

## **Guidance: Access to Information During a State of Emergency**

*Right to Information and Protection of Privacy Act*

*Personal Health Information Privacy and Access Act*

The purpose of this document is to provide guidance on access rights under the *Right to Information and Protection of Privacy Act* and the *Personal Health Information Privacy and Access Act* during the COVID-19 pandemic and resulting state of emergency declared by the Province on March 19, 2020. The pandemic has brought unprecedented challenges for the Province and has required public authorities to make decisions that affect public health and civil liberties. The public's right to access information about these decisions is of vital importance, not only as the ongoing situation develops, but also as a matter of historical record.

When the state of emergency was declared on March 19, 2020, most public bodies and health care custodians significantly altered their day-to-day operations and focused their efforts on essential services required to address the pandemic. In many cases, this impacted their ability to process and respond to access requests. Following the directives issued by the Chief Medical Officer of Health, the Access and Privacy Division of the Ombud's Office also suspended normal operations at that time.

Collectively, these events have had an impact on access rights and have raised questions on what this means for statutory time limits for access requests under both *Acts*. This guidance document sets out this Office's interpretation of the state of emergency on access rights, as well as steps that all public bodies and custodians should follow to ensure that access rights are restored as soon as possible.

### **Declaration of a State of Emergency and Mandatory Order**

The Province declared a state of emergency on March 19, 2020, including directives from Public Health, to address the COVID-19 pandemic. The declaration has been updated to address various issues that have arisen as a result of the pandemic, including statutory time limits under Provincial statutes.

The relevant portions of the state of emergency declaration are as follows:

17. On the recommendation of the Attorney General, retroactive to March 19, 2020, the operation of the provisions of any act, regulation, rule, municipal by-law or ministerial order that establish limitation periods for commencing any proceeding before a court, administrative tribunal or other decision-maker is hereby suspended.

18. On the recommendation of the Attorney General, retroactive to March 19, 2020, the operation of the provisions of any act, regulation, rule, municipal by-law or ministerial order that establish limitation periods for taking steps in any proceeding before a court, administrative tribunal or other decision-maker is hereby suspended.

...

20. ...[P]aragraphs 17 and 18 cease to have effect on September 19, 2020. A limitation period for commencing a proceeding or a time period for taking steps in a proceeding resumes running on September 19, 2020, and the period from March 19, 2020, to September 18, 2020, shall not be counted in calculating the limitation period or time period.

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The full text of the most recent version of the state of emergency declaration is available on the GNB website at: <https://www2.gnb.ca/content/dam/gnb/Corporate/pdf/EmergencyUrgence19.pdf>.

### **Impact of the State of Emergency Declaration and Mandatory Order on RTIPPA and PHIPAA**

In light of the ongoing pandemic and state of emergency, this Office has reviewed this order and considered its application to both the *Right to Information and Protection of Privacy Act* and the *Personal Health Information Privacy and Access Act*, and particularly its impact on their statutory timelines.

Paragraph 17 of the order suspends the statutory timelines for commencing proceedings “before a court, administrative tribunal or other decision-maker”, effective March 19, 2020. In our view, this means that the statutory time limits for individuals to file complaints with this Office under either the *Right to Information and Protection of Privacy Act* and the *Personal Health Information Privacy and Access Act* are suspended until September 19, 2020. This has the effect of allowing individuals additional time, if needed, to file complaints with our Office. As a result, our Office has and will continue to accept properly constituted complaints during this time.

Paragraph 18 of the order suspends “limitation periods for taking any steps in any proceeding before a court, administrative tribunal or other decision-maker,” effective March 19, 2020. The order appears to be purposefully broad to include more than just courts and administrative tribunals in its scope. Heads of public bodies are tasked as the decision-maker on access rights under the *Right to Information and Protection of Privacy Act*, as are custodians under the *Personal Health Information Privacy and Access Act*. In our view, both fall within the scope of “other decision-maker” for the purposes of this order.

This means that all the statutory timeframes for steps to occur in processing access requests, as well as during complaint investigations under both the *Right to Information and Protection of Privacy Act* and the *Personal Health Information Privacy and Access Act* are also suspended until September 19, 2020.

This does not mean that public bodies or custodians are excused from taking steps to address access requests for the duration of the state of emergency. Rather, this order recognizes that many entities, including courts, administrative tribunals, and other decision-makers may have missed time limits to take steps under their respective processes due to the widespread disruption to operations as a result of the pandemic and state of emergency. It appears that the order was meant to serve as a stop-gap measure to preserve jurisdiction to act outside of the established time limits between March 19, 2020 and September 19, 2020. As such, to further limit the impact on access rights, this Office will in the interim rely on statutory timelines as a guide when determining what is practicable for a public body. This reflects the need for flexibility and pragmatism in the face of the new challenges presented by the COVID-19 pandemic.

In our view, this order should be interpreted as a stop-gap measure that preserves a public body or custodian’s jurisdiction to treat an access request in the event that a statutory time limit was missed since the state of emergency was declared on March 19, 2020. Public bodies and custodians should, in observing the emergency directives, take steps to resume normal operations as soon as reasonably practicable, including timely processing of access requests. This should include taking steps to process and respond to access requests in as timely a manner as possible. Statutory time limits should be respected to the fullest extent possible within that context.

Please note that this Office will be adopting a similar approach for complaint files that were ongoing as of March 19, 2020 and for complaints that were submitted since that date while the Office’s main operations were suspended.

The suggested steps for public bodies and custodians to take in resuming the processing of access requests are set out below.

### **Where do we go from here?**

As normal operations begin to resume, we encourage all public bodies and custodians to take the following steps with respect to access requests that were ongoing as of or received since March 19, 2020. The goal of this exercise is to ensure that access rights are restored without any further unreasonable delays.

#### **Step 1**

Conduct an inventory of all requests, including those that were ongoing as of March 19, 2020 as well as those that have been received since that date.

#### **Step 2**

Contact each of the applicants to inform them that you are in the process of resuming normal operations and want to ensure that their request is addressed as soon as possible:

- take this opportunity to make sure you understand what exactly the applicant is looking for and to discuss when the applicant can expect to receive a response; and
- if the applicant indicates that they are no longer interested in pursuing the request, follow up with the applicant in writing to confirm this.

#### **Step 3**

Conduct a triage of all access requests that need to be addressed, with a view to:

- identify requests that appear to be the easiest/least complicated to address, with the aim of responding to these first, thus reducing the overall number of active access requests;
- identify any requests that merit prioritization or more urgent consideration as a result of the pandemic and ongoing state of emergency;
- identify requests that appear to be larger in scope and/or more complex to process to determine whether additional time will be required to process and provide a response; and
- keep in regular touch with applicants so that they know when they can expect to receive a response to their request, particularly if you will not be able to respond within the usual time frame to do so.

In our view, the order issued by the Minister of Public Safety has the effect of preserving jurisdiction on any access requests that had not been fully responded to by March 19, 2020, or received since that date, until the public body or custodian resumes normal operations and is in a better position to meet its statutory timelines to respond to requests. This will continue to be the case for access requests received by public bodies until September 19, 2020.

That being said, we encourage public bodies to take all reasonable steps to respond to access requests as soon as practical.

We encourage any public body or custodian that has questions about the above to contact our Office for direction and assistance.

Please note that the Ombud does not have authority under either the *Right to Information and Protection of Privacy Act* or the *Personal Health Information Privacy and Access Act* to issue blanket time extensions to all public bodies and/or custodians to respond to access requests.

The Access and Privacy Division recognizes the impact that recent events have had, and will continue to have to some extent, on access rights. We continue to monitor the situation carefully and are encouraging the restoration of timely access rights as soon as circumstances reasonably allow.

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