

Investigation Process: Access Complaints

Section 68 of the *Right to Information and Protection of Privacy Act*

The purpose of the Ombud's authority to accept and investigate complaints about how a public body has handled an applicant's access request is to provide for an independent review mechanism under the *Act*.

The *Act* grants individuals the right to request and receive information held by public bodies. If a person is not satisfied with the public body's decisions in relation to his or her access request, that person can make a complaint with our Office asking the Ombud to investigate.

Section 67 of the *Act* grants a broad right to complain to the Ombud's Office where a person "is not satisfied with a decision, an act or omission of a head of a public body in relation to the request," "is not satisfied with the decision of a head of a public body to extend a time limit under subsection 11(3)," or "is not satisfied with the decision of a head of a public body to consider a request to be abandoned under subsection 12(1)".

Applicants have the right to complain to our Office about the public body's:

- decision to self-extend the time limit to respond to an access request under s. 11(3);
- failure to provide a response to an access request within the public body's time limit to do so;
- decision to consider an access request abandoned under s. 12;
- decision to transfer an access request to another public body under s. 13; and
- decision to refuse access to any of the requested information under the *Act*.

Complaints to our Office must be made in writing and must be filed within 40 business days after an applicant receives notice of the public body's decision or the date the applicant becomes aware of the act or omission of the head of the public body. The Ombud may allow a longer period for filing a complaint in appropriate circumstances (ss. 67(3) and 67(4)).

In the case that the public body fails to respond to an access request within its time limit to do so, a complaint must be filed with our Office within 40 business days after the public body's time limit to respond to the request (s. 67(5)).

Investigation process

The Ombud's powers to address access complaints are found in s. 68 of the *Act*:

68(1) Subject to subsection 65(2) and section 69, on receiving a complaint the Ombud shall investigate the complaint or shall take steps to resolve the complaint informally under subsection (2).

68(2) The Ombud may take any steps the Ombud considers appropriate to resolve a complaint informally to the satisfaction of the parties in a manner consistent with the purposes of the *Act*.

68(3) If the Ombud cannot resolve a complaint within 45 business days after the commencement of the informal resolution process referred to in subsection (2) or within the extended time limit under subsection

(4), as the case may be, the Ombud shall investigate the complaint and shall prepare the report referred to in section 73.

68(4) The Ombud may only extend the time limit in subsection (3) with the consent of the applicant or the third party, as the case may be, and the head of the public body.

Upon receipt of an access complaint, we will first review it to verify whether we have jurisdiction to investigate (is the complaint about a public body that is subject to the *Act*?), whether the complaint documentation is complete (i.e., completed Form 2, a copy of the access request, and a description of what the applicant is complaining about), and whether it was made to our Office in a timely fashion.

Once we determine that we have the authority to investigate the complaint, we will notify the public body and provide it with a copy of the complaint. At that time, we will also ask the public body to provide us with a response to the complaint, which may include asking for explanations as to why access to certain information was refused, how the public body conducted its search for the relevant information, copies of the relevant information for our review, and any other questions or issues that we want the public body to address.

Informal resolution

Our Office will take any steps we consider appropriate to informally resolve the complaint through discussions with both the public body and the applicant. The informal resolution process begins once we have received the public body's response to our notice of complaint, including the relevant records for our review, following which we have 45 business days to resolve the complaint informally. Under the recent amendments to the *Act* that came into effect on April 1, 2018, the time limit for the informal resolution process can only be extended with the consent of both the applicant and the head of the public body.

For complaints about a public body not responding to an access request or self-extending the time limit to respond to an access request under s. 11(3), we will make every effort to address these complaints as quickly as possible with a view to ensure that applicants receive a response to the request without undue delay.

If, based on our review and discussions with the public body and the applicant, both parties to the complaint are satisfied with the outcome of the informal resolution process, the matter is successfully resolved and we will close our file.

If not informally resolved, matter is remitted to the Ombud

If the complaint is not informally resolved within 45 business days (or the extended time limit as consented to by both parties, as the case may be) from the start of the informal resolution process, the matter will be remitted to the Ombud for final disposition. The Ombud will review the matter with a view to determine whether a formal investigation is merited or if it would be appropriate to refuse to investigate under s. 69 of the *Act*. For example, the Ombud may refuse to or cease to investigate a complaint if, having regard to all the circumstances of the case, further investigation is unnecessary (which will often be the case where our Office is satisfied that the public body has responded adequately to the complaint through the informal resolution process).

If the Ombud decides to proceed with a formal investigation, the Ombud will review the matter and allow the parties to the complaint, as well as any other person the Ombud considers appropriate, to make representations. On completing an investigation, the Ombud will prepare a report with the Ombud's findings and may recommend that:

- the public body grant, in whole or part, the request for access to a record,
- reconsider a request for information that was considered to be abandoned under subsection 12(1), or
- if the public body failed to reply to the access request, that the public body grant or refuse the request in whole or part.

If the Ombud finds that the public body has met its obligations to the applicant, the Ombud may confirm the public body's decision to refuse an access request in whole or part or to consider an access request to be abandoned under s. 12(1).

The Ombud's investigation is to be completed and a report made under s. 73 of the *Act* within 90 business days after a complaint is filed with our Office, although the Ombud has the authority to extend the time limit to do so of his or her own accord so long as the Ombud notifies the parties and anyone who has made representations of the anticipated date for providing the report.

Upon completion, the Ombud must provide a copy of the report to both the applicant and the public body.

Complying with the recommendation

If the Ombud's report contains a recommendation to the public body, the public body must decide whether it will accept the Ombud's recommendation or not. The public body is required to decide within 20 business days after receiving the Ombud's report and give written notice to the applicant, with a copy to our Office. The public body's notice shall inform the applicant of the reasons for the public body's decision.

If the public body accepts the recommendation, the public body shall comply with it within 20 business days after receiving the Ombud's report.

If the public body does not accept the Ombud's recommendation, the public body's notice must inform of the applicant's appeal rights under the *Act* and the time limit in which to do so. A failure on the part of the public body to notify the applicant of its decision within 20 business days is treated as a decision to not accept the Ombud's recommendation, thus triggering the appeal rights under the *Act*.

Should this be the case, the applicant would then be entitled to appeal the matter to a judge of the Court of Queen's Bench under s. 75 of the *Act*. In the event that the applicant opts not to exercise his or her appeal rights, the Ombud has the authority to appeal the matter on his or her own motion under s. 75(2) of the *Act*.

Third party complaints

As the records held by public bodies often includes information about third parties (i.e., people who or organizations that are not a public body or the applicant), a third party also complaint rights under s. 67 of the *Act*.

If a public body notifies a third party of an access request for information about the third party under the third party notification process set out in ss. 34 to 36 of the *Act*, the public body must ultimately decide whether to grant access to that information or not and inform the third party of its decision. If the public body decides to grant access to information and the third party does not agree, the third party has the right to file a complaint with our Office.

Third party complaints to our Office must be made in writing and must be filed with our Office within 15 business days after the date of the public body's notice of its decision to the third party under s. 36 of the *Act*. The Ombud may allow a longer period for filing a complaint in appropriate circumstances.

Upon receipt of a third party complaint, we will first review the information provided to verify whether we have jurisdiction to investigate the complaint (is the complaint about a public body that is subject to the *Act*?), whether the complaint documentation is complete (i.e., completed Form 5, a copy of the public body's notice to the third party), and whether the complaint was made to our Office in a timely fashion.

Once we have determined our authority to investigate the complaint, we will send a copy of the third party's complaint to the head of the public body and the applicant.

The investigation process as described above also applies to third party complaints. In short, we will take steps to informally resolve complaints within 45 business days of the start of the informal resolution process. In the event that this does not occur, the matter will be remitted to the Ombud for final disposition.

On completing an investigation, the Ombud will prepare a report with the Ombud's findings and will either recommend that the public body grant, in whole or part, the information in question or confirm the public body's decision to refuse access to the information in question.

Upon completion, the Ombud must provide a copy of the report to the third party and the public body.

The provisions described above about public bodies complying with the Ombud's recommendations apply to third party complaints.