

RECOMMENDATIONS FOR NWT'S HSPL: ACCESS & CORRECTION

I. Staring Principle, Stated Purpose

An individual must have access to personal information held by an organization about them. There are exemptions to this principle; that is the right of access is not absolute. The common exceptions can be summarized as follows:

- if access would pose a serious and imminent threat to the life or health of any individual;
- it would have an unreasonable impact upon the privacy of other individuals;
- the request is frivolous or vexatious; there are existing or anticipated legal proceedings between the organization and the individual;
- providing access would be unlawful;
- denying access is required or authorized by or under law;
- providing access may prejudice an investigation of possible unlawful activity, or the prevention or detection of a crime or the enforcement of laws.

An individual also has the right to request a correction to personal information held by an organization about them. There is one key exemption to this principle; that is, if the information sought to be corrected is a professional observation or opinion.

Equally important is the principle that an organization must provide reasons for denial of access or a refusal to correct personal information.

II. RECOMMENDATION LANGUAGE

To translate the above, together with the feedback from the Panels, the NWT can consider the following schemes:

- ***Manitoba***

Right to examine and copy information

5(1) Subject to this Act, an individual has a right, on request, to examine and receive a copy of his or her personal health information maintained by a trustee.

How to make a request

5(2) A request must be made to the trustee who the individual believes maintains the personal health information.

Trustee may require written request

5(3) A trustee may require a request to be in writing.

Trustee must respond promptly

6(1) A trustee shall respond to a request as promptly as required in the circumstances but no later than 30 days after receiving it, unless the request is transferred to another trustee under section 8.

Duty to assist an individual

6(2) A trustee shall make every reasonable effort to assist an individual making a request and to respond without delay, openly, accurately and completely.

Failure to respond

6(3) The failure of a trustee to respond to a request within the 30-day period is to be treated as a decision to refuse to permit the personal health information to be examined or copied.

Trustee's response

7(1) In responding to a request, a trustee shall do one of the following:

- (a) make the personal health information available for examination and provide a copy, if requested, to the individual;
- (b) inform the individual in writing if the information does not exist or cannot be found; or
- (c) inform the individual in writing that the request is refused, in whole or in part, for a specified reason described in section 11, and advise the individual of the right to make a complaint about the refusal under Part 5.

Duty to provide an explanation

7(2) On request, a trustee shall provide an explanation of any term, code or abbreviation used in the personal health information.

Information in electronic form

7(3) When a request is made for personal health information that a trustee maintains in electronic form, the trustee shall produce a record of the information for the individual in a form usable by the individual, if it can be produced using the trustee's normal computer hardware and software and technical expertise.

Transferring a request to another trustee

8(1) Within seven days after receiving a request, a trustee may transfer it to another trustee if

- (a) the personal health information is maintained by the other trustee; or
- (b) the other trustee was the first to collect the personal health information.

Response within 30 days after transfer

8(2) A trustee who transfers a request under subsection (1) shall notify the individual of the transfer as soon as possible, and the trustee to whom the request is transferred shall respond to it as promptly as required in the circumstances but no later than 30 days after receiving it.

Trustee must take precautions about release

9 A trustee

- (a) shall not permit personal health information to be examined or copied without being satisfied as to the identity of the individual making the request; and
- (b) shall take reasonable steps to ensure that any personal health information intended for an individual is received only by that individual.

Fees

10 A trustee may charge a reasonable fee for permitting examination of personal health information and providing a copy, but the fee must not exceed the amount provided for in the regulations.

REASONS FOR REFUSING ACCESS

Reasons for refusing access

11(1) A trustee is not required to permit an individual to examine or copy his or her personal health information under this Part if

- (a) knowledge of the information could reasonably be expected to endanger the health or safety of the individual or another person;
- (b) disclosure of the information would reveal personal health information about another person who has not consented to the disclosure;

- (c) disclosure of the information could reasonably be expected to identify a third party, other than another trustee, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected;
- (d) the information was compiled and is used solely
 - (i) for the purpose of peer review by health professionals,
 - (ii) for the purpose of review by a standards committee established to study or evaluate health care practice in a health care facility or health services agency,
 - (iii) for the purpose of a body with statutory responsibility for the discipline of health professionals or for the quality or standards of professional services provided by health professionals, or
 - (iv) for the purpose of risk management assessment; or
- (e) the information was compiled principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding.

Severance of information

11(2) A trustee who refuses to permit personal health information to be examined or copied under subsection (1) shall, to the extent possible, sever the personal health information that cannot be examined or copied and permit the individual to examine and receive a copy of the remainder of the information.

- ***Newfoundland***

Individual's right of access

52.(1) An individual has a right of access to a record containing his or her personal health information that is in the custody or under the control of a custodian.

(2) The right of access to a record of personal health information referred to in subsection (1) does not extend to personal health information in respect of which a custodian is authorized to refuse access under section 58 but where that information can be severed from a record, the individual has a right of access to the remainder of the record in accordance with this Act.

(3) Where a record is not a record dedicated primarily to personal health information about the individual who is requesting access, the individual has a right of access only to the portion of personal health information about himself or herself in the record that can reasonably be severed from the rest of the record for the purpose of providing access.

Exercise of right of access

53.(1) An individual may exercise a right of access to a record of his or her personal health information by making a request for access to the custodian that the individual believes has custody or control of the information.

(2) A custodian may require a request under subsection (1) to be in writing unless the individual making the request

- (a) has limited ability to read or write English; or
- (b) has a disability or a condition that impairs his or her ability to make a request in writing.

Content of request

54.(1) A request referred to in subsection 53(1) shall contain sufficient detail to permit the custodian to identify and locate the record with reasonable efforts.

(2) Where a request does not contain sufficient detail to permit the custodian to identify and locate the record with reasonable efforts, the custodian shall offer assistance to the person requesting access to reformulate the request to comply with subsection (1).

Time of response

55.(1) A custodian shall respond to a request under subsection 53(1) without delay and in any event not more than 60 days after receiving the request.

(2) Notwithstanding subsection (1), a custodian may extend the time limit set out in subsection (1) for an additional 30 days where

- (a) meeting the time limit set out in subsection (1) would unreasonably interfere with the operations of the custodian; or
- (b) the information consists of numerous records or locating the information that is the subject of the request cannot be completed within the time limit set out in subsection (1).

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

- (a) give the individual making the request under subsection (1) written notice of the extension, together with reasons for the extension; and
- (b) grant or refuse the individual's request as soon as possible and in any event not later than the expiration of the time limit as extended.

Response of the custodian

56.(1) In its response under section 55, the custodian shall, as appropriate,

- (a) where the custodian decides to grant access, make the record available to the individual for examination and, upon request of the individual, provide a copy of the record to the individual and an explanation, where necessary, of any information contained in the record;
- (b) give a notice in writing to the individual stating that, after reasonable efforts, the custodian has concluded that the record does not exist or cannot be found; or
- (c) where the custodian is entitled to refuse the request, in whole or in part, give a notice in writing to the individual making the request stating that access to the record in whole or part is refused, together with reasons for the refusal, and that the individual may appeal the refusal to the Trial Division under Part VII or request a review of the refusal by the commissioner under Part VI.

(2) Where a custodian fails to respond to a request for access within the period referred to in subsection 55(1) or (2) he or she shall be considered to have refused the request for access and the individual requesting access may appeal that refusal to the Trial Division under Part VII or request a review of the refusal by the commissioner under Part VI.

Fees

57.(1) A custodian may charge a reasonable fee for providing a copy of a record in response to a request for access and the fee shall not exceed the maximum fee set by the minister.

(2) A custodian may waive all or part of a fee referred to in subsection (1).

Refusal of access

58.(1) A custodian shall refuse to permit an individual to examine or receive a copy of a record of his or her personal health information where

- (a) another Act, an Act of Canada or a court order prohibits disclosure to the individual of the record or the information contained in the record in the circumstances;
- (b) granting access would reveal personal health information about an individual who has not consented to disclosure; or
- (c) the information was created or compiled for the purpose of
 - (i) a committee referred to in subsection 8.1(2) of the *Evidence Act*,
 - (ii) review by a standards or quality assurance committee established to study or evaluate health care practice, or

- (iii) a body with statutory responsibility for the discipline of health care professionals or for the quality or standards of professional services provided by health care professionals.

(2) A custodian may refuse to permit an individual to examine or receive a copy of a record of his or her personal health information where

- (a) the record or the information in the record is subject to a legal privilege that restricts disclosure of the record or the information;
- (b) the information in the record was collected or created primarily in anticipation of, or for use in, a proceeding and the proceeding, together with all appeals or processes resulting from it, has not been concluded;
- (c) the following conditions are met:
 - (i) the information was collected or created in the course of an inspection, investigation or similar procedure authorized by law or undertaken for the purpose of the detection, monitoring or prevention of the receipt of a service or benefit under an Act or program operated by the minister, or a payment for that service or benefit, and
 - (ii) the inspection, investigation or similar procedure, together with all proceedings, appeals or processes resulting from it, have not been concluded; or
- (d) granting access could reasonably be expected to
 - (i) result in a risk of serious harm to the mental or physical health or safety of the individual who is the subject of the information or another individual,
 - (ii) lead to the identification of a person who was required by law to provide information in the record to the custodian, or
 - (iii) lead to the identification of a person who provided information in the record to the custodian in confidence under circumstances in which confidentiality was reasonably expected.

(3) In addition to the grounds set out in subsections (1) and (2) , a custodian may refuse to grant a request for access to a record of personal health information where the custodian believes on reasonable grounds that the request for access to the record is

- (a) frivolous or vexatious;
- (b) made in bad faith; or
- (c) for information already provided to the individual.

(4) Notwithstanding subparagraph (2)(d)(i), an individual shall not be refused access to a certificate of involuntary admission or a community treatment order issued under the *Mental Health Care and Treatment Act* in respect of that individual.

Informal access

59.(1) Nothing in this Act prevents a custodian from

- (a) granting an individual access to a record of his or her personal health information where the individual makes an oral request for access or makes no request, provided that access is authorized under this Part; or
- (b) with respect to a record of personal health information to which an individual has a right of access, communicating with the individual about the collection, use or disclosure of personal health information about the individual.

(2) Nothing in this Part relieves a custodian from a legal duty to provide, in a manner that is not inconsistent with this Act, personal health information as expeditiously as is necessary for the provision of health care to the individual.

Correction

60.(1) Where a custodian has granted an individual access to a record of his or her personal health information and the individual believes that the record is inaccurate or incomplete, he or she may request that the custodian correct the information.

(2) A request under subsection (1) may be made orally or in writing.

Time of response

61.(1) A custodian shall respond to a request for correction under subsection 60(1) without delay and in any event not more than 30 days after receiving the request.

(2) Notwithstanding subsection (1), a custodian may extend the time limit set out in that subsection for an additional 30 days where

- (a) meeting the time limit set out in subsection (1) would unreasonably interfere with the operations of the custodian; or
- (b) the information that is the subject of the request for correction is located in numerous records so that the request cannot be completed within the time limit set out in subsection (1).

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

- (a) give the individual making the request under subsection 60(1) written notice of the extension, together with reasons for the extension; and

- (b) respond to the individual's request as soon as possible and in any event not later than the expiration of the time limit as extended.

Response of custodian

62.(1) In its response under section 61, the custodian

- (a) shall grant the request for correction where the individual making the request under subsection 60(1)
 - (i) demonstrates to the satisfaction of the custodian that the record is incomplete or inaccurate for the purposes for which the custodian uses the information, and
 - (ii) gives the custodian the information necessary to enable the custodian to correct the record; or
- (b) may refuse the request for correction where
 - (i) the record was not originally created by the custodian and the custodian does not have sufficient knowledge, expertise and authority to correct the record,
 - (ii) the information which is the subject of the request consists of a professional opinion or observation that a custodian has made in good faith about the individual, or
 - (iii) the custodian believes on reasonable grounds that the request is frivolous, vexatious or made in bad faith.

(2) Where a custodian fails to respond to a request for correction within the time period referred to in subsection 61(1) or (2) he or she shall be considered to have refused the request for correction and the individual making the request may appeal that refusal to the Trial Division under Part VII or request a review of the refusal by the commissioner under Part VI.

Duty of custodian

63.(1) Where a custodian grants a request for a correction under paragraph 62(1)(a), he or she shall

- (a) make the requested correction
 - (i) by recording the correct information in the record and
 - (A) striking out the incorrect information in a manner that does not obliterate the record, or
 - (B) where it is not possible to strike out the incorrect information, by labelling the information as incorrect, severing the incorrect

information from the record, storing the incorrect information separately from the record, and maintaining a link in the record that enables a person to trace the incorrect information, or

- (ii) where it is not possible to record the correct information in the record, by ensuring that there is a practical system in place to inform a person accessing the record that the information in the record is incorrect and to direct the person to the correct information;
- (b) provide written notice to the individual making the request for correction under subsection 60(1) of an action taken under paragraph (a); and
- (c) provide written notice of the requested correction, to the extent reasonably possible, to a person to whom the custodian has disclosed the information within the 12 month period immediately preceding the request for correction unless the custodian reasonably believes that the correction will not have an impact on the ongoing provision of health care or other benefits to the individual or where the individual requesting the correction has advised that notice is not necessary.

(2) Where a custodian refuses to grant a request for correction under paragraph 62(1)(b) he or she shall

- (a) annotate the personal health information with the correction that was requested and not made and, where practicable, notify a person to whom the information was disclosed within the 12 month period immediately preceding the request for correction of the notation unless the custodian reasonably expects that the notation will not have an impact on the ongoing provision of health care or other benefits to the individual or the individual requesting the correction has advised that notice is not necessary; and
- (b) provide the individual requesting the correction with a written notice setting out the correction that the custodian has refused to make, the refusal together with reasons for the refusal, and the right of the individual to appeal the refusal to the Trial Division under Part VII or request a review of the refusal by the commissioner under Part VI.

Duty of custodian

64.A custodian shall not make a record of personal health information, or part of it, available to an individual under this Part without first taking reasonable steps to be satisfied as to the individual's identity.

- **Alberta**

Right of individual to access individual's health information

7(1) An individual has a right of access to any record containing health information about the individual that is in the custody or under the control of a custodian.

(2) The right of access to a record does not extend to information in respect of which a custodian is authorized or required to refuse access under section 11, but if that information can reasonably be severed from a record, an individual has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required by the regulations.

How to make a request

8(1) To obtain access to a record, an individual must make a request to the custodian that the individual believes has custody or control of the record.

(2) A custodian that has received a request for access to a record under subsection (1) may require the applicant to submit the request in writing.

(3) In a request, the applicant may ask

- (a) for a copy of the record, or
- (b) to examine the record.

Abandoned request

9(1) Where a custodian contacts an applicant in writing respecting the applicant's request, including

- (a) seeking further information from the applicant that is necessary to process the request, or
- (b) requesting the applicant to pay a fee or to agree to pay a fee,

and the applicant fails to respond to the custodian, as requested by the custodian, within 30 days after being contacted, the custodian may, by notice in writing to the applicant, declare the request abandoned.

(2) A notice declaring a request abandoned must state that the applicant may ask for a review of that decision by the Commissioner.

Duty to assist applicants

10 A custodian that has received a request for access to a record under section 8(1)

- (a) must make every reasonable effort to assist the applicant and to respond to each applicant openly, accurately and completely,
- (b) must create a record for an applicant if
 - (i) the record can be created from information that is in electronic form and is in the custody or under the control of the custodian, using its normal computer hardware and software and technical expertise, and

- (ii) creating the record would not unreasonably interfere with the operations of the custodian,
- and
- (c) must provide, at the request of an applicant and if reasonably practicable, an explanation of any term, code or abbreviation used in the record.

Right to refuse access to health information

11(1) A custodian may refuse to disclose health information to an applicant

- (a) if the disclosure could reasonably be expected
 - (i) to result in immediate and grave harm to the applicant's mental or physical health or safety,
 - (ii) to threaten the mental or physical health or safety of another individual, or
 - (iii) to pose a threat to public safety,
- (b) if the disclosure could reasonably lead to the identification of a person who provided health information to the custodian explicitly or implicitly in confidence and in circumstances in which it was appropriate that the name of the person who provided the information be kept confidential,
- (c) if the disclosure could reasonably be expected to reveal
 - (i) advice, proposals, recommendations, analyses or policy options developed by or for a member of the Executive Council, or
 - (ii) consultations or deliberations involving a member of the Executive Council or the member's staff,
- (d) if the disclosure could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a custodian referred to in section 1(1)(f)(iii), (iv) or (vii), or
- (e) if the information relates to
 - (i) procedures or techniques relating to audits to be conducted or diagnostic tests or assessments to be given,
 - (ii) details of specific audits to be conducted or of specific tests or assessments to be given, or
 - (iii) standardized diagnostic tests or assessments used by a custodian, including intelligence tests,

and disclosure of the information could reasonably be expected to prejudice the use or results of particular audits, diagnostic tests or assessments.

- (2) A custodian must refuse to disclose health information to an applicant
- (a) if the health information is about an individual other than the applicant, unless the health information was originally provided by the applicant in the context of a health service being provided to the applicant,
 - (b) if the health information sets out procedures or contains results of an investigation, a discipline proceeding, a practice review or an inspection relating to a health services provider,
 - (c) if the health information would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendation, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees, unless the health information
 - (i) has been in existence for 15 years or more,
 - (ii) is part of a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
 - (iii) is part of a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision where
 - (A) the decision has been made public,
 - (B) the decision has been implemented, or
 - (C) 5 years or more have passed since the decision was made or considered,
- or
- (d) if the disclosure is prohibited by another enactment of Alberta.

Time limit for responding to a request for access

12(1) A custodian must make every reasonable effort to respond to a request under section 8(1) within 30 days after receiving the request or within any extended period under section 15.

- (2) In a response under subsection (1), the custodian must tell the applicant
- (a) whether access to a record or part of it is granted or refused,
 - (b) if access to the record or part of it is granted, where, when and how access will be given, and

- (c) if access to the record or part of it is refused,
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
 - (ii) the name, title, business address and business telephone number of an affiliate of the custodian who can answer the applicant's questions about the refusal, and
 - (iii) that the applicant may ask for a review of that decision by the Commissioner.

(3) The failure of the custodian to respond to a request under section 8(1) within the 30-day period or any extended period referred to in subsection (1) is to be treated as a decision to refuse access to the record.

Correction or amendment of health information

13(1) An individual who believes there is an error or omission in the individual's health information may in writing request the custodian that has the information in its custody or under its control to correct or amend the information.

(2) Within 30 days after receiving a request under subsection (1) or within any extended period under section 15, the custodian must decide whether it will make or refuse to make the correction or amendment.

(3) If the custodian agrees to make the correction or amendment, the custodian must within the 30-day period or any extended period referred to in subsection (2)

- (a) make the correction or amendment,
- (b) give written notice to the applicant that the correction or amendment has been made, and
- (c) notify any person to whom that information has been disclosed during the one-year period before the correction or amendment was requested that the correction or amendment has been made.

(4) The custodian is not required to provide the notification referred to in subsection (3)(c) where

- (a) the custodian agrees to make the correction or amendment but believes that the applicant will not be harmed if the notification under subsection (3)(c) is not provided, and
- (b) the applicant agrees.

(5) If the custodian refuses to make the correction or amendment, the custodian must within the 30-day period or any extended period referred to in subsection (2) give written notice to the

applicant that the custodian refuses to make the correction or amendment and of the reasons for the refusal.

- (6) A custodian may refuse to make a correction or amendment that has been requested in respect of
- (a) a professional opinion or observation made by a health services provider about the applicant, or
 - (b) a record that was not originally created by that custodian.

(7) The failure of the custodian to respond to a request in accordance with this section within the 30-day period or any extended period referred to in subsection (2) is to be treated as a decision to refuse to make the correction or amendment.

Refusal to correct or amend information

14(1) Where a custodian refuses to make a correction or amendment under section 13, the custodian must tell the applicant that the applicant may elect to do either of the following, but may not elect both:

- (a) ask for a review of the custodian's decision by the Commissioner;
- (b) submit a statement of disagreement setting out in 500 words or less the requested correction or amendment and the applicant's reasons for disagreeing with the decision of the custodian.

(2) An applicant who elects to submit a statement of disagreement must submit the statement to the custodian within 30 days after the written notice of refusal has been given to the applicant under section 13(5) or within any extended period under section 15(3).

- (3) On receiving the statement of disagreement, the custodian must
- (a) if reasonably practicable, attach the statement to the record that is the subject of the requested correction or amendment, and
 - (b) provide a copy of the statement of disagreement to any person to whom the custodian has disclosed the record in the year preceding the applicant's request for the correction or amendment.

Extending time

15(1) The custodian may extend the time for responding to a request under section 8(1) or 13(1) for an additional period of up to 30 days or, with the Commissioner's permission, for a longer period if

- (a) the request does not give enough detail to enable the custodian to identify the record that is requested or to be corrected or amended,

- (b) a large number of records are involved in the request and responding within the period set out in section 12(1) or 13(2), as the case may be, would unreasonably interfere with the operations of the custodian, or
- (c) more time is needed to consult with another custodian before deciding whether to grant access to a record or to make the correction or amendment requested.

(2) If the time is extended under subsection (1), the custodian must tell the applicant

- (a) the reason for the extension,
- (b) when a response can be expected, and
- (c) that the applicant may make a complaint to the Commissioner about the extension.

(3) The Commissioner may extend the time within which an applicant must submit the statement of disagreement under section 14(2) if in the opinion of the Commissioner

- (a) it is unreasonable to expect the applicant to submit the statement within the period set out in section 14(2), or
- (b) it is fair to extend the time for any other reason.

Request under s8 or s13 deemed to be a request under FOIP

16(1) If a written request is made under section 8(1) for access to a record that contains information to which the *Freedom of Information and Protection of Privacy Act* applies, the part of the request that relates to that information is deemed to be a request under section 7(1) of the *Freedom of Information and Protection of Privacy Act* and that Act applies to that part of the request as if it had been made under section 7(1) of that Act.

(2) If a written request is made under section 13(1) to correct or amend information to which the *Freedom of Information and Protection of Privacy Act* applies, the request is deemed to be a request under section 36(1) of the *Freedom of Information and Protection of Privacy Act* and that Act applies to the request as if it had been made under section 36(1) of that Act.

(3) This section does not apply if the custodian that receives the request is not a public body as defined in the *Freedom of Information and Protection of Privacy Act*.

Existing procedures still available

17 An individual is not limited to the procedure set out in this Part to request access to health information about the individual if another procedure is available.

III. NEW SUB-TOPIC:

Since the last meeting of the Panels, a new topic, relevant to access, has arisen and is worthy of mention, and brief discussion: *Bill 24 — 2008 E-Health (Personal Health Information Access and Protection Of Privacy) Act*.^{*} This bill is expected to govern how access can be granted in the context of electronic health records and other health data repositories.

* http://www.leg.bc.ca/38th4th/1st_read/gov24-1.htm