

Custodian Responding to an Access Complaint

These are guidelines to assist you in understanding the access to personal health information complaint process under the **Personal Health Information Act** (PHIA). You can find additional resources on our [website](#).

Access Complaints

A person who makes an access to personal health information request to a custodian may make a complaint to the Office of the Information and Privacy Commissioner (OIPC) about a custodian:

- refusing (or partially refusing) to give access to records;
- failing to respond to the request within the legislation's time limit; or
- not conducting a reasonable search for records or not assisting the individual.

Remedies

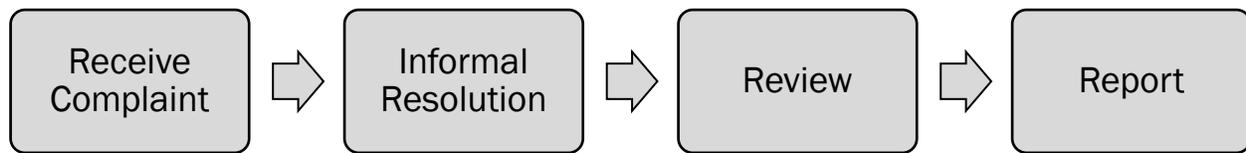
Following an investigation of an access complaint, the Commissioner may recommend that a custodian:

- provide access to a record;
- modify, stop, or not begin an information practice, policy, or procedure that contravenes PHIA; or
- implement an information practice.

The Commissioner may also issue a report in which there are no recommendations for the custodian.

The Complaint Process

1. OIPC receives a complaint. We will provide the complaint to the custodian and you will have 14 days to respond. The complainant also has 14 days to make any submissions or arguments in support of their complaint.
2. OIPC will generally work with you and the complainant to try to reach an informal resolution of the complaint.
3. If we have not resolved the complaint, OIPC may conduct a review of any unresolved issues.
4. If necessary, OIPC will issue a Commissioner's report with recommendations for the custodian.



We explain the steps in this process in more detail below.

Receiving a Complaint and Making Submissions

After our Office receives a complaint, we will assign it to an Access and Privacy Analyst (Analyst). The Analyst will contact you to notify you of the complaint. The Analyst will ask you to provide documents and written representations (submissions) relevant to the complaint. Your response to our Office is due within 14 days from that date. This response must include the following:

- the complainant’s request for their personal health information (their access request);
- your decision letter in response to the complainant’s access request;
- any correspondence between you and the complainant;
- a copy of the records sent to the complainant;
- all records responsive to the request, without redactions;
- any practices, policies, or procedures you have that relate to the complaint; and
- submissions in support of your decision, including (where applicable):
 - your reasons for applying any exceptions to access;
 - a description of your search for records;
 - an explanation for the delay in responding to the request; or
 - any other information that you wish to provide.

You should provide these documents as clearly labelled, separate files. Along with an exact copy of the records (if any) that you provided to the complainant, you must provide us with a copy of all responsive records without redactions. This copy should be an “audit” copy that discloses all personal health information but indicates what personal health information the custodian withheld from the complainant.

If you do not provide your submissions within 14 days, we will proceed with the investigation based on the relevant information available to OIPC. Without your written submissions, it is highly unlikely that the custodian will meet its burden of proof, and we will likely have to move the matter to a review and issue a Commissioner’s report. If you are unable to provide written submissions, you should contact OIPC to explain why and to discuss acceptable alternatives.

Our Office will not release any records or reveal any personal health information that the records contain. The release of additional records, if any, is the custodian’s responsibility.

Burden of Proof

The custodian bears the burden of proving, on a balance of probabilities, that it has followed PHIA in responding to an access request. Your submissions should do more than simply identify which provisions of PHIA the custodian believes apply – you will need to provide detailed and convincing evidence for why you believe the custodian may (or must) withhold personal health information from the complainant. If you base the exception on the possibility that disclosure will cause harm, you will typically need to demonstrate that there is a “reasonable expectation of probable harm” that is more than just speculation. You should include any legislation, case law, policy documents, or other relevant background information that you believe support the application of any exceptions to access.

Applying Additional or Alternate Exceptions

If the custodian intends to apply any exceptions to access that you did not apply in your response to the complainant’s access request, you must inform the complainant and our Office within 14 days of receiving notice of our investigation. OIPC will not consider any discretionary exceptions that the custodian raises after this period.

Deemed Refusal Complaints

If the complaint is about the custodian’s failure to respond to an access request within 60 days (or any new deadline PHIA allows), then your submissions must address why the custodian was unable to meet the deadline.

Reasonable Search Complaints

If the complainant is alleging that the custodian has not located responsive records or that your response was incomplete, then your submissions should include the following details of the search the custodian conducted for responsive records:

- the steps you took to identify and locate records;
- where you searched (e.g. paper files, databases, emails, off-site storage locations, etc.);
- the types of searches you conducted (e.g. keyword search of email or database, manual search of paper files, etc.);
- when the searches took place;
- who conducted the searches; and
- why the custodian believes no records exist or why no further records exist.

Informal Resolution

The Analyst will usually focus on resolving the matter informally during the first 60 days of an investigation.

During informal resolution, the Analyst will use your submissions as well as the submissions we receive from the complainant to understand the nature of the complaint and attempt to identify possible opportunities to resolve the complaint in a way that satisfies both the

complainant and the custodian. Generally, the Analyst will provide you and the complainant with an assessment after reviewing your submissions, the records, and the complainant's submissions.

If you agree to release any further records or personal health information to the complainant, the custodian is responsible for sending those records to the complainant. You should copy the Analyst on any correspondence releasing records.

During our efforts at informal resolution, it is important that you respond promptly to the Analyst's questions or requests. If you do not participate in the process we may proceed to a review without your input.

Possible informal resolution of a complaint may include:

- the custodian conducting a further search for records;
- the custodian releasing additional records or parts of records;
- the custodian confirming that no responsive records exist; or
- other outcomes that are agreeable to the complainant and the custodian and compliant with PHIA.

In some cases, our initial assessment of a complaint may conclude that the custodian responded to the request properly and the complainant may choose to accept the custodian's earlier response and we will close our investigation.

Review

If there are any issues in the complaint that we have not resolved in the informal resolution period, then our Office may conduct a review and, if necessary, issue a report with the Commissioner's recommendations. If the Analyst believes more information is necessary, they will ask you to provide further submissions and give you a deadline. We might not consider submissions that we receive after that deadline.

The Commissioner may decide not to conduct a review in limited circumstances under section 67(3) of PHIA. Should the Commissioner make this decision, we will notify you of the reason.

Commissioner's Report

If necessary, our Office may write and release a report of our findings following an investigation of an access complaint. OIPC publishes Commissioner's reports on our website and we will send you a copy.

OIPC will consider your submissions and the complainant's submissions during the report process. We may quote your submissions in the Commissioner's report. If you have provided submissions or other information that you feel is confidential that you do not want us to quote, you should notify the Analyst. However, procedural fairness requires the Commissioner to provide reasons for any decisions and recommendations. Therefore, we may still need to explain your position on the matter.

The Commissioner's report may contain recommendations that the custodian provide access to a record or part of a record or make improvements to its access to personal health information process. The Commissioner may decide not to make any recommendations. If there are no recommendations, the report will explain why.

After you receive the Commissioner's report with recommendations, the custodian has 15 days to decide whether to follow the Commissioner's recommendations. Regardless of the custodian's decision, the custodian must give written notice of its decision to the complainant and our Office.

If the custodian disagrees with the Commissioner's recommendation to disclose records, then you must notify the complainant of their right to appeal that decision to Court.

If you have any questions or concerns about the complaint process, please do not hesitate to contact our Office at:

Office of the Information and Privacy Commissioner
PO Box 13004, Station A
St. John's, NL A1B 3V8
Phone: (709) 729-6309 Fax: (709) 729-6500
Toll Free: 1-877-729-6309
commissioner@oipc.nl.ca
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