Nova Scotia Freedom of Information and Protection of Privacy Review Office

Submission to Law Amendments Committee

Re: Personal Health Information [Bill 89]

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Date of Appearance: November 24, 2010

A. Introduction

In the Personal Health Information Act ["PHIA"], the Department of Health ["Health"] has made a provision for independent oversight of custodians' decisions respecting personal health information. The Privacy Review Officer under the *Privacy Review Officer Act* is named as the independent oversight for PHIA.

As the Privacy Review Officer, Health initiated a lengthy consultation process with me and my office over the last few years in developing PHIA. I applaud the Ministry of Health for undertaking the consultation as it moved forward on this new legislation.

Notwithstanding best efforts of Health and the Review Officer, a number of issues remain of concern. Health has always maintained it was trying to adopt similar language to the *Freedom of Information and Protection of Privacy Act* ["*FOIPOP*"] and the *Privacy Review Officer Act* ["*PRO*"]. Health also indicated it was following in large part the personal health information model from Ontario. However, certain sections of PHIA repeat language from *FOIPOP* or *PRO* and re-create the difficulties the Review Office has observed in overseeing those acts. The sections of PHIA that include revised provisions from *FOIPOP* or *PRO* actually appear to weaken some of the effective provisions, without actually echoing the Ontario model.

The Review Office's concerns with these difficulties is that they may have the effect of reducing the independence of the Review Officer under PHIA, and serve to erode citizens' confidence that they can get a fair hearing on their rights under PHIA. As the designated oversight body, I want to be on the record with respect to these concerns so they may be considered prior to the Bill reaching final Reading and/or be available for future reference.

B. Summary of Issues:

1. Access of FOIPOP Review Officer to all Records: Solicitor-client Privilege

a. Provision in the *FOIPOP Act* [also in the *Part XX* of the *MGA*]

38(1) Notwithstanding any other Act or any privilege that is available at law, the Review Officer may, in a review,

(a) require to be produced and examine any record that is in the custody or under the control of the public body named in the request made pursuant to subsection (1) of Section 6; and
(b) enter and inspect any premises occupied by the public body.

b. Proposed wording for Bill 89

99 (1) Notwithstanding any other Act or any privilege that is available at law, ***with the exception of solicitor-client privilege****, the Review Officer may, in a review pursuant to clause 92(2)(a) or (2)(b) or (3)(a),*

(a) require to be produced and examine any record relevant to the matter that is in the custody or under the control of the custodian; and
(b) enter and inspect any premises occupied by the custodian.

The bolded language is different from *FOIPOP* and Health advises those words are intended to comply with the *Bloodtribe* ruling. But the case of *Bloodtribe* hinged on the absence of a specific clause in the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)* that would allow the commissioner to review records "notwithstanding . . . any privilege that is available at law." The Review Office takes the position that the language of section 38 of the *FOIPOP* does not restrict the office's right to examine records claimed to be solicitor-client privileged. As a result, excepting records claimed to be solicitor-client privileged from the purview of the Review Officer under PHIA has the effect of granting Applicants a weaker right of review under PHIA than they otherwise enjoy under *FOIPOP*.

Moreover, this change does not serve to bring PHIA closer in line with its ostensible model in the Ontario Act, or any other similar statutes across the country. The Review Office has canvassed our colleagues in jurisdictions with personal health information legislation. None reported that the independence of the oversight body was restricted in the way that is proposed in PHIA. No Commissioner has been told that it would not be given access to records claimed to be solicitor-client privileged; albeit they have also not reported a situation in which a personal health record contained a solicitor-client document. Commissioners would at the very least expect the custodian to provide documentation such as an affidavit attesting to the solicitor-client nature of the record being withheld. This language is problematic as once again it suggests a weaker outcome for the oversight provisions of PHIA, and as a result may serve to lessen public confidence that their rights as provided for under PHIA are not being independently reviewed and protected.

Custodians' rights to seek and receive legal advice would not be compromised by the Review Officer examining documents over which privilege has been claimed, thanks to an existing clause in PHIA:

5(3) Nothing in this Act is to be interpreted to interfere with solicitor-client privilege.

The Review Officer interprets this as meaning that providing a copy of a record to the Review Office, over which a claim of solicitor-client privilege is being made, does not waive the privilege. This is correct and clear.

c. Establishing a strong and clearly independent oversight is a critical component in ensuring that the public's rights to access information and protect privacy are respected. Limiting the scope of reviews, as section 99(1) seeks to do, undermines that principle. Section 14(1) of the proposed new *Auditor General Act* – a current bill before the House – provides guidance on a strong oversight wording:

(k) "privileged records" are records that are subject to solicitor-client privilege, litigation privilege, settlement privilege or public interest immunity;

14 (1) Notwithstanding the Freedom of Information and Protection of Privacy Act or any other legislation, ***and notwithstanding any other rights of privacy, confidentiality or privilege, including public interest immunity and solicitor-client privilege, the Auditor General has the right of unrestricted access, at all times, to all records of any auditable entity,*** *including the right to copy such records and to any things or property belonging to or used by any auditable entity, and every officer, employee and agent of any auditable entity shall forthwith provide the Auditor General any such information or explanations, or information concerning its duties, activities, organization and methods of operation, that the Auditor General believes to be necessary to perform the Auditor General's duties under this Act.*

This language is clear and appropriate for any independent oversight body requiring access to records in the course of fulfilling its mandate such as the Review Officer under PHIA.

2. Mediation

a. Provisions in *FOIPOP* [also in the *Part XX* of the *MGA*]

35 The Review Officer ***may try to settle a matter*** *under review through mediation.*

36 Where the Review Officer is unable ***to settle a matter within thirty days*** *through mediation, the Review Officer* ***shall*** *conduct a review in accordance with Section 37.*

b. While mediation is correctly a matter of discretion, there is a serious problem imposing time constraints on mediation. By its very nature mediation should not be subjected to time constraints as the process is driven by the parties, not the Mediator. The parties require time to consider their positions and find possible ways to resolve differences in order to come to a mutually agreeable solution. Imposing a timeline on mediation arbitrarily and unreasonably limits the opportunities to seek creative solutions, while increasing the likelihood of a public review.

In this case, Health has taken language direct from *FOIPOP*, but has here selected one of that Act's weaker provisions. Concerns about this issue in the *FOIPOP Act* have been raised with Justice on a number of occasions. The most recent provided in part:

30-Day mediation time limit acts as an impediment to mediated resolutions

There is a need to remove the statutory 30-day mediation restriction under FOIPOP, MGA, PRO Act and the pending PHIA *because the limit is unrealistic and restrictive and means mediation is not attempted as often as it could be. The 30-day limitation does not lend itself to the flexibility associated with good mediation practice. A new policy of promoting informal resolutions has proved to be highly successful. That process is not hampered by any unrealistic timelines. The Review Officer should have unfettered discretion to refer Reviews to mediation for an appropriate period of time to the benefit of both applicants and public bodies.*

Moreover, this strict time limit does not accord with similar legislation in other jurisdictions, including the Ontario *Personal Health Information Act*, where timelines for mediation are at the discretion of the commissioner.

Section 57(1)(c) of Ontario's Personal Health Information Act, gives the Commissioner the following powers:

57(1) Upon receiving a complaint made under this Act, the Commissioner may inform the person about whom the complaint is made of the nature of the complaint and,

. . .

(c) authorize a mediator to review the complaint and to try to effect a settlement, within the time period that the Commissioner specifies, between the complainant and the person about which the complaint is made.

Depending on the size and scope of a complaint, a Mediator is given an appropriate time frame, at the discretion of the Commissioner, to allow all parties to attempt to come to a mutual solution. Mediation is thus left open and flexible. Ontario reports that this mediation process is working well and has helped to increase earlier resolutions for the public and reduce the number of public reports that have been issued.

3. What is *relevant* in a Review and who decides? Section 99(1)(a)

a. Provision in *FOIPOP* [also in the *Part XX* of the *MGA*]

38 Notwithstanding any other Act or any privilege that is available at law, the Review Officer may, in a review,

(a) require to be produced and examine any record that is in the custody or under the control of the public body named in the request made pursuant to subsection (1) of Section 6; . . .

b. Proposed Provision in PHIA

(a)require to be produced and examine any record ***relevant to the matter*** *that is in the custody or under the control of the public body named in the request made pursuant to subsection (1) of Section 6; and*

Health has advised that it made this addition to the like provision from the *FOIPOP Act* because it believes it should let custodians decide what is relevant and, therefore, what should be shared with the Review Officer as relevant in a Review. Health appears to take the position that it cannot dictate to custodians in the same fashion as Justice imposes certain obligations on public bodies. This despite the fact that many of the public bodies under *FOIPOP* are also at arm's length from government.

The Review Officer's ability to independently conduct a review under *FOIPOP* is not limited by terms set by the very offices being reviewed. This particular language in *FOIPOP* makes clear that citizens have a strong, independent oversight making sure that their rights are protected.

Health has indicated that by adding the words ***relevant to the matter*** to s. 99(1)(a) – a section otherwise similar to the *FOIPOP* clause – it is enabling a custodian to provide only those records or information it deems relevant. If this wording achieves that goal, which remains in doubt, it significantly dilutes the power of the independent oversight body to be the one to determine what is and is not relevant. By allowing the custodian or public body under review to determine the parameters of the review, PHIA gives citizens a weaker right of Review than that found in *FOIPOP*.

4. Timeline discrepancies for access and privacy

a. Provision in *FOIPOP* [also in the *Part XX* of the *MGA*]

7(2) The head of the public body shall respond in writing to the applicant ***within thirty days*** *after the application is received . . .*

9(1) The head of a public body may extend the time provided for in Section 7 or 23 for responding to a request ***for up to thirty days*** *or, with the Review Officer's permission, for a longer period if*

(a) the applicant does not give enough detail to enable the public body to identify a requested record;
(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body; or
(c)more time is needed to consult with a third party or other public body before the head of the public body can decide whether or not to give the applicant access to a requested record.

(2) Where the time is extended pursuant to subsection (1), the head of the public body shall tell the applicant

(a) the reason;

(b) when a response can be expected; and
(c) that the applicant may complain about the extension to the Review Officer.

b. Proposed Process for Requesting Access under PHIA

PHIA correctly imposes a timeline on custodians to process an access or correction of a record request and make provision for an extension of time as follows:

84(1) A custodian who receives from an individual for access to or correction of a record of personal health information shall, as soon as possible, in the circumstances ***but no later than 30 days*** *after receiving the request, by written notice to the individual.*

(a) grant the individual's request,
(b) refuse the individual's request, or
(c) extend the ***deadline for replying for a period of not more than thirty days*** *or, with the Review Officer's permission, for a longer period if*

(i) replying to the request within thirty days would unreasonably interfere with the activities of the custodian; or
(ii) the time required to undertake the consultations necessary to reply to the request within thirty days would make it not reasonably practical to reply within that time.

(2) A custodian that extends the time limit under subsection (1) shall

(a) give the individual written notice of the extension setting out the length of the extension and the reason for the extension; and
(b) grant or refuse the individual's request as soon as possible in the circumstances but no later than the expiry of the time limit as extended.

c. Present Provisions in the *PRO*

There already exists a problem with lack of any timelines in the recent *PRO Act* [proclaimed Sept 2009]. This gap in timelines has been brought to the attention of Justice in a recent brief, which provided as follows:

Gap in timelines for public bodies to respond to privacy complaints
Presently there are no timelines in which a public body must respond to privacy complaints it receives under its internal privacy complaint process. The PRO Act and the PHI Bill require a citizen to exhaust an internal privacy complaint process within a public body prior filing a Request for Review with the oversight body. There is a need to have timelines for public bodies' internal privacy complaints under the PRO Act, such as the statutory timelines in which public bodies are required to respond to access to information requests under FOIPOP. If there are no 30/60 day limits then there can be no "deemed refusal" designation. This creates an uncertain ability for an applicant to file a Request for Review with respect to delay or failure of a public body to respond to a privacy complaint.

d. Process for Privacy Complaints under PHIA

PHIA gives the Review Officer the following powers with respect to privacy [sections 11 to 70]:

92(2) The Review Officer may

(a) monitor how the privacy provisions are administered and conduct reviews of complaints arising from the privacy provisions;
(b) initiate an investigation of compliance if there are reasonable grounds to believe that a custodian has contravened or is about to contravene the privacy provisions and the subject-matter of the review relates to the contravention;
(c) mediate and make recommendations on complaints concerning the privacy provisions;
(d) undertake research matters concerning the privacy provisions;
(e) inform the public about the privacy provisions; and
(f) on the request of a custodian, provide advice and comments on the privacy provisions.

Health has made no provision with respect to the timeline in which a custodian is to respond to a privacy complaint. This is problematic. In the *FOIPOP* and PHIA with respect to an access request, a public body in the former and a custodian in the latter must respond within 30 days. In those instances where that timeline is not met, the person making the access request can request a review by the Review Officer for the "deemed refusal." Citizens' rights of access are therefore protected: a decision must be made in response to an access request, or that failure to make a decision may be subject to a review.

Despite timelines existing for the access side of PHIA, the Bill's privacy provisions have no equivalent timeline, which means the custodian has unlimited time in which to respond and a member of the public has no means to complain to the Review Officer about the delay. This approach is particularly inconsistent under PHIA where custodians are required by law to have an internal complaint process and the Review Officer is bound not to investigate until that internal complaint process is completed. A custodian who ignores the complaint or allows an investigation to go on indefinitely can do so without the person complaining having any recourse. Citizens' rights to request redress of a privacy complaint are therefore unprotected.

Health indicates that this inability to review the custodian's failure to respond to the complainant in a timely fashion can be rectified because the Review Officer has the ability to undertake an investigation on her own initiative. Notwithstanding that an attempt by the Review Officer to conduct an own motion investigation may be obstructed by the simple requirement that an internal complaint must be completed first, using own motion powers to get around the absence of an important provision in the act is not an effective use of those powers. In addition, if the Review Officer did initiate an investigation it would be about the failure to respond to the complainant and not about the merits of the privacy concern. Moreover, it violates procedural fairness to suggest that a complainant should have to take this roundabout way to have his or her complaint

addressed. The absence of timelines for privacy in PHIA similar to those imposed by the parts of the same Bill dealing with access create significant problems for citizens seeking redress of privacy complaints.

5. Role of Supreme Court of Nova Scotia

Presently under *FOIPOP* pursuant to s. 32(3) and s. 40, applicants can choose whether or not to file a Request for Review with the Review Officer or make an application directly to Nova Scotia Supreme Court ["NSSC"]. In other words, after a public body has made a decision about an access request the applicant can bypass the Review Officer and go directly to Court or an applicant can choose to go through the Review Officer's process and, thereafter, if the public body does not follow the Review Officer's recommendation, the applicant may file an appeal for a trial *de novo* to NSSC.

This option under *FOIPOP* is working well and seems to allow an effective redress for Applicants' access rights. It provides Applicants with options and ensures that all the same rights of redress are available for all types of complaints.

Health indicates that it was intentional in PHIA to require applicants [except in one major exception] to always go to the Review Officer before applying to the NSSC. Applicants have no choice under PHIA.

The major exception is if the record is being withheld from the applicant based on solicitor-client privilege. Health indicates in this case it wants to require a citizen to take the matter directly to Supreme Court. Instead of an Applicant having the opportunity to pursue his/her rights under the free process at the Review Office, s/he is forced to bear the considerable costs of a Supreme Court hearing.

The Review Officer raised another complicating factor with Health. In situations where a custodian cites the solicitor-client privilege exemption and an additional exemption or exemptions to deny access, an Applicant will face the unfair situation of having to go through two separate processes to have his/her access rights heard.

The Applicant would have to pursue the solicitor-client exemption to the NSSC, while at the same time pursuing the other exemptions through a Review Officer's report. If an Applicant wanted the matter dealt with as a whole, the Judge would have to wait for the Review Officer to complete the Review to deal with the other portion of the record because an Applicant has no choice to go to NSSC first for that portion.

6. Express or Implied Consent: Grateful Patient Provision

a. Relevant Statutory Provisions

1. In sections 32, 34, and 43, PHIA provides that express consent is required to collect, use or disclose personal health information.

2. This is in contrast to the **Ontario legislation**, the otherwise prototype for PHIA. That statute provides:

Use and disclosure of personal health information

31(1) A health information custodian that collects personal health information in contravention of this Act shall not use it or disclose it unless required by law to do so. 2004, c. 3, Sched. A, s. 31(1).

(2) Repealed: 2004, c. 3, Sched. A, s. 31(4).

(3) Repealed: 2004, c. 3, Sched. A, s. 31(4).

(4) Spent: 2004, c. 3, Sched. A, s. 31(4).

Fundraising

32(1) Subject to subsection (2), a health information custodian may collect, use or disclose personal health information about an individual for the purpose of fundraising activities only where,

(a) the individual expressly consents; or

(b) the individual consents by way of an implied consent and the information consists only of the individual's name and the prescribed types of contact information.

3. Personal health information is defined in the interpretation section of PHIA as follows:

3(r) "personal health information" means identifying information about an individual, whether living or deceased, and in both recorded and unrecorded forms, if the information

(i) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,
(ii) relates to the application, assessment, eligibility and provision of health care to the individual, including the identification of a person as a provider of health care to the individual,
(iii) relates to payments or eligibility for health care in respect of the individual,
(iv) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,
(v) is the individual's registration information, including the individual's health-card number, or
(vi) identifies an individual's substitute decision-maker;

In a subsequent provision identifying information is deemed to be included as part of but not the same as personal health information as follows:

4(1) In addition to the matters referred to in clause 3(s) and subject to subsection 8(2), ***personal health information includes identifying information*** *about an*

individual that is not personal health information but that is contained in a record that contains personal health information about the individual within the meaning of that clause.

> *(l) "identifying information" means information that identifies an individual or, where it is reasonably foreseeable in the circumstances, could be utilized, either alone or with other information, to identify an individual;*

The implied consent provision in Ontario is intended to enable custodians to share minimal identifying information [name and contact information] with hospital foundations. That identifying information would not include personal health information as defined by PHIA.

Learning from jurisdictions with similar personal health information is important. Ontario reports minimal opt out of implied consent and no breaches: no cases where personal health information inappropriately shared with the fundraising agency of a hospital.

If there was an intention to allow for implied consent this could be achieved in PHIA by permitting only *identifying information* to be shared NOT personal health information.

The main point is that personal health information includes identifying information but identifying information does not necessarily include personal health information.

b. <u>It would not be appropriate for the Review Officer to take a position for or against implied or express consent. The role of the Review Officer is to raise privacy related questions that the Committee may want to consider:</u>

(a) Is the public getting accurate information? For example, some media coverage suggests *personal health information* will be shared by the hospital to the foundation. Is this accurate or would it only be *identifying information* such as name and address that would be given to the foundation in the same way as in Ontario. Who is going to educate the public about this new legislation to enable them to make informed choices?

(b) What is the difference between express and implied consent? What is the most respectful way to allow patients to give or withhold their consent to have their names and contact information shared with a fundraising foundation? Is the model under PHIA not already using implied consent for the creation of an electronic health record, which may have many privacy ramifications?

(c) If implied consent was provided for in the legislation it is enabling not mandatory, which means hospitals as the custodians can choose whether or not to provide the information to the foundations. The safeguards would be up to the custodians. What are those safeguards? Factors to consider could be:

1. How will hospitals ensure that patients are given, clear ample information how to opt out? If the manner in which patients are informed in advance of their ability to opt out at any time [one on one, posters, public education] *in advance* of their identifying information being shared with a foundation this may be tantamount to patients giving informed consent.
2. An equally important safeguard is the screening process. The theory is that this screen is applied to all patient files to ensure no identifying information is given to a foundation in those instances where the patient's situation is particularly sensitive. Who develops the screens? Have they been successful in other jurisdictions?

Thank you for the opportunity to provide this presentation to the Committee.