed \$30.00 per request, as compensation for all of the following:

- (a) receiving and clarifying the request;
- (b) locating and retrieving the record, including any record held electronically;
- (c) providing an estimate of the access fee to the requester as required by subsection 82(1) of the Act;
- (d) review of the record for no longer than 15 minutes by the custodian or an agent of the custodian to determine whether the record contains personal health information to which access may be refused under subsection 72(1) of the Act;
- (e) severing of the record if access to part of the record is refused under subsection 72(1) of the Act;
- (f) preparing the record for photocopying, printing or electronic transmission for no longer than 30 minutes;
- (g) preparing a response letter to the requester;
- (h) supervising an individual's examination of original records for no longer than 30 minutes;
- (i) the cost of mailing a record by regular mail to an address in Canada.

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

The regulation also permits custodians to charge additional specific fees where appropriate - for example, if the preparation of the record for photocopying takes two hours, rather than the 30 minutes provided for in clause 14(f) of the regulation.

Specific fees	
15 In addition to the general fee provided for in Section 14 and any direct costs provided for in Section 16, a custodian may charge up to the maximum fee set out in the following table for the activity specified:	
Activity	Maximum Fee
Making photocopies of a record	\$.20 per page
Preparing a record for photocopying, printing or electronic transmission	\$12.00 for every 30 minutes after the first 30 minutes referenced in the general fee under clause 14(f)
Faxing a record	\$.20 per page
Making a compact disk containing a copy of a record stored in electronic form	\$10.00 per request
Making a microfiche copy of a record stored on microfiche	\$.50 per sheet
Making a paper copy of a record from microfilm or microfiche	\$.50 per page
Making a copy of an audio cassette	\$5.00 per cassette
Making and providing a copy of a ¼", ½" or 8mm video cassette that is	
- 1 hour long or less	\$20.00
- more than 1 hour long	\$25.00
Making and providing a copy of a ¾" video cassette that is:	
- 1 hour long or less	\$18.00
- more than 1 hour long	\$23.00
Producing a record stored on medical film, including x-ray, CT and MRI films	\$5.00 per film
Printing a photograph from a negative or from a photograph stored in electronic form, per print:	
- per 4" x 6" print	\$10.00
- per 5" x 7" print	\$13.00

- per 8" x 10" print	\$19.00
- per 11" x 14" print	\$26.00
- per 18" x 20" print	\$32.00
<i>Review of the record by a custodian or an agent of the custodian to determine whether the record contains personal health information to which access may be refused under section 72(1) of the Act</i>	<i>\$ 25.00 for every 15 minutes after the first 15 minutes referenced in the general fee under clause 14(d)</i>
<i>Supervising an individual's examination of original records</i>	<i>\$ 6.00 for every 30 minutes after the first 30 minutes referenced in the general fee under clause 14(h)</i>
See www.novascotia.ca/DHW/PHIA for the official text of the regulation	

The regulation also permits the charging of fees where the custodian has incurred a direct cost. In three of the four cases covered in the regulation, the additional fee would have been incurred as a result of a request from the individual. The fourth (taxes payable on services) is required by government.

Personal Health Information Act Regulation
Direct costs
16 <i>In addition to the general fee provided for in Section 14 and the specific fees provided for in Section 15, a custodian may charge for the following direct costs incurred by the custodian, including any applicable tax:</i>
<i>(a) charges to retrieve a record from and return the record to off-site storage, if an individual requests expedited access to a record for which additional retrieval costs are charged to the custodian;</i>
<i>(b) courier costs, if courier delivery is requested by the individual;</i>
<i>(c) the cost of mailing a record to an address outside Canada;</i>
<i>(d) taxes payable on the services provided.</i>
See www.novascotia.ca/DHW/PHIA for the official text of the regulation

FEE ESTIMATE

The custodian must first provide an estimate of the fee to the individual. Although it is not required by *PHIA*, a custodian may provide the estimate in writing [See Template 6-2 *Estimate of Fees – Access to Personal Health Information*].

The custodian may alter the final fee payable if the actual costs to the custodian were higher than the estimate. However, the Review Officer has the discretion to review a fee estimate and the final fees charged for access and make a recommendation for the final fee.

When determining a fee, a custodian should consider the overall purpose of *PHIA*, which includes the ability of an individual to access their own personal health information. The fee should not be a barrier to access. If a fee estimate is high or the individual objects to the estimate, the custodian should work with the individual to determine if their request could be narrowed.

FEE FOR VIEWING THE RECORD

Under the fee regulation, a fee may also be charged for supervising the viewing of the record if the individual has not requested a copy of the information.

FEE WAIVERS

Under *PHIA*, a custodian has the discretion to waive all or part of an access fee. Section 82 (3) states:

“A custodian has the discretion to determine whether to grant a fee waiver and may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, the individual cannot afford the payment or for any other reason it is fair to excuse payment.”

The decision to waive a fee is discretionary. Each custodian must determine for itself when it would be “fair to excuse payment.”

REQUESTING A FEE WAIVER

The *Act* does not specify a process for requesting a fee waiver. If an individual requests a reduction or waiver of an access, a custodian may wish to provide a form to the individual to make the request (See *Template 6-3 Request for a Fee Waiver*).

CONSIDERATIONS WHEN DECIDING TO REDUCE OR WAIVE AN ACCESS FEE

It may be helpful for a custodian to consider the following when making a decision on a fee waiver request:

- The onus is on the individual requesting the waiver to provide evidence to support the request.
- In exercising their discretion, custodians should review all evidence provided by the individual.
- Even if an individual provides evidence that s/he cannot afford the fee, or that there are other circumstances that the individual is suggesting would make it fair to excuse payment, a custodian is not obligated to reduce or waive the fee.
- Although a custodian may request that the individual provide evidence in writing, the individual is not required to provide it in writing. The lack of documented evidence would, however, make it more difficult to assess the individual's request. This should be explained to the individual.
- When a custodian receives a request for a fee waiver, the custodian should view it as an opportunity to work with the individual to see if the request can be narrowed.

Previous Review Officer decisions under *the Freedom of Information and Protection of Privacy Act* have acknowledged that fees are a part of any access process, but that they can be questioned "if the costs are so high as to discourage access to the Act" (FI-97-22).² It is reasonable to assume that the same principle would be applied to fees levied under *PHIA*.

In a decision frequently cited by Nova Scotia Review Officers, the Ontario Freedom of Information and Protection of Privacy Commissioner stated factors to be considered to determine whether it would be "fair" for fees to be waived.³ The factors have been restated below using the "custodian" and "individual" language in *PHIA*:

² Nova Scotia (Department of Human Resources) (Re), 1997 CanLII 1031 (NS FOIPOP) at page 5.

³ Order P-760 Ministry of Natural Resources. Available at www.ipc.on.ca

1) *The manner in which the custodian attempted to respond to the individual*

If the custodian responds quickly to the individual's request for personal health information, expressing a willingness to work with the individual, it may be reasonable to waive some or all of the fee.

2) *Whether the custodian worked with the individual to narrow or clarify the request*

If the custodian works with the individual to narrow the request or clarify what specific information the individual is seeking, it may be reasonable to waive some or all of the fee.

3) *Whether the custodian provided any documents to the individual free of charge*

A custodian may be less likely to waive a fee if some documents have already been provided to the individual free of charge.

4) *Whether the individual worked constructively with the custodian to narrow the scope of the request for personal health information*

A custodian may be less likely to waive a fee if the individual has refused to work with the custodian to narrow or clarify the scope of the request.

5) *Whether the application involves a large number of records*

If the request would require a significant amount of time for the custodian to retrieve, review and produce information, it may not be fair for the financial burden to shift from the individual to the custodian.

6) *Whether or not the individual has advanced a compromise solution which would reduce costs*

An individual's willingness to work with the custodian to limit the time and resources necessary to fulfill the request may result in a custodian being more willing to reduce or waive the fee.

REVIEW OF A FEE WAIVER DECISION

If an individual requests a fee waiver, and the custodian decides not to reduce or waive the access fee, the custodian is not required to provide the reasons to the individual in writing.

However, decisions on fee waivers are subject to a review by the Review Officer, who has the authority to mediate and make recommendations on requests for reviews of decisions in respect of the access provisions.⁴

In a case of a review, it would be helpful to the custodian to have the reasons for denying the request documented.

REFUSING A REQUEST FOR ACCESS: REQUIREMENT FOR NOTICE

Where a custodian refuses an individual's request for access in whole or in part, the custodian shall provide the individual with written notice setting out the reasons for the refusal and that the individual is entitled to make a complaint to the Review Officer (section 81(2)). See Template 6-4 *Response to Request for Access to Personal Health Information*.

RESPONDING TO A REQUEST FOR ACCESS

Under section 84(1), a custodian who receives a request for access to a record of personal health information must respond to the individual as soon as possible, but no later than 30 days after receiving the request. In the written response, the custodian must either:

- grant the request;
- refuse the request; or
- extend the deadline for replying for a period of not more than 30 days; or longer with permission from the Review Officer.

A custodian may only extend the time for notice if replying to the request within 30 days would unreasonably interfere with the activities of the custodian, or if the time required to undertake the consultations necessary to reply to the request would not make it reasonably practical to reply within that time (section 84(1)(c)).

⁴ PHIA section 92(3)

If a custodian extends the time for response, a written notice must be sent to the applicant. The notice should state the length of the extension and the reasons for the extension.

The custodian must seek approval from the Review Officer for any time extension beyond 60 days. The timeline of 60 days includes the initial 30 day response deadline plus the custodian extension of 30 days. Approval of time extensions beyond 60 days is at the discretion of the Review Officer.

An individual who is not satisfied with a decision of the custodian about access to a record is entitled to make a request to the Review Officer for a review of the custodian's decision (section 92(3)).

See Template 6-4 *Response to Request for Access to Personal Health Information*. This template can be used for a granting or refusal of access, in whole or in part.

CORRECTION OF PERSONAL HEALTH INFORMATION

Individuals may request that the custodian correct information contained within their records of personal health information (section 85) [See Template 6-5 *Request for Correction to Personal Health Information*].

No fee may be charged for a correction to personal health information.

The custodian's timelines for correction are the same as those for access: the custodian must respond as soon as possible but no later than 30 days after the request for access was made. The custodian may extend the deadline for a response for 30 days or longer with the Review Officer's permission (section 84(1)).

If the custodian does not respond to the individual's request for correction within 30 days, the custodian is deemed to have refused the request (section 86).

The custodian shall make the correction if the individual demonstrates, to the satisfaction of the custodian, that the record is not complete, accurate, or up-to-date and gives the custodian the information necessary to enable the custodian to correct the record (section 87(1)).

However, a custodian is not required to correct a record if:

- it consists of a record that was not originally created by the custodian and the custodian does not have sufficient knowledge, expertise, and authority to correct the record; or

- it consists of a professional opinion or observation that a custodian has made in good faith about the individual (section 87(2)).

EXAMPLE

Jessica is a patient of Rosalie, a psychologist. Rosalie has diagnosed Jessica as having a narcissistic personality disorder.

Jessica has reviewed her record, and wants her psychologist to change the diagnosis in the record.

Under section 87(2), Rosalie is not required to change her professional opinion made in good faith about Jessica.

Where possible, if a correction is made, the custodian should make the correction by recording the correct information in the record and striking out the incorrect information without obliterating the record (section 88(a)(i)(A)).

Where it is not possible to correct the information in this manner, under (section 88(a)(i)(B)) a custodian may make the correction by:

- labeling the information as incorrect;
- severing the incorrect information from the record;
- storing it separately from the record; and
- maintaining a link in the record that indicates that a correction has been made and enables the tracing of the incorrect information.

If a custodian cannot correct a record by either of these two methods, the custodian must ensure that there is a practical system in place to: inform a person who accesses the record that the information in the record is incorrect and direct the person to the correct information (section 88(a)(ii)).

The custodian must provide written notice to the individual about how the record was corrected (section 88(b)).

On the request of the patient, the custodian must also make reasonable effort to give written notice of the correction to the persons to whom the custodian has disclosed the information, unless the correction cannot be reasonably expected to have an effect on the ongoing provision of health care or other benefits to the patient (section 88(c)).

“FRIVOLOUS OR VEXATIOUS” REQUESTS TO CORRECT A RECORD

A custodian may refuse to grant the request for a correction where the custodian believes on reasonable grounds that the request for correction is either frivolous or vexatious or is part of a pattern of conduct that amounts to an abuse of the right of correction (section 89).

REFUSING A REQUEST FOR CORRECTION: REQUIREMENT FOR NOTICE

Under section 90, if a custodian refuses to make the correction, the custodian must give the reasons for the refusal and inform the individual that the individual is entitled to:

- prepare a concise statement of disagreement setting out the correction the custodian refused to make;
- require that the custodian attach the statement of disagreement as part of the records;
- disclose the statement of disagreement whenever the custodian discloses information to which the statement relates;
- require that the custodian make all reasonable efforts to disclose the statement of disagreement to any person who would have been notified had the request been granted; and
- make a complaint about the refusal to the Review Officer.

See Template 6-6 *Response to a Request for Correction Granted in Full*; Template 6-7 *Response to a Request for Correction Granted in Part*; Template 6-8 *Response to a Request for Correction Refusal*.

COMPLAINTS TO THE REVIEW OFFICER: ACCESS AND CORRECTION

If a custodian has refused an individual access to their personal health information or refused to make a correction as requested by the individual, the individual may ask the Review Officer to conduct a review of the custodian’s decision (section 91(b)).

See Chapter 10: *The Review Officer, Reviews and Mediation* for details on the process for review of an access or correction decision.