



Prince Edward Island
Legislative Assembly

*Information and
Privacy Commissioner*
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Île-du-Prince-Édouard
Assemblée législative

*Commissaire à l'information et
à la protection de la vie privée*
C.P. 2000, Charlottetown PE
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Meaghan Hughes
Cox & Palmer
Dominion Building, Suite 600
97 Queen Street
Charlottetown, PE C1A 4A9

June 4, 2025

VIA EMAIL

Dear Ms. Hughes,

Re: Request for Advice, Health Information Act
Custodian: Health PEI
Our File Reference: C/24/00210

On behalf of Health PEI, Steven Forbes from your office called me, and subsequently wrote to me on June 10, 2024, seeking advice about Health PEI's authority or duty to disclose personal health information to the PEI Office of the Ombudsperson. I understand you have recently assumed responsibility for this file.

As more fully explained in this letter, it is my opinion that Health PEI has the authority to disclose personal health information to the Ombudsperson.

Background

In his letter of June 10, 2024, Mr. Forbes requested advice from our office about "...whether, in certain circumstances, Health PEI has authority to voluntarily disclose personal health information to OmbudsPEI pursuant to section 34 of the *Ombudsperson Act*, R.S.P.E.I. 1988, c.O-5.01."

In his letter, he specified that Health PEI does not dispute that they are required to provide personal health information if requested to do so, if the Ombudsperson has decided to conduct an investigation pursuant to section 14 of the *Ombudsperson Act*. The issue was whether Health PEI could disclose personal health information to the Ombudsperson before a notice of intent to investigation was issued.

Section 48 of the *Health Information Act*, R.S.P.E.I. 1988, Cap. H-1.41 gives me the authority to provide advice and recommendations on any matter respecting any rights or duties under the

Health Information Act. This includes rights or duties with regard to disclosure of personal health information by a custodian.

Material Facts

Health PEI is a custodian under the *Health Information Act*. As a custodian, Health PEI has custody or control of a large amount of personal health information of individuals, and has certain obligations and authorities in respect of the safety and security of, access to, and collection, use, and disclosure of that personal health information, pursuant to the *Health Information Act*.

The *Ombudsperson Act* defines a publicly-funded health entity to be Health PEI. Under the *Ombudsperson Act*, the Ombudsperson has authority to investigate a publicly-funded health entity's decisions, recommendations, or acts that were done or omitted to be done in the exercise of a power, duty, or function of such entities which may, or do, adversely affect a person.

The *Ombudsperson Act* requires the Ombudsperson to notify the entity that is the subject of the complaint about their intention to investigate prior to commencing the investigation [s.23, *Ombudsperson Act*]. Once a formal notice of intent to investigate is issued under section 23, the Ombudsperson has the authority to require the production of any information relating to the matter being investigated. A provision of any other Act that requires a person not to disclose information does not apply with respect to the Ombudsperson's investigation [s.25, *Ombudsperson Act*].

Sometimes the Ombudsperson will ask an entity for more information about the circumstances that gave rise to the complaint, to ensure they understand the complaint and the issues, and to see if they can resolve the matter informally. This is done prior to issuing a formal notice of intent to investigate under section 23 of the *Ombudsperson Act*, and the Ombudsperson's office generally refers to this as an informal assessment.

My understanding is that the Ombudsperson relies on section 34 of the *Ombudsperson Act* to obtain information for the purpose of this informal assessment. Section 34 permits the disclosure of information to the Ombudsperson if they request it.

A custodian is not permitted to disclose personal health information except as authorized under the *Health Information Act*. The *Health Information Act* sets out situations where a custodian can disclose personal health information, and to whom. The Ombudsperson is not specifically identified in the *Health Information Act* as an entity to whom a custodian can disclose personal health information without consent.

Advice Requested

Health PEI is requesting advice regarding whether they have the authority to provide personal health information to the Ombudsperson for an informal assessment, before the Ombudsperson has issued a formal notice under section 23 that they intend to undertake an investigation. In other words, does Health PEI have the authority to disclose personal health information to the Ombudsperson under section 34 of the *Ombudsperson Act*?

Discussion

Health PEI has a responsibility for ensuring the personal health information of citizens is appropriately protected and that Health PEI is not collecting, using, or disclosing that personal information in a way or for a purpose that is not authorized. Subsection 23(1) of the *Health Information Act* prohibits a custodian from disclosing personal health information except as authorized under the *Health Information Act* or its regulations.

Preliminary Issue – “Information”

Mr. Forbes also commented that because the term “information” is not defined in the applicable legislation and there is no guidance on this term in the *Interpretation Act*, R.S.P.E.I. 1988, Cap. I-8.1, he questioned whether section 34 of the *Ombudsperson Act* applies to personal health information.

As a preliminary issue, I want to address Mr. Forbes’ comment about the term “information” not being defined in either the *Ombudsperson Act*, the *Health Information Act*, or the *Interpretation Act*. As you are aware, when a term is not defined in legislation, we look to the ordinary meaning of the word. The ordinary meaning of “information” is “data” or “knowledge” in various formats.

Personal health information is defined in the *HIA* and covers a variety of types of information. In general, though, it is identifying information about an individual that relates specifically to the individual’s health, the provision of health care services to the individual or entitlement to benefits under or participation in a health care service or program.

Not all information is “personal health information”. But all personal health information is “information”. Therefore, I am satisfied that the term “information” as used in the *Ombudsperson Act* includes personal health information.

Authority to disclose to the Ombudsperson

The Ombudsperson has an important role in ensuring that government entities are treating citizens fairly. The Ombudsperson's role, duties and authorities are set out in the *Ombudsperson's Act*. In order to carry out their legislated duties, the Ombudsperson may require access to information in the custody or control of such government entities, which may include personal health information.

It is not disputed that the *Ombudsperson Act* gives the Ombudsperson the power to investigate complaints. However, the Ombudsperson also has the authority to try to resolve any problem raised in a complaint through the use of negotiation, conciliation, mediation or other non-adversarial approaches [subsection 14(5) of the *Ombudsperson Act*].

Further, section 33 gives the Ombudsperson the authority to determine their own procedure for the office of the Ombudsperson and its staff in the exercise of their powers, and the performance of their duties under the Act.

The Ombudsperson has set a procedure whereby the office reviews complaints to make sure they have authority over the subject matter and can accept the complaint. If they decide to accept a complaint, they may talk to the complainant and the entity complained about, to get more information to understand and assess the issues and determine whether a full, formal investigation is warranted or whether the matter can be resolved in a more informal manner.

The resolution authority under subsection 14(5) of the *Ombudsperson Act* does not require a formal notification of intent to investigate to be issued. An informal resolution can be accomplished at any stage after a complaint is received. The 2022-23 Annual Report of the Ombuds Office shows that the majority of complaints the Ombudsperson received during that time were informally resolved without formal investigation.

The Ombudsperson must have sufficient information in order to carry out their duties under the legislation. This is not limited to only situations where a formal notice of intent to investigate has been issued under section 23. The Ombudsperson requires information to be able to assess whether a matter should go to a full formal investigation, whether a matter has the possibility of being resolved informally, or to actually engage in any of the informal resolution mechanisms.

Section 14 of the *Ombudsperson Act* gives the Ombudsperson the authority to investigate a complaint, and the power to try to resolve any problem raised in a complaint through the use of alternative resolution mechanisms, such as negotiation, conciliation, mediation or other non-adversarial approaches. The Ombudsperson also has the authority to cease to investigate a complaint. The Ombudsperson requires sufficient information to carry out these duties, and not all such information is able to be obtained from a complainant. This is where section 34 comes into effect.

Section 34 of the *Ombudsperson Act* authorizes a publicly-funded health entity to provide the Ombudsperson information in its possession, custody or control respecting any person who is receiving services from or dealing with that entity, where it is satisfied that providing the information will assist the Ombudsperson in fulfilling any of the Ombudsperson's duties or exercising any of the Ombudsperson's powers pursuant to the *Ombudsperson's Act*. It does not require a notice of intention to investigate to have been issued by the Ombudsperson.

In his letter, Mr. Forbes refers to disclosure of information under section 34 of the *Ombudsperson Act* as the voluntary disclosure of information, and this appears to be where some of the reluctance arises. While the heading used to describe section 34 is "the voluntary provision of information", this is not exactly what the provision says. The word "voluntary" does not appear in the provision itself, only in the heading. Clause 19(3)(a) of the *Interpretation Act* states that section headings are not part of an enactment and are to be considered to have been included for convenience of reference only. This means that the actual wording of the provision itself must be read and considered, not what the heading says.

When we read section 34, it authorizes a government entity that is the subject of a complaint, including a publicly-funded health entity, to disclose information to the Ombudsperson if the Ombudsperson requests it, and providing the information will "assist the Ombudsperson in fulfilling any of the Ombudsperson's duties or in exercising any of the Ombudsperson's powers pursuant to this Act".

This wording is important because the word "voluntary" purports to be the provision of information on the sole discretion of the entity providing it. However, what this provision actually does is give the entity the legal authority to provide it, as long as it is for the purpose of assisting the Ombudsperson in fulfilling their duties or exercising their powers under their legislation.

When the Ombudsperson has received a complaint about a reviewable entity, they must determine whether they have jurisdiction and, if so, they have to decide whether there is any merit to the complaint, whether it can be resolved informally, or whether it needs to become the subject of a formal investigation which results in finding and recommendations. All of these activities are part of the Ombudsperson's duties and an exercise of their powers under their legislation.

In his letter, Mr. Forbes reviewed many of the provisions in the *Health Information Act* where a custodian is authorized to disclose personal health information without consent of the individual to whom it relates, and explained why none of these provisions applies to a request for voluntary disclosure of information by the Ombudsperson under section 34 of the *Ombudsperson Act*.

I agree that the majority of the provisions described do not apply. However, I disagree with Mr. Forbes' assessment and interpretation of the application of subsection 24(6) of the *Health Information Act*.

Subsection 24(6) of the Health Information Act

Subsection 24(6) of the *Health Information Act* requires a custodian to disclose personal health information to facilitate an investigation. Mr. Forbes comments that there is not yet an investigation, so assesses this provision as not being applicable.

Respectfully, in my view, this is too narrow an interpretation. The Ombudsperson is authorized to conduct an investigation of a complaint made to them. The term “investigation” is not defined in the *Ombudsperson Act*. When the Ombudsperson is assessing a complaint to determine the circumstances, or whether the matter can be resolved informally before a full and formal investigation, or whether a full and formal investigation is warranted, this all part of the investigative continuum.

This is important because subsection 24(6) of the *Health Information Act* requires a custodian to disclose information without consent of the individual to whom it relates to a person carrying out an investigation or similar procedure that is authorized under an enactment “for the purpose of facilitating the...investigation or procedure”. It does not require a full and formal investigation to have been undertaken, only that the disclosure is for the purpose of facilitating the investigation or similar procedure. When the Ombudsperson is seeking more information to assess the validity of a complaint and for the purposes of determining the next step in their process, this is for the purpose of facilitating their investigation process.

Clause 23(13)(d) of the Health Information Act

Further, in my view clause 23(13)(d) of the *Health Information Act* would also apply. This provision permits a custodian to disclose personal health information without consent for the purpose of delivering, evaluating or monitoring a program of the custodian that relates to the provision of health care or the payment of health care.

Clause 23(13)(d) of the *Health Information Act* states: “A custodian may disclose personal health information relating to an individual without the consent of the individual if the disclosure is... (d) for the purpose of delivering, evaluating or monitoring a program of the custodian that related to the provision of health care or the payment of health care.” The Ombudsperson’s role would fall into this category.

The Ombudsperson’s authority and function under their legislation is a form of evaluating and monitoring the provision of services by entities, and decisions relating to the provision of those services. In the case of Health PEI, this would include the provision of health care and may also include the payment of health care. The informal assessment by the Ombudsperson after receiving a complaint is a step in this process.

For these reasons, clause 23(13)(d) of the *Health Information Act* would also permit disclosure to the Ombudsperson for the purposes of the Ombudsperson carrying out an assessment of a complaint about health or other similar services provided by Health PEI to an individual.

Limits on Authority to Disclose Personal Health Information

Although in my opinion Health PEI does have the authority to disclose personal health information to the Ombudsperson at the assessment stage of a complaint made to the Ombudsperson, this is not a *carte blanche* to disclose all personal health information about the individual in the custody or control of Health PEI. Subsection 23(2) of the *Health Information Act* limits the disclosure to the minimum amount of personal health information as necessary to accomplish the purpose for which it is disclosed.

Therefore, although Health PEI is authorized to disclose personal health information to the Ombudsperson at the request of the Ombudsperson for the purposes of assessing whether a complaint has merit or if it can be informally resolved or whether it requires a formal investigation, such disclosure would be limited to disclosing only that personal health information which the Ombudsperson requires for the purposes of their assessment.

Advice

For the reasons outlined above, I am satisfied that Health PEI has the authority under the *Health Information Act* to disclose personal health information to the Ombudsperson pursuant to section 34 of the *Ombudsperson Act*, during the informal assessment phase and prior to the Ombudsperson issuing a formal notice under section 23 of intention to investigate.

This authority is limited to the amount of personal health information that is required by the Ombudsperson to carry out their assessment, as would be outlined in their request for disclosure under section 34 of the *Ombudsperson Act*.

Conclusion

Thank you for bringing this matter forward. I appreciate that both Health PEI and the Ombudsperson want to ensure they are carrying out their statutory duties to the best of their ability and in accordance with the statutes that govern them.

There is a delicate balance between ensuring sufficient information is available for the Ombudsperson to fulfill their role, while also making sure that they do not unreasonably invade the personal privacy of individuals to whom that information might relate. I commend both Health PEI and the Ombudsperson for taking these roles and responsibilities seriously.

Please note that in an effort at ensuring transparency of our office, we are beginning a practice of posting our advice to public entities on our website. As such, please be aware that it is my intention to post this letter to our website.

Sincerely,

A handwritten signature in blue ink, appearing to read "Denise N. Doiron". The signature is fluid and cursive, with a large initial 'D'.

Denise N. Doiron
Information and Privacy Commissioner

c. Melanie Fraser, CEO