

Guidance: Privacy in Emergency Situations

Right to Information and Protection of Privacy Act Personal Health Information and Privacy Act

The COVID-19 outbreak, which was declared earlier this month to be a global pandemic and resulted in the Province declaring a state of emergency as of March 19, 2020, has raised questions about the sharing of personal and personal health information and protection of privacy during emergencies.

During a public health crisis, privacy laws apply as always; however, they should not be a barrier to appropriate information sharing. The sharing of complete and accurate information is critical during a crisis and privacy considerations should not put anyone's health at risk.

The purpose of this guidance document is to provide general direction on information collection, use and disclosure in emergency situations. It is important that public bodies, health custodians and private sector organizations know how personal or health information may be shared during a pandemic or emergency situation.

Privacy laws include several provisions that authorize the collection, use, and disclosure of personal information and/or personal health information in the context of a public health crisis. In doing so, you should be able to identify the specific legislative authority on which you are relying.

General guidance: Common sense approach

- Only collect, use, and/or disclose the minimum amount of information necessary.
- Avoid publicly identifying individuals unless absolutely necessary, as this may stop others from coming forward with pertinent information.
 - Instead: provide details such as location, the relevant time period, and date to assist in identifying others who may have been exposed.
- Safely transmit the required information using methods appropriate to the sensitivity of the information being shared.
- Emergency situations impact appropriate collection.
 - In general, when staff call in sick, employers should not request a specific diagnosis.
 - During a pandemic, it would be reasonable to ask if there was any association with COVID-19:
 - Has the employee been asked to self-isolate?
 - Do they have a confirmed diagnosis?
 - If a staff member is off because of COVID-19, seek guidance from Public Health on what information should be communicated with staff that may have been in contact with the individual, as well as the larger organization.

How Information May be Shared under New Brunswick's Privacy Laws

New Brunswick has two privacy laws:

- the *Right to Information and Protection of Privacy Act* (RTIPPA) applies to public bodies; and
- the *Personal Health Information Privacy and Access Act* (PHIPAA) applies to health care custodians.

These Acts govern the collection, use and disclosure of personal information (RTIPPA) and personal health information (RTIPPA and PHIPAA). Each contain provisions that allow for the sharing of information, including personal information and personal health information, including when doing so is necessary and in the public interest in the event of an emergency.

Both Acts require that any collection, use or disclosure of personal information or personal health information be limited to that which is needed to achieve the reasonable purpose of the collection, use or disclosure.

Both Acts also require that reasonable security measures be taken to protect personal information or personal health information at all times.

Right to Information and Protection of Privacy Act

The *Right to Information and Protection of Privacy Act* (RTIPPA) applies to “public bodies”, which include provincial government departments and agencies, Crown corporations, boards, and commissions, regional health authorities, schools, as well as municipalities, rural communities, and related municipal entities.

This Act permits public bodies to collect personal information, which includes personal health information, if the collection is expressly authorized or required by another Provincial or federal statute (s. 37(1)). Collection of personal information is also permitted if it relates directly to and is necessary for a program, activity or service of the public body, if it is collected for law enforcement purposes, or the information is collected by or for the public body for the purpose for which the information was disclosed to it under a provision of section 46 or 46.1 (s. 37(2)).

The Act generally requires public bodies to collect personal information directly from the individual the information is about. Public bodies may collect personal information from other sources with the individual's consent, or without consent in specific circumstances, such as when the collection is authorized by law (s. 38(1) (a)) or the individual is not able to provide the information directly in a health or safety emergency (s. 38(1)(c)).

If a public body is authorized to collect personal information, the Act also permits the use of the information if it is for the same purpose as the collection or for a consistent purpose.

Public bodies may disclose personal information in emergency situations with the consent of the individual, or without consent in certain circumstances, including:

- where necessary to protect the mental or physical health or safety of any individual or group of individuals (s. 46(1)(i));
- if the disclosure is authorized by a Provincial or federal law (s. 46(1)(c)); or
- if the disclosure is for the same purpose for which it was collected or for a consistent purpose (s. 38(1)(a.1)).

Section 33.1(1) of the Act states:

33.1(1) Despite any provision of this Act, whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

This section releases a public body from the requirement of obtaining consent and overrides all exceptions to disclosure under the Act. This not only allows for, but also requires proactive disclosure of information in emergencies where the public interest trumps any otherwise applicable exceptions to disclosure, including the protection of privacy. There is no need for an access request to have been made to invoke this section.

If the information a public body intends to disclose under this section is third party information, the public body is required to notify “any person to whom the information relates”, if practicable to do so (s. 33.1(2)). If it is not practicable to do so, the public body is to mail a notice of disclosure to the latest known address of the person (s. 33.1(3)).

Personal Health Information Privacy and Access Act

This Act applies to personal health information in the custody or control of health care providers, referred to as custodians. Custodians include the Department of Health, the two regional health authorities, nursing homes, ambulance operators, physicians, pharmacists, registered nurses and certain other health professionals with custody or control of personal health information.

This Act authorizes custodians to collect and use personal information for the purposes of providing health services.

The Act also allows custodians to disclose personal health information with the consent of the individual, or without consent in specific circumstances, including:

- to a person who is providing or has provided health care to an individual, to the extent necessary to provide health care to that individual (s. 37(2)(a));

- to the chief medical officer of health or other medical officers of health if the disclosure is required by another Provincial or federal law, including the *Public Health Act* (s. 37(5.1)(a));
- to a public health authority established under a federal law or law of another province, territory, or jurisdiction if the disclosure is made for a public health purpose (s. 37(5.1)(b));
- if the disclosure is required to prevent or reduce a risk of serious harm to the mental or physical health or safety of individuals (s. 39(1)(a));
- to prevent or reduce a risk of significant harm to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest (s. 39(1)(b)); or
- if the disclosure is required by another Provincial or federal law (s. 42).

Public Health Emergencies

Privacy legislation does not impede the work of public health officials in the case of a pandemic or other public health emergency.

The Minister of Health and the Chief Medical Officer have broad powers with respect to the handling of personal information and personal health information for public health purposes under the *Public Health Act*. These powers are in effect at all times, whether or not an emergency has been declared.

Investigations conducted and orders issued under the authority of the *Public Health Act* could require the collection, use, and disclosure of certain personal information, including personal health information, relating to employees, patients, and other individuals.

Under this *Act*, medical officers of health have broad powers to collect and use personal information and personal health information to contain and prevent the spread of notifiable diseases and to mitigate risks associated with a health hazard (s. 64.1(2)).

Medical officers of health also have the authority to require individuals to provide personal information or personal health information upon request for these same purposes (s. 64.1(3)).

Note: These provisions override the application of the *Right to Information and Protection of Privacy Act* in the event of a conflict or inconsistency between the provisions of these two laws.

Otherwise, the work conducted by public officials under the authority of the *Public Health Act* are at all times bound by their obligations with respect to protecting personal information and personal health information as set out above under the *Right to Information and Protection of Privacy Act* and/or the *Personal Health Information Privacy and Access Act*, depending on whether they are acting in the capacity of a public body or a custodian.

The *Public Health Act* also includes powers for the Minister or medical officers of health to disclose personal or personal health information for these same purposes. In addition, the Minister of Health has specific authority to order disclosure of information (personal or otherwise) for the purpose of protecting the health of the public (s. 66(2)).

Further, this Act contains mandatory reporting provisions for certain health care professionals, as well as institutions, schools, and early learning and child care facilities (ss. 27-32).

Repercussions of release of personal and/or personal health information

Often the fear of being sued can give a public body or a custodian pause when considering releasing personal information or personal health information that would normally be protected.

Both the *Right to Information and Protection of Privacy Act* and the *Personal Health Information Privacy and Access Act* have provisions that shield public bodies and custodians from lawsuits when they have acted in good faith in handling personal information and/or personal health information.

Section 81 of the *Right to Information and Protection of Privacy Act* states:

- 81 No action lies and no proceeding may be brought against the Province of New Brunswick, a public body, the head of a public body, an elected official of a local public body or any person acting for or under the direction of the head of a public body for damages resulting from
- (a) the disclosure of or failure to disclose, in good faith, all or part of a record or information under this Act or any consequences of that disclosure or failure to disclose,
 - or
 - (b) the failure to give a notice required by this Act if reasonable care is taken to give the required notice.

Section 78 of the *Personal Health Information Privacy and Access Act* states:

- 78 No action lies and no proceeding may be brought against the Province of New Brunswick, a custodian or any person acting for or under the direction of the custodian for damages resulting from
- (a) the disclosure of or failure to disclose, in good faith, all or part of a record or information under this Act or any consequences of that disclosure or failure to disclose, or
 - (b) the failure to give a notice required by this Act if reasonable care is taken to give the required notice.

Further, if personal information or personal health information is disclosed in error by a public body or a custodian, s. 82(1)(a) of the *Right to Information and Protection of Privacy Act* requires the disclosure to be a

wilful contravention of the Act to be considered an offence. As for custodians, section 76 of the *Personal Health Information Privacy and Access Act* requires proof that the custodian did not take all reasonable steps to prevent the contravention for it to become an offence. Inadvertent or erroneous disclosures of personal information or personal health information, if they were made in good faith, would not be considered offences.

The *Public Health Act* also contains similar immunity provisions under s. 64:

64(1) No action or other proceeding for damages or otherwise shall be instituted against a medical officer of health, an acting medical officer of health, the chief medical officer of health, an acting chief medical officer of health, an inspector or the Minister or any agent, servant or employee of the Minister for any act done in good faith in the execution or intended execution of any duty or power under this Act or for any alleged neglect or default in the execution in good faith of any such duty or power.

64(2) Subsection (1) does not apply to prevent an application for judicial review.

64(3) Notwithstanding subsections 4(2) and 4(4) of the Proceedings Against the Crown Act, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person referred to in subsection (1) to which the Crown would otherwise be subject and the Crown is liable under the Proceedings Against the Crown Act for any such tort as if subsection (1) had not been enacted.

The Private Sector

Except for custodians under the *Personal Health Information Privacy and Access Act*, New Brunswick does not have legislation that applies to the private sector. Private sector organizations may be covered by federal legislation and should check the Privacy Commissioner of Canada's website: <https://www.priv.gc.ca/en/>. If a private sector business or organization is contracting with a public body or health information custodian (for example, as an information manager), contractual agreements should be checked for language that might actually put personal information or personal health information in the control of the public body or custodian.

Resources and further information

Right to Information and Protection of Privacy Act: <http://laws.gnb.ca/en/ShowPdf/cs/R-10.6.pdf>

Personal Health Information Privacy and Access Act: <http://laws.gnb.ca/en/ShowPdf/cs/P-7.05.pdf>

Public Health Act: <http://laws.gnb.ca/en/ShowPdf/cs/P-22.4.pdf>

Government of New Brunswick's website with up-to-date information on the Coronavirus: gnb.ca/coronavirus

Office of the Privacy Commissioner of Canada's guidance on privacy and the COVID-19 outbreak: https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200320/

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