

Manitoba Ombudsman Practice Note

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THE DUTY TO ASSIST UNDER PHIA

The duty to assist under the Personal Health Information Act (PHIA) relates to access requests under part 2 of the act. The act requires trustees to “make every reasonable effort to assist” a requester and “to respond without delay, openly, accurately and completely” (subsection 6(2) of PHIA).

The duty to assist is in addition to other obligations under PHIA that must be met to fulfill the formal access process (e.g. responding within time limits and providing the prescribed contents in refused access responses). This duty should always be considered and be applied in a manner that is reasonable on a case-by-case basis and throughout the processing of the request.

Elements of the duty to assist

Make every reasonable effort to assist

The first element of the duty to assist is to make “every reasonable effort” to assist a requester. This includes providing assistance proactively and in response to a requester asking for help.

At the stage of requesting access, reasonable efforts to assist would include:

- Discussing whether the request can be accommodated informally (e.g. a trustee may routinely print copies of test results on request of a patient during an appointment).
- Explaining the access to information process under PHIA:
 - Informing whether a verbal request can be made or whether the trustee requires the request in writing (subsection 5(3)).
 - If a trustee typically uses a specific form for requesting access, provide the individual with a copy of the form, or a link to where it can be located.
 - If a trustee has a policy on access to information under PHIA, tell the individual where to find the policy, and provide contact information for a privacy officer that can assist the individual with any questions.
- Assisting in the making of verbal requests:
 - Under PHIA, an access request may be verbal although the trustee may require it be in writing (subsection 5(3)). If an individual cannot make a written request,



assist the individual by writing down the request or, if a trustee typically uses a specific form for requesting access, assist the individual with completing the form.

- Determining whether the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the requester:
 - The objective would be to narrow the request while still meeting the requester's access needs and not dissuading the request.
 - A trustee may also ask the requester in writing for additional information related to the request, and the time for responding is suspended when the trustee is clarifying a request with a requester (subsection 10.1(1) of PHIA). Where appropriate, efforts should be made to speak with the requester before this step is taken as it may render a formal request for clarification unnecessary, and informal and timely contact can avoid unnecessary delays. The trustee may then simply document the clarification in a written acknowledgment to the requester.
- Speaking with a requester to discuss the processing of the request and gather further information, with the objective of arriving at a resolution, prior to deciding to disregard a request.
- Explaining to the requester what information needs to be provided to demonstrate the requester's authority to exercise the rights of another individual (subsections 60(1) and 60(2) of PHIA).

Reasonable efforts to assist a requester throughout the processing of the request would include explaining various processes under PHIA, such as:

- Whether the trustee applies fees to fulfill requests and, if so, providing information on how the fees are calculated (such as a fee schedule).
- How to modify a request to reduce the amount of fees.
- How to make a request for a waiver or reduction of fees for accessing personal health information, if the trustee has a policy of considering such requests.
- How to make a request for a correction to personal health information, and providing a copy of any form that the trustee typically uses for correction requests.

Respond without delay

The next element of the duty to assist is to respond without delay. The trustee should begin working on the request upon receipt to ensure a timely response.

There are also specific requirements in PHIA to respond to the requester within the legislated time limit. Under PHIA, a trustee must respond to a request "as promptly as required in the circumstances" but no later than the time limit set out in subsection 6(1) of the act. Depending on the circumstances, the response must be made within 24 hours, 72 hours or 30 days. In many circumstances, requests can be responded to in advance of the time limit, and in all circumstances must be responded to without delay. PHIA does not permit the time limit to be extended.

Respond openly

To respond openly requires trustees to be transparent. This duty can be fulfilled in communicating with requesters to explain access decisions, such as:

- Explaining the basis of fees being charged in relation to the access request and, if applicable, identifying potential options for reducing fees.
- Providing reasons for a decision not to waive fees.
- Explaining why the requester is being asked to provide additional information (under subsection 10.1(1) of PHIA) and how the information is relevant and necessary for fulfilling their request.

An example of openness is providing information to the requester to explain a record to which access has been given. Under PHIA a trustee, if asked, must provide an explanation of any term, code or abbreviation used in the personal health information as soon as reasonably practicable (subsection 7(2)), and may also offer such information without need of a request.

Another example of openness is creating a record. PHIA does not require a trustee to create a record, but a trustee could discuss with the requester whether this approach would meet his or her request and, if so, create a new record.

Respond accurately

The duty to respond accurately requires having sufficient information upon which to base the trustee's access decision, such as through:

- Conducting an adequate search for responsive records:
 - It is not sufficient to believe that there are no responsive records, or that if those records existed, there would be a reason for refusing access.
 - Reasonable efforts would include developing a logical, realistic and practical strategy to identify and locate the responsive records, based on an experienced employee's understanding of the entity's organizational structure, programs, activities and responsibilities and how records are maintained in the organization.
 - The trustee should search all reasonable locations, including off-site locations, where the requested records might be found, and should consider records in both paper and electronic form.
 - If adequate searches have not been conducted, all relevant records would not be identified and the resulting response would be inaccurate and incomplete.
- Thoroughly reviewing the records before deciding that there is a specified reason to refuse access:
 - It is not sufficient to assume that a specified reason for refusing access applies; the information may be different than anticipated.
 - The records must be reviewed on a line-by-line basis, as reasons for refusing access apply to information in the records, not necessarily entire records. The

requester has a right to any remaining information that is not subject to a reason for refusing access, to the extent that this information can be severed from the record (subsection 11(2) of PHIA).

Respond completely

The duty to respond completely includes responding in relation to all of the requested records. A complete response when access is not provided to all of the requested records would include the following:

- If requested records do not exist or cannot be located:
 - Confirming that some or all of the records do not exist or cannot be located, and identifying which records fall within these categories.
 - Explaining the searches conducted to attempt to locate the records.
 - If the records were destroyed, explaining the records management processes and destruction policies that were followed.
- If access to part or all of the responsive records is refused:
 - Subsection 7(1) of PHIA sets out the required contents of a written response concerning a refusal of access to personal health information.

Complaint investigations by Manitoba Ombudsman about duty to assist

PHIA provides a right of complaint to the ombudsman “about any decision, act or failure to act” that relates to the request (subsection 39(1) of PHIA). A requester may complain specifically about a failure to fulfill the duty to assist, or the ombudsman may consider whether the duty to assist was met in an investigation of any type of access complaint.

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