

# REPORT OF THE COMMISSIONER'S FINDINGS

*Right to Information and Protection of Privacy Act*

Complaint Matter: 2011-174-AP-085

July 26, 2011

Office of the Access to Information and Privacy Commissioner of New Brunswick

## **INTRODUCTION and BACKGROUND**

1. The present Report of Commissioner's findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This matter stems from a Complaint made by the Applicant to this Office dated January 26, 2011.

2. On December 7, 2010, the Applicant submitted a request for information to Horizon Health Network ("Horizon") as follows:

Please consider this email my request under Right to Information Act for all cases of any deaths that happened in the Psych Unit (CNC or ward) since 1994 in the hospitals in N.B. with psych units ("the Request").

3. Horizon issued its response on January 5, 2011, providing the following:

Horizon Health Network is only able to provide information related to the hospitals within its jurisdiction. We are not responsible for and do not have information which pertains to Vitalité Health Network. You would have to contact this organization for their data.

Horizon Health Network did not have an existing document or report which provides the detail you were looking for ("the Response").

4. The Applicant filed a complaint about the Response with this Office on January 26, 2011 and provided the following comments:

Enclosed please find a copy of letter from Mr. Donald Peters, CEO of Horizon Health Network. I am complaining to you about his response because I feel entitled to at least have Mr. Peters reveal this information that I requested at least for the Hospitals with Psych Units within Horizon Health Network only. I will send a request for the other hospitals directly to Vitalite Health Network.

## **INFORMAL RESOLUTION PROCESS**

5. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties and in accordance with the rights and obligations provided by the Act.

6. The informal resolution process provides guidance to public bodies and applicants with a view to better understand this new legislation. Ideally, this process will encourage a

prompt and satisfactory outcome to the complaint (*Note: A full description of the steps involved in the Commissioner's informal resolution process can be found in **Appendix A** of this Report*).

7. The initial step undertaken by the Commissioner was to review the Request and the Response and determine whether the Response met the requirements of the *Act*. In that regard, steps undertaken included meeting with officials at Horizon to review the steps taken in responding to the Request, including Horizon's determination that no relevant records existed.
8. At this stage, Horizon indicated that it did not interpret the Request to be for the medical files of the individuals who had died in psychiatric units, and in any event, determined that this information would constitute personal health information of other individuals, to which the Applicant does not have a right of access.
9. Horizon thus treated the Request as one asking for the number of cases of deaths in New Brunswick hospitals with mental health units and in response, Horizon stated that it did not have an existing document or report with the requested information. Further, Horizon informed us that its current records database only allows for retrieval of information back to 2003, and as a result, Horizon was unable to conduct a search for relevant records prior to that point in time.
10. At our meeting, Horizon indicated that the requested information, i.e., the number of cases of deaths in mental health units per geographical zone, could be readily retrieved since 2003. The information Horizon retrieved from the database indicated that there had been 4 deaths on psychiatric units at Horizon hospitals since 2003.
11. While Horizon did not have a specific record with the exact information requested at the time of the Request, we were not satisfied that the Response provided a full and frank disclosure, given that the information could be retrieved from the database and communicated to the Applicant.
12. Horizon also raised concerns as to whether the release of this information could lead to the identification of the individuals, given that there were only four individual cases. We reviewed the relevant provisions of the *Act* and determined that in this case, there was little risk of the individuals being identified by the release of this information.

13. Based on the above, we invited Horizon to consider providing a revised response to the Applicant indicating the number of deaths in psychiatric units in Horizon hospitals.
14. Horizon agreed to continue the informal resolution process and to provide a revised response as discussed. Our Office reviewed the revised response prior to its issue to ensure that we were satisfied that it provided a full and complete response to the Request and that it was compliant with Horizon's obligations under the Act.
15. The revised response provides as follows:

Upon further review our records show that there were 4 deaths in Horizon Health Network since 2003. This review would include the psychiatric units in Fredericton, Saint John, Moncton and Miramichi. We are unable to go back to 1994 as you had requested ("Revised Response").

16. As we were satisfied with the Revised Response as a means of informally resolving the complaint, our Office then issued letters to both the Applicant and Horizon detailing the next steps in the informal resolution process. As Horizon had agreed to provide the Revised Response to the Applicant, we invited the Applicant to review and to provide comments to our Office about the Revised Response.
17. The Applicant indicated that the Revised Response was not satisfactory and provided the following comments:

...this will confirm that I am not happy with the response from Horizon Health Network. Further investigation is necessary, as how could a Health Authority not have the full details of the questions I asked for in my letter...

Please investigate to the fullest. Thank you.

## **FORMAL INVESTIGATION**

18. As the informal resolution process was not successful, our Office proceeded to review the entire matter once more in order to determine whether further investigation was necessary.
19. We reviewed the Request and the Revised Response provided by Horizon. We were satisfied that the Revised Response provided a complete reply to the Request in

accordance with the *Act* and see no reason to alter our findings or to investigate the matter further.

20. The Commissioner therefore finds that Horizon's Revised Response provided a full and frank disclosure to the Request and in accordance with its obligations under the *Act*. In that regard, it is not necessary for me to make a recommendation in this matter.

Dated at Fredericton, New Brunswick, this 26 day of July, 2011.

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Anne E. Bertrand, Q.C.  
Commissioner

# Appendix A

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Office of the Access to Information and Privacy Commissioner of New Brunswick

## “Complaint Process”

*The Commissioner's Policy on the Complaint Process is designed to respect the Right to information and Protection of Privacy Act, to encourage both cooperation and transparency, and all the while reaching for a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the Act. Below is an explanation of the distinction between what is referred to as an informal resolution process and a formal complaint investigation more commonly recognized by the public, along with timelines. This Complaint Process is communicated to both the applicant and the public body at the outset of a complaint matter filed with our Office.*

## **Commissioner's Policy on the Complaint Process**

Upon the receipt of a complaint, the *Act* allows the Commissioner to proceed in two ways: by investigating the complaint, or by taking any appropriate steps to resolve the matter informally. For all intents and purposes, in both the informal resolution process and the formal investigation the Commissioner's work constitutes an 'investigation' into the merits of the complaint; however, in the informal resolution process, the Commissioner takes all steps necessary to resolve the complaint to the satisfaction of all involved, and in a manner consistent with the purposes of the *Act*. When this is not possible, the Commissioner concludes her work by a formal investigation which leads to the publication of a formal Report of the Commissioner's Findings.

Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner has adopted a policy to treat all complaints in the first instance by way of informal resolution. Our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and to become more familiar with their rights and obligations under the legislation. Educating the public of the application of this new law is an important part of the mandate of this Office. We are of the view that such a process will make way for improved requests for information and response procedures in the future, which may limit the need to file complaints.

### **Informal Resolution Process**

#### **Step 1 – Review**

In all cases, upon receipt of a complaint, we issue letters to both the applicant and the public body indicating that the Commissioner seeks to resolve the matter informally. A deadline is initially set to try to do so within 45 days of the date of receipt of the complaint to our Office.

Although it is called an 'informal resolution process', the Commissioner's Office must review the full substance of the complaint, which includes the initial request for information and the response by the public body, which are the same steps undertaken in any investigation process. Our Office then meets

with the public body's officials to review all relevant records relating to the request. This review of all relevant records may include requesting further information from the public body in order for us to fully understand which records may have been overlooked and which could be relevant to the request. Such a meeting is held shortly after receipt of the complaint to begin the process without delay.

### **Informal Resolution Process**

#### **Step 2 – Preliminary Findings**

Where the Commissioner is satisfied that the public body has made an adequate search and has identified and provided to the Commissioner all records relevant to the request for information, or where the Commissioner believes there are issues regarding the application of the rules of the *Act* which inhibit a full review of all relevant records, our Office analyzes the initial response given by the public body against all records provided to the Commissioner in order to determine if the initial response conforms to the requirements of the *Act*.

The Commissioner communicates her preliminary findings to the public body by letter. Those preliminary findings inform the public body of the direction of the investigation and of the remaining issues, if any, which must be addressed before we can proceed to the next step, i.e., inviting the public body to submit a 'revised response' to the applicant's request for information. If a revised response is not required, the complaint process proceeds to Step 4.

The suggestion to consider a revised response is made with the continued intent of resolving the complaint informally and with a view to provide the applicant access to the information that the *Act* deems should be disclosed.

If the public body agrees to prepare a revised response, a timeline is set during which the 'proposed revised response' must be submitted to the Commissioner. That timeline is based on the complexity of the work involved to prepare the proposed revised response in each case.

### **Informal Resolution Process**

#### **Step 3 – Proposed Revised Response**

When the public body provides a proposed revised response, the Commissioner reviews it to ensure that it also meets the requirements of the *Act*. If the proposed revised response meets the requirements of the law, the Commissioner invites the public body to submit it directly to the applicant as a revised response to the applicant's initial request for information.

If the proposed revised response does not meet the requirements of the law, the Commissioner will provide additional comments to the public body as required in order for the public body to achieve a properly constituted revised response. It is important to note that it is not for the Commissioner to prepare nor to provide a revised response, but rather to encourage the public body to provide a lawful response to the request for access to information under the *Act*.

## **Informal Resolution Process**

### **Step 4 – Applicant's Comments**

In the case where the public body is ready to issue the vetted revised response to the applicant, the Commissioner issues letters to both parties indicating that a revised response will be submitted to the applicant and the public body sends the revised response directly to the applicant. In her letters to the parties, the Commissioner invites the applicant to review the revised response and to provide comments in relation thereto to the Commissioner. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the revised response. The Commissioner then reviews the applicant's comments on the revised response.

Or, in the event that a revised response was not required, the Commissioner informs both parties that the initial response to the request for information was appropriate and in conformity with the *Act*. In such a case, the Commissioner invites the applicant to provide comments to the Commissioner as to why it is believed the initial response to the request was inappropriate. The applicant is usually accorded a period of 10 to 15 days within which to do so, depending on the complexity of the matter. The Commissioner then reviews the applicant's comments.

If the culmination of the above steps to date exceeds the initial 45 day timeframe allotted, the Commissioner may decide to continue with the informal resolution process if there is a belief that a satisfactory resolution in accordance with the *Act* is possible. The timeframe at this stage is based on completing the process within the 90 day investigation deadline set by the *Act*.

In complex matters, the timeframe for the continued work on a revised response may extend beyond the 90 day period to complete the matter. In such a case, the Commissioner notifies both parties in writing of an extension of time to complete the matter as permitted by section 72. The notification indicates the new deadline within which the case will be concluded, and the reasons why the extension of time is necessary, e.g., to bring an informal resolution to the complaint.

Again, it is important to reiterate that our complaint process policy is premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and all efforts are deployed within the allotted timeframe (or extension thereof permitted by the *Act*) to make this happen, whenever possible.

## **Informal Resolution Process**

### **Step 5 – Revised Response Satisfactory**

In the event that the applicant is satisfied with the revised response, the Commissioner concludes her investigation as one having been resolved informally to the satisfaction of both parties and in conformity with the *Act*. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally.

In the event the applicant provides comments which accept the Commissioner's preliminary findings that the public body's initial response was in accordance with the *Act*, the Commissioner concludes her investigation. This conclusion of the matter is confirmed in writing to both parties stating that the complaint has been resolved informally to the satisfaction of both parties.

In both above instances, there is no requirement for the Commissioner to file a formal report under section 73 for the reason that there is no recommendation to be made to the public body on its response (revised or initial) to the request for information.

### **Informal Resolution Process – Formal Investigation**

#### **Step 6 – Revised Response Not Satisfactory**

In the event that the Commissioner finds that the public body's revised response is not in conformity with the *Act* and the public body decides not to consider proposed changes thereto, or in the event that the applicant is not satisfied with the revised response, upon reviewing the comments obtained from the applicant the Commissioner may decide to further investigate the matter. This step brings the informal resolution process to an end and converts the matter into a formal investigation process which will eventually lead to the issuance of a formal report under section 73.

The Commissioner renders her findings and any recommendations in a formal report which is issued to both parties. The de-identified report will also be made available to the public on the Commissioner's Office website (*NB*: website under construction).

This complaint process is intended to encourage both cooperation and transparency, all the while remaining confidential and with the intent to reach a satisfactory resolution in accordance with the requirements of the *Act*.