



**OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island**

Order No. FI-22-005

Re: Health PEI

**Prince Edward Island Information and Privacy Commissioner
Denise N. Doiron**

June 28, 2022

Summary: An Applicant made an access request to Health PEI, asking a series of questions. The Applicant was not satisfied with Health PEI's answers and asked the Commissioner to conduct a review. The Commissioner refused to conduct an inquiry pursuant to section 64.1 of the *Freedom of Information and Protection of Privacy Act*.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, sections 6, 8, 60, and 64.1.

Citations: Order FI-20-001, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 7327 (PE IPC)

Review Report 261-2021, 001-2021 – PART II, *Re: Rural Municipality of Lumsden No. 189*, 2021 CanLII 117557 (SK IPC)

Report A-2020-002, *Re: Memorial University*, 2020 CanLII 35643 (NL IPC)

I. BACKGROUND

- [1] An individual (the “Applicant”) made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (“FOIPP Act”), asking Health PEI a series of questions about the administration of the *Mental Health Act*, and information about members of the *Mental Health Act* Review Board.
- [2] Health PEI answered the Applicant’s questions. However, the Applicant was not satisfied with Health PEI’s answers to their questions and requested a review of Health PEI’s response. In making their request for review, the Applicant asked our office some additional questions in relation to the responses provided by Health PEI.
- [3] The first issue on every request for review we receive is to assess whether a review is warranted. I provided a copy of the Applicant’s request for review, and enclosures, to Health PEI, but I did not request a response from Health PEI, as I had sufficient information to assess our jurisdiction, and determine whether to conduct an inquiry.

II. ACCESS REQUEST AT ISSUE

- [4] The Applicant made the following access request to Health PEI:

“Name of Administrator under the PE Mental Health Act responsible as noted in the Act as of the date of this request and prior to December 3, 2020. Information showing we currently have a functioning Mental Health Review Board including names of the Board members whose terms are past the date of December 24, 2020, including Board Chair.

I am requesting information and confirmation as to who the individual would be, as referred to under the PE Mental Health Act, as the individual responsible for notifying any person in PE who is detained under the Mental Health Act of that detention and their right to an Appeal process via the PE Mental Health Review Board, and as to their right to Legal Counsel, as of the date of this request.

I am also requesting information and confirmation about who that individual would have been prior to December 3, 2020.

I am requesting information that demonstrates that PE currently has a functioning Mental Health Review Board as is required under the PE Mental Health Act.

I am requesting information and confirmation on the names of the current PE MHRB members who are in good standing as of December 24, 2020. This should include the name and status of the Board Chair as well.

Time Frame: *various (see above) prior to December 3, 2020-present”

III. JURISDICTION

- [5] Section 60 of the *FOIPP Act* permits an applicant who has made an access request to a public body to ask the Commissioner to review a decision of the public body in relation to such a request. The Applicant made a request to Health PEI, a public body, for information, and Health PEI made a decision to provide information to the Applicant. The Applicant asked me to conduct a review of Health PEI's response to their request. Therefore, I am satisfied I have jurisdiction in this matter.

IV. ISSUE

- [6] Although applicants have a right to request a review, I have some discretion about whether to conduct an inquiry. Section 64.1 of the *FOIPP Act* gives the Commissioner the discretion to refuse to conduct an inquiry if the subject matter has been dealt with in an order of the Commissioner, or if the circumstances warrant:

64.1 The Commissioner may refuse to conduct an inquiry pursuant to section 64 if, in the opinion of the Commissioner,
(a) the subject matter of a request for a review under section 60 has been dealt with in an order or investigation report of the Commissioner; or
(b) the circumstances warrant refusing to conduct an inquiry.

- [7] The issue in this matter is whether I should conduct a review of Health PEI's response to the Applicant's request, or if I should exercise my discretion under section 64.1 of the *FOIPP Act* to refuse to conduct a review.

V. ANALYSIS

- [8] For the reasons set out below, I am refusing to conduct an inquiry in this matter, pursuant to subsections 64.1(a) and 64.1(b) of the *FOIPP Act*.

[9] Under the *FOIPP Act*, a public body is not obligated to answer an applicant's questions. However, in this instance, Health PEI chose to provide answers to the Applicant's questions. Health PEI responded to the Applicant, answering their questions under the following three headings, taken from the text of the Applicant's access request:

1. Name of Administrator under the PE *Mental Health Act* responsible as noted in the Act as of the date of this request and prior to December 3, 2020.
2. Information showing we currently have a functioning Mental Health Review Board including names of the Board members whose terms are past the date of December 24, 2020, including Board Chair.
3. I am requesting information and confirmation as to who the individual would be, as referred to under the PE *Mental Health Act*, as the individual responsible for notifying any person in PE who is detained under the *Mental Health Act* of that detention and their right to an Appeal process via the PE Mental Health Review Board, and as to their right to Legal Counsel, as of the date of this request.

[10] I will refer to these headings as I assess whether or not to conduct an inquiry and review the response from Health PEI.

Subsection 64.1(a) – Has the subject matter been dealt with?

[11] The Applicant submitted their request to Health PEI on January 18, 2021, and received Health PEI's response on February 23, 2021, which is 36 days. The Applicant asks me to review the following:

I do wish that the you as the Privacy Commissioner make it clear to all government departments that they are by law required to adhere to the time frames and that if they are unable to meet that time frame they are required to apply for an extension to that time frame.

[12] Although the Commissioner may authorize an extension for a public body to respond to an applicant in some circumstances, the Applicant's statement is not a complete description of the extension provisions. Section 9 of the *FOIPP Act* requires a public body to make every reasonable effort to respond to an access to information request within 30 days. In some circumstances, section 12 of the *FOIPP Act* authorizes a public

body to take an extension of up to 30 days. A public body does not require the Commissioner's authorization to extend their time to respond under section 12 of the *FOIPP Act* unless the extension is for more than 30 days.

- [13] The time limits set out at section 9 of the *FOIPP Act*, and the extensions set out at section 12 of the *FOIPP Act*, have been considered in several orders, see for example, Order FI-20-001, *Re: Department of Economic Growth, Tourism and Culture*, 2020 CanLII 7327 (PE IPC).
- [14] Some circumstances “stop the clock”, so I make no assessment about whether Health PEI complied with the time limit or extension provisions. I am not absolving Health PEI if they failed to comply with the time limits, but I am refusing to conduct a review. The Applicant has received a response to their questions, and the provisions regarding time limits have been considered in other reviews. The Applicant has not raised any new issue to be addressed.
- [15] I am refusing to conduct an inquiry, pursuant to subsection 64.1(a) of the *FOIPP Act*, as, in my opinion the subject matter has been dealt with in an order of the Commissioner pursuant to subsection 64.1(a) of the *FOIPP Act*.

Subsection 64.1(b) – Do the circumstances warrant refusing to conduct a review?

- [16] The Applicant states:
- In regard to the actual answers provided to the Access to Information Request questions I do have some concerns which I am asking that you address.
- [17] As a preliminary remark, section 6 of our *FOIPP Act* refers to a right of access to records in the possession or control of a public body. Although the title of the law refers to “freedom of information”, the provisions in the statute relate to access to records. Subsection 8(1) of the *FOIPP Act* requires public bodies to make every reasonable effort to assist a person who makes a request for access to a record, but it does not mean they

have to answer every question. The *FOIPP Act* does not require public bodies to assist a person who is not asking for access to a record.

- [18] This principle has been accepted in several other Canadian jurisdictions. The Saskatchewan Information and Privacy Commissioner recently issued a few decisions relating to applicants' questions including, for example, Review Report 261-2021, 001-2021 – PART II, *Re: Rural Municipality of Lumsden No. 189*, 2021 CanLII 117557 (SK IPC), in which the Commissioner in Saskatchewan summarizes this principle as follows:

[37] . . . I further note in their access to information request, the Applicant also asked for responses to questions, but LA FOIP applies to records in the possession or control of a local authority. If records exist that could answer the questions, local authorities should provide them to an applicant, but LA FOIP does not require a local authority to answer questions.

- [19] Health PEI could have refused to answer the Applicant's questions, but they did not. Since Health PEI did choose to answer the Applicant's questions, I must determine whether an inquiry into their response is warranted.
- [20] I will address the Applicant's concerns under the headings set out in paragraph 9 above.

Question 1: Name of Administrator under the PE Mental Health Act responsible as noted in the Act as of the date of this request and prior to December 3, 2020.

- [21] The first question and answer are about who the administrators were under the *Mental Health Act* prior to December 3, 2020, and at the time the Applicant submitted their access request. Health PEI listed the three psychiatric facilities under the *Mental Health Act General Regulations* which may provide care to involuntary patients. They identified two officers who were responsible for administering these psychiatric facilities during the relevant time period, one who was Administrator effective as of November 30, 2020, and the other who had been Administrator prior to that date.

- [22] After answering the Applicant's question about who the administrators were at the specified dates, Health PEI also added:

Please note that the psychiatric facility Administrator role defined in the *Mental Health Act*, in relation to QEH and PCH applies only to those portions of each hospital where inpatient mental health services, both on a voluntary and involuntary basis, are provided. Both hospitals also have an Administrator responsible for the remainder of the building and other health care services provided onsite.

- [23] The Applicant states that they are "seeking further clarity on this response", and continues with two questions which begin "Are they implying that . . .". It does not appear that the Applicant asked these follow up questions to Health PEI.
- [24] While we would encourage public bodies to try to assist applicants, even after a response is provided, it is not a requirement that they answer follow up questions. Further, we are aware that not all questions can be answered to the satisfaction of some applicants. This reflects a similar observation of the Information and Privacy Commissioner for Newfoundland and Labrador, expressed in the recent decision, Report A-2020-002, *Re: Memorial University*, 2020 CanLII 35643 (NL IPC), at paragraph 28, when considering whether a public body responded in an open, accurate and complete manner when refusing to continue to answer an applicant's follow up questions after records were provided.
- [25] The Applicant asks about Health PEI's implied meanings. These are hypothetical questions about roles of the administrators and operations of the *Mental Health Act*. These are not questions that are appropriate for a review under the *FOIPP Act*.
- [26] Although the Applicant states again "Clarity on this issue is required", what the Applicant is asking for is clarification on provisions of the *Mental Health Act*, which is not within our jurisdiction. We cannot interpret the *Mental Health Act* or provide any guidance to a public body if it does not relate to access to information or protection of privacy.

[27] Health PEI answered the Applicant's questions. The Applicant's follow-up questions in their request for review are not within our jurisdiction. For these reasons, I am of the view the circumstances warrant refusing to conduct an inquiry. Pursuant to subsection 64.1(b) of the *FOIPP Act* I refuse to conduct an inquiry into the Applicant's concerns about any implied meanings in Health PEI's response to the first question.

Question 2: Information showing we currently have a functioning Mental Health Review Board including names of the Board members whose terms are past the date of December 24, 2020, including Board Chair.

[28] The Applicant asked for the names of the members of the *Mental Health Act* Review Board. The *Mental Health Act* Review Board is a separate public body, and the names of the Review Board members, including the Chair, is publicly available information. A public body is not required to answer questions about a different public body, and may refuse to grant access to records if the information is readily available to the public.

[29] In this instance, Health PEI advised the Applicant that the information was not in their custody or control and directed the Applicant to the *Mental Health Act* Review Board's information page, accessible through the Provincial Government's general website, which is available to the public. This information page listed the names and terms of the members of the Review Board, and identified the individual serving as Chair of the Review Board.

[30] In relation to individuals whose term on the Review Board had expired, Health PEI referred the Applicant to a legislative provision that relates to expired terms of office. Health PEI states:

Information regarding the Mental Health Review Board, including membership, is publicly available on the Mental Health Review Board webpage. Members are appointed by the Lieutenant Governor in Council, as established in subsection 27(2) of the *Mental Health Act*, and information regarding membership appointments, as such, is not in Health PEI's custody or control. Pursuant to the *Interpretation Act*, section 17, the members of the Board whose terms have expired continue to act as members until their successors are named:

17. Majority may act

[...]

(2) Where an enactment establishes a board, commission or other body consisting of three or more members (in this section called the “association”),

[...]

(e) a member of the association whose term of office has expired may continue to act as, and shall be deemed to be, a member of the association until such time as the appointment of his successor takes effect. 1981, c.18, s.17.

[31] The Applicant has two concerns about this response: that Health PEI referred the Applicant to the website instead of providing the information directly, and their view that the website was not current.

[32] The Applicant is concerned that Health PEI referred the Applicant to a website instead of providing the information. The Applicant advises me that they were aware of this website, but states, in part:

I am requesting that you as the Privacy Commissioner look into why anyone would respond to an Access to Information request that is asking for specific name and term dates in regard to the PEI MHRB would provide nothing more than a web page which they obviously did not even look at themselves to ensure it actually contained the proper and up to date information being requested in the Access to Information Request they were responding to.

[33] Health PEI had advised the Applicant that this information is not in their custody or control. I confirm that the Review Board (*Mental Health Act*) is listed in the regulations to the *FOIPP Act* as a separate public body from Health PEI. Members are appointed by Lieutenant Governor in Council, and a list of members of the *Mental Health Act* Review Board is on the Executive Council Office’s webpage, which is also a separate public body from Health PEI.

[34] I have no concerns about a public body referring an applicant to the website of another public body. This is an appropriate answer to a request for information that is both publicly available and not within their custody or control.

- [35] The Applicant believes that the website is not current because they believe there had been an inaccuracy on the website before, and the terms of office of some of the members had expired.
- [36] The Applicant contacted a person who was identified as a contact person for the *Mental Health Act* Review Board on a website. This individual was the administrator of the three psychiatric facilities, but around this time the individual changed positions, and was no longer the administrator or the contact person. By the Applicant's observation, the contact person on the website was changed twice after this. The Applicant does not believe that one of the individuals in one of the changes was properly identified as a contact person, stating their belief that the individual was not employed in a leadership role at Health PEI at the time they were listed as a contact person for the Review Board. There is no requirement for the contact person for the *Mental Health Act* Review Board to be an administrator of a psychiatric facility or in some other leadership role with Health PEI. There may have been a delay in updating the web page with a new contact person, but this is not an issue that warrants an inquiry under the *FOIPP Act*.
- [37] The website sets out the terms of office, and some of these terms had expired. Health PEI directed the Applicant to a provision of the *Interpretation Act* which states that a member of a board, whose term has expired, is deemed to continue to be a member of the board until the appointment of their successor takes effect. The Applicant does not mention Health PEI's explanation in their request for review, but I have no reason to doubt that this explanation is accurate.
- [38] With the exception of the possible delay in updating the name of the contact person, I am not persuaded that the contact person or the list of members of the *Mental Health Act* Review Board was not accurate. The Applicant has not persuaded me that Health PEI knew, or ought to have known, that the information on the website was not accurate when Health PEI referred the Applicant to the website.

[39] I am refusing to conduct an inquiry into the Applicant's concerns about Health PEI's answer to the second question. I have no concerns about whether Health PEI's answer is open, accurate and complete, and have no concerns about Health PEI referring an applicant to a website for information that is publicly available, and not within their custody or control.

[40] In my opinion, the circumstances warrant refusing to conduct an inquiry pursuant to subsection 64.1(b) of the *FOIPP Act*, and I therefore refuse to conduct an inquiry into Health PEI's response to the Applicant's second question.

Question 3: I am requesting information and confirmation as to who the individual would be, as referred to under the PE *Mental Health Act*, as the individual responsible for notifying any person in PE who is detained under the *Mental Health Act* of that detention and their right to an Appeal process via the PE Mental Health Review Board, and as to their right to Legal Counsel, as of the date of this request.

[41] Health PEI advised the Applicant of the names of the administrators who were responsible for the notification duties summarized by the Applicant when a person is detained under the *Mental Health Act*.

[42] After identifying the individuals as requested by the Applicant, Health PEI included the sentence:

... Individuals, or a member of their family as appropriate, receive a letter outlining this information. . .

[43] The Applicant expresses concerns with this statement in Health PEI's response. The Applicant then goes on to provide excerpts from the *Mental Health Act*, which have the headers "Information Status of Patient", "Notice to Family", and "Patient Rights", to support their concerns about this sentence in Health PEI's response. The Applicant states, in part:

There is no mention of only telling a family member when appropriate. . . but rather in every case the next immediate adult person of the patient related or otherwise is to be notified legally, otherwise we would be in a situation where citizens of PE can be picked up and detained under the PE MHA and no one has to be told what happened to them or where they are, or that they have a right to legal counsel and the Appeal Process.

In the actual case involved that has been the reason for all of these inquiries, the patient nor the next immediate adult person were advised of the Involuntary status, a right to legal counsel or the Appeal process, in any manner let alone by a letter written and provided by the Administrator. *[ellipsis in original]*

- [44] Respectfully, regarding the first part of the Applicant's concern, the Applicant appears to have misinterpreted Health PEI's response to the question. First, the Applicant uses the phrase "when appropriate", which is not an accurate reflection of Health PEI's statement. Further, I do not accept the Applicant's interpretation of Health PEI's answer. On the face of it, although it is accurate that the specific phrase "as appropriate" is not used in the legislation, Health PEI uses this expression in the context of summarizing Health PEI's actions when providing information to an individual who is receiving health care services in one of their facilities. The *Mental Health Act* is a complex legal framework. In this role I cannot interpret the *Mental Health Act*, but the Applicant has not persuaded me that Health PEI's statement is inaccurate. Without delving into interpreting the *Mental Health Act*, I see nothing in Health PEI's answer that warrants a review.
- [45] The second part of the Applicant's concern, the allegation that a particular patient nor their "next immediate adult person" were advised of the information required under the *Mental Health Act*, does not pertain to access to information or protection of privacy. Rather, it pertains to the Applicant's interpretation of certain provisions in the *Mental Health Act*, and relates to whether Health PEI complied with the provisions of the *Mental Health Act*. Interpretation of and compliance with the *Mental Health Act* is not within my jurisdiction to review, unless it impacts access to information or protection of privacy.

[46] On the plain reading of the above-quoted sentence of Health PEI, it appears Health PEI was summarizing their notification procedures of the *Mental Health Act*, and I have no concerns about whether Health PEI has answered the Applicant's question openly, accurately and completely. I am not persuaded that an inquiry is necessary to review the accuracy of Health PEI's response. The remainder of the Applicant's issue with Health PEI's response to Question 3 is not within my jurisdiction.

[47] For these reasons, I am refusing to conduct an inquiry into the Applicant's concerns about Health PEI's answer to the third question. I am not persuaded that Health PEI's answer is not open, accurate or complete. The circumstances warrant refusing to conduct an inquiry, and I am refusing to conduct an inquiry pursuant to subsection 64.1(b) of the *FOIPP Act*.

Up-to-date Website

[48] In addition to their concerns about Health PEI's answers to their questions, the Applicant also seeks our assistance to ensure that government webpages are kept up to date. The Applicant states:

Clearly there are some major issues with government departments and staff of Health PEI ensuring that the correct and up to date information is being made available on these government web pages which is supposed to be public information that is easily accessible for our use.

I am requesting that you as the Privacy Commissioner look into who is in charge of ensuring this information is updated on these government web pages.

[49] The *FOIPP Act* does not give the Commissioner the jurisdiction to compel this activity as requested by the Applicant. This is not a circumstance that warrants a review. I am refusing to conduct a review pursuant to subsection 64.1(b) of the *FOIPP Act*.

VI. DECISION

- [50] Health PEI was not obligated to respond to the Applicant's questions, as the intention of the *FOIPP Act* is relating to access to records. However, as Health PEI chose to treat the request as a *FOIPP Act* request, they were obligated to respond to the Applicant openly, accurately, and completely.
- [51] Health PEI could have chosen to simply refuse to answer the questions the Applicant asked, but they did not. Health PEI did respond to the Applicant's questions, although the Applicant did not accept the answers. I have no concerns about whether Health PEI's responses were open, accurate or complete.
- [52] In my opinion, as set out above, the concerns raised by the Applicant have either been dealt with in another order, or the circumstances warrant refusing to conduct an inquiry. I therefore refuse to conduct an inquiry pursuant to section 64.1 of the *FOIPP Act*.
- [53] In accordance with section 67 of the *FOIPP Act*, the Commissioner's decision is final. However, an application for judicial review of the decision may be made pursuant to section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.

Signed: Denise N. Doiron

Denise N. Doiron
Information and Privacy Commissioner