

2010/2011

Annual Report

OFFICE OF THE ACCESS TO INFORMATION
AND PRIVACY COMMISSIONER
Province of New Brunswick

2010/2011 Annual Report

(Representing first 7 months of operations)

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

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March, 2012

The Honourable Dale Graham
Speaker of the Legislative Assembly
Legislative Building
PO Box 6000
Fredericton, New Brunswick
E3B 5H1

Dear Mr. Speaker,

Pursuant to section 63 of the *Right to Information and Protection of Privacy Act* and section 64 of the *Personal Health Information Privacy and Access Act*, I am pleased to submit the following Annual Report on the activities of the Office of the Access to Information and Privacy Commissioner for its first seven months of operations.

As you will recall, this Office was first established by the Province on September 1, 2010 and this first Annual Report covers the period from that date to March 31, 2011.

Respectfully submitted,

Anne E. Bertrand, Q.C.
Access to Information and Privacy Commissioner

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FROM THE COMMISSIONER

I am pleased to present the first Annual Report on behalf of the Office of the Access to Information and Privacy Commissioner, one which represents the first seven months of operations from September 1st, 2010, the date upon which the Office of the Commissioner was first established.

On that important date, two new laws were proclaimed for New Brunswick: the *Right to Information and Protection of Privacy Act* and the *Personal Health Information and Privacy and Access Act*. Both pieces of legislation were timely as they reflected the new trend of governments at all levels, in Canada and abroad: to become more open and transparent in their affairs by remaining mindful of the importance of accountability to their citizens.

As I assumed the role of New Brunswick's first Access to Information and Privacy Commissioner, my small team and I set out to lay the cornerstone of our work: resolving complaints and addressing concerns by promoting the spirit of the legislation and encouraging the use of the new rules through education. With a background in many areas of the law, including administrative law and adjudication, I wanted to apply my practical experience to these new legislations to motivate their proper application, and as a result, compliance. Experiences in other jurisdictions had shown that complaint investigations required a lot of attention and sometimes brought about legal wrangling, thereby resulting in extensive bureaucratic procedures and adversarial attitudes while not necessarily encouraging observance to the rules.

For these reasons, we embarked on a new approach: to first attempt to resolve all complaint matters through an informal process. Our informal process was based on the notion that a complaint may be resolved between both participants when the new rules are well understood and are applied in conformity with the legislation. This, in our view, would result in a more effective resolution and positive long term effects. The process was also desirable in that it provided the public the service it rightfully deserves, while affording public bodies and health care providers the necessary guidance they needed to fulfill their legal obligations. Over the course of this first short seven months of our mandate, we found the public to be acutely interested in the new rules regarding access and privacy and inclined to have us

assist them with their concerns. The public also welcomed the informal resolution process and most public bodies and health care providers participated in the informal resolution process by finding workable solutions to complaints and recognizing the merit in simpler procedures costing less time and resources. Our track record, in such a short time, demonstrated an impressive success rate for the informal resolution of complaints. We also began to develop our Office's public awareness campaign through a variety of presentations that promoted the new statutes and offered useful instruction on their best application.

Having established our goals and permanent offices, we looked then to the coming year 2011-2012 with encouragement that New Brunswickers, public bodies, and health care providers alike would continue to cooperate with the implementation of the ***Right to Information and Protection of Privacy Act*** and the ***Personal Health Information and Privacy and Access Act***. We have been delighted with the level of collaboration we received and believed that it would continue.

As Commissioner, I am confident that with these new laws and the creation of our Office to see to their implementation and observance, this Province has a unique opportunity to shape the ways in which public bodies and health care providers perceive access to information and protect our most private personal information. I sincerely believe that the most tangible measure of the success of this Office will be the degree to which these changes are effected.

Anne E. Bertrand, Q.C.

STATUTORY RESPONSIBILITIES and MANDATE

On September 1, 2010, the Office of the Access to Information and Privacy Commissioner was created as the independent oversight body with statutory responsibilities under two new pieces of legislation: the *Right to Information and Protection of Privacy Act* and the *Personal Health Information Privacy and Access Act*.

The *Right to Information and Protection of Privacy Act* provides the public with the right to access information held by provincial public bodies and requires public bodies to protect personal information under their care and control. The new legislation replaces two previous laws: the *Right to Information Act* (1980) and the *Protection of Personal Information Act* (2001). The oversight body under the previous legislation was the Office of the Ombudsman, which remains responsible for access and privacy matters that arose prior to September 1, 2010.

The *Act* represents a new era of transparency and accountability for the Province, which determined that law reform in this area was necessary to better address the challenges of governance in an increasingly electronic era and to bring the New Brunswick law more into step with similar legislation in other Canadian jurisdictions.

The *Personal Health Information Privacy and Access Act* is the first law in New Brunswick to specifically regulate personal health information in the context of the greater health care system in both the public and private sector. The *Act* provides individuals with the right to access their own personal health information and places obligations on health care providers (“custodians”) to treat personal health information entrusted to them in a confidential manner.

The Commissioner is an Officer of the Legislative Assembly and is independent of the Provincial Government. Under these two new pieces of legislation, the Commissioner has a number of oversight responsibilities, including:

- ❖ monitoring how the *Acts* are administered
- ❖ conducting independent and confidential investigations to ensure rights and obligations are respected
- ❖ informing the public about their rights and responsibilities under both *Acts*
- ❖ promoting best practices to public bodies and health care providers to assist in meeting their obligations under the *Acts*
- ❖ making recommendations as necessary to encourage better compliance with the *Acts*

SETTING UP THE COMMISSIONER'S OFFICE

With these exciting times came the task of identifying and establishing the physical offices as well as the internal operations for the Office of the Commissioner. We graciously thank the Women's Issues Branch of the Executive Council Office for having provided to us temporary quarters for the first six months.

We then relocated to our permanent office space on Regent Street in March of 2011. Steps to carry out this office set up included:

- ❖ identifying staffing needs and office equipment to meet the demands for the new legislation
- ❖ undertaking important analyses of these new laws to seek goals and outcomes, both short and long term
- ❖ establishing:
 - the overall administration for the new Office
 - how best to serve the public in a professional and user-friendly manner, including providing assistance
 - a firm filing system to record all in-coming matters, to track time limits and deadlines, and to record decisions rendered
 - procedure for intake regarding general inquiries, complaints, and privacy concerns
 - the informal resolution process
 - manner in which investigations would be conducted
- ❖ Commissioner and her staff participating in training sessions for public bodies on *Right to Information and Protection of Privacy Act*
- ❖ initial meetings with government departments and staff to introduce our Office and our role
- ❖ meetings with professional organizations in the health care sector to introduce our Office, our role and the new health legislation
- ❖ participating in public speaking engagements to raise awareness about the new legislation

OUR APPROACH TO ACCESS TO INFORMATION COMPLAINT INVESTIGATION: *INFORMAL RESOLUTION*

Recognizing that the *Right to Information and Protection of Privacy Act* brought about new rules and an expanded scope (new public bodies becoming subject to the law) we understood and acknowledged that the early months would be a learning curve for everyone.

Upon a thorough analysis of the *Act*, including a strong adherence to its purpose and spirit, the Commissioner adopted a policy to treat all complaints in the first instance by way of informal resolution.

This was premised on the notion that it is preferable for all parties concerned to resolve complaints informally, and for both parties to become more familiar with their rights and obligations under the new legislation.

We therefore approached every complaint with a collaborative approach and designed the informal resolution process to respect of the law: encourage both cooperation and transparency and seek a satisfactory resolution for both the applicant and the public body in accordance with the requirements of the *Act*.

In doing so, we hoped that that educating the public of the application of this new law would make way for improved access to information requests as well as motivating public bodies to provide timely and meaningful responses. Our end goal: to limit the need to file complaints in the future.

ABOUT THE

Right to Information and Protection of Privacy Act

The *Right to Information and Protection of Privacy Act* guarantees the right of the public to access information held by provincial public bodies and obligates public bodies to safeguard and protect personal information it holds.

Right to Information

The public has the right to request and receive information from public bodies, including information about the public business of a public body as well as information held by a public body about himself or herself. That right of access extends to all information held by a public body and can only be refused in accordance with the specific provisions as set out in the *Act*.

Generally, public bodies have thirty days to respond to requests for information. This time limit can be extended under certain circumstances, such as if the public body needs more information from the individual to process the request, where there are a large number of records that relate to the request, or where a third party may be involved.

If a public body does not respond in time to a request for information or does not grant access to all or part of the requested information, the individual may file a complaint with the Commissioner's Office, or even refer the matter to the Courts.

Protection of Privacy

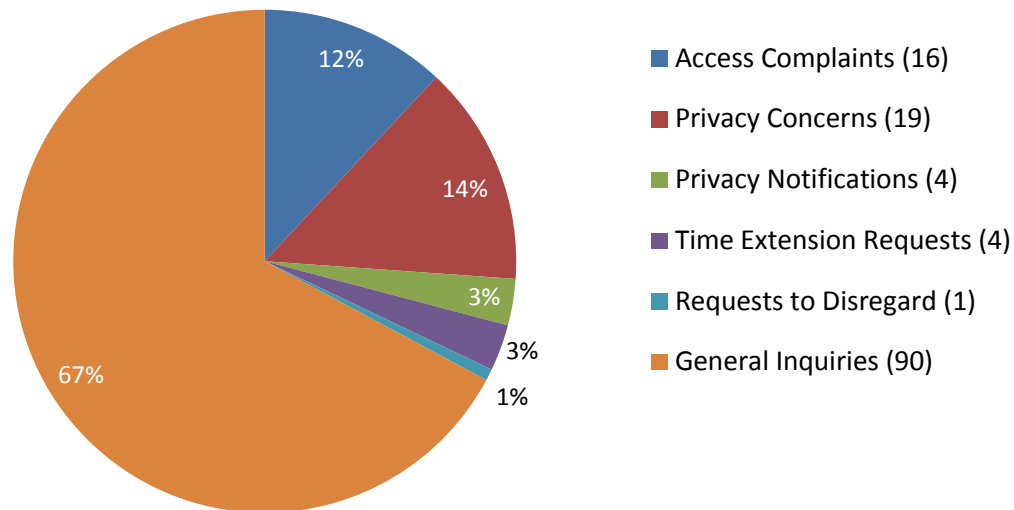
The *Act* sets limits on how public bodies can collect, use and disclose personal information. Personal information means anything about a person in their personal capacity and includes a person's name, home address, age, gender, marital status, personal health information, etc.

If an individual is concerned that a public body has not handled his or her personal information in a confidential manner, he or she may contact the Commissioner's Office and ask us to review the matter.

STATISTICS TO DATE on matters concerning the *Right to Information and Protection of Privacy Act*

Period covered: September 1, 2010 to March 31, 2011

TOTAL FILES 134



Of the total files opened under the *Right to Information and Protection of Privacy Act*, we had concluded 76 % (102 files) by March 31st while 32 files remained active.

ANALYSIS of the Statistics to date on matters concerning the *Right to Information and Protection of Privacy Act*

Access Complaints made up 12% of the total files under this statute:

4 were concluded by March 31st

Average time spent on access complaint files: 77.8 days

16 remained active at March 31st

Privacy Concerns (*individuals concerned that an incident or policy was in contravention of the Act*) made up 14% of the total files under this statute:

12 were concluded by March 31st

Average time spent on privacy concerns files: 35.2 days

7 remained active at March 31st

Privacy Notifications (*public bodies alerting our Office that an incident or process may have been or may be in contravention of the Act*) made up 3% of the total files under this statute:

1 was concluded by March 31st

Time spent on single privacy concerns file: 79 days

3 remained active at March 31st

Time Extension Requests (*public bodies requesting to have the time limit within which to respond to a request for information extended*) made up 3% of the total files under this statute:

3 were concluded by March 31st

Average time spent on time extension requests: 7.3 days

1 remained open at March 31st

Requests to Disregard (*public bodies requesting to disregard an access to information request for information under certain circumstances*) made up 1% of the total files under this statute and this file remained active on March 31st.

General Inquiries (*questions from individuals or public bodies regarding the Act*) made up 67% of the total files under this statute:

82 were answered by March 31st

Average time to reply : 9.2 days

ABOUT THE

Personal Health Information Privacy and Access Act

The *Personal Health Information Privacy and Access Act* is the first piece of legislation in New Brunswick to regulate information practices in both public and private sector health care. The *Act* provides individuals with the right to access their own personal health information and obligates custodians to safeguard and protect personal health information entrusted to their care.

Personal health information means any identifying information about a person that relates to physical or mental health, family history or health care history and includes, among others: date of birth, address, Medicare number, health care services and prescription provided, name of treating physician, DNA and blood type, etc.

The *Act* applies to all those involved in the health care sector who are entrusted with sensitive personal health information, and include: regional health authorities, hospitals, health clinics, private practice doctors, dentists, physiotherapists, laboratories, nursing homes, and researchers working on health care-related issues, etc.

Right to Access One's Health Information

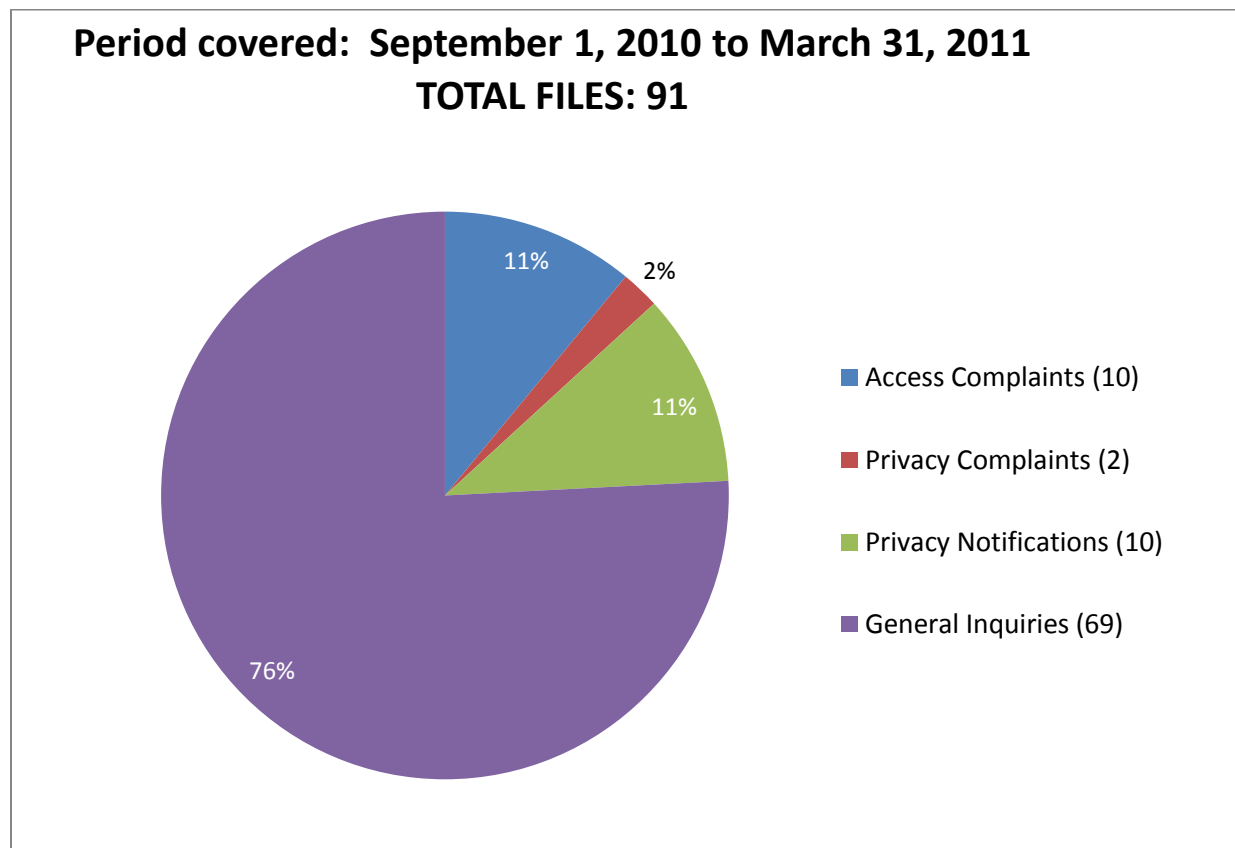
Individuals have the right to examine and receive a copy of their personal health information. Health care providers are required to respond to access requests as promptly as required under the circumstances and generally have a maximum of thirty days to do so. This time limit can be extended under certain circumstances, such as if the health care provider has to process a large amount of records and to ensure that the information released only concerns that of the individual. Where the health care provider does not provide the individual's health information in a timely or complete manner, that individual may file a complaint with the Commissioner's Office.

Protection of Personal Health Information

The *Act* sets rules on how health care providers can collect, use and disclose, store and destroy personal health information, as well as how best to protect it.

Where an individual is concerned that his or her personal health information was not kept confidential, not protected or use or disclosed without consent, a complaint may be filed with the Commissioner's Office.

STATISTICS TO DATE on matters concerning the *Personal Health Information Privacy and Access Act*



Of the total files opened under the *Personal Health Information Privacy and Access Act*, we had concluded 67 % by March 31st while 30 files remained active.

ANALYSIS of the Statistics to date on matters concerning the *Personal Health Information Privacy and Access Act*

Access Complaints made up 11% of the total files under this statute:

5 were concluded by March 31st

Average time spent on access complaints: 41.4 days

5 remained open at March 31st

Privacy Complaints (*individuals concerned that information was not protected*) made up 2% of the total files under this statute:

1 was concluded by March 31st

Time spent on privacy complaint: 51 days

1 remained open at March 31st

Privacy Notifications (*health care providers alerting our Office that an breach of privacy incident may have occurred*) made up 11% of the total files under this statute:

1 was concluded by March 31st

Time spent on privacy complaint: 39 days

9 remained open at March 31st

General Inquiries (*questions from individuals or custodians of personal health information regarding the Act*) made up 76% of the total files under this statute:

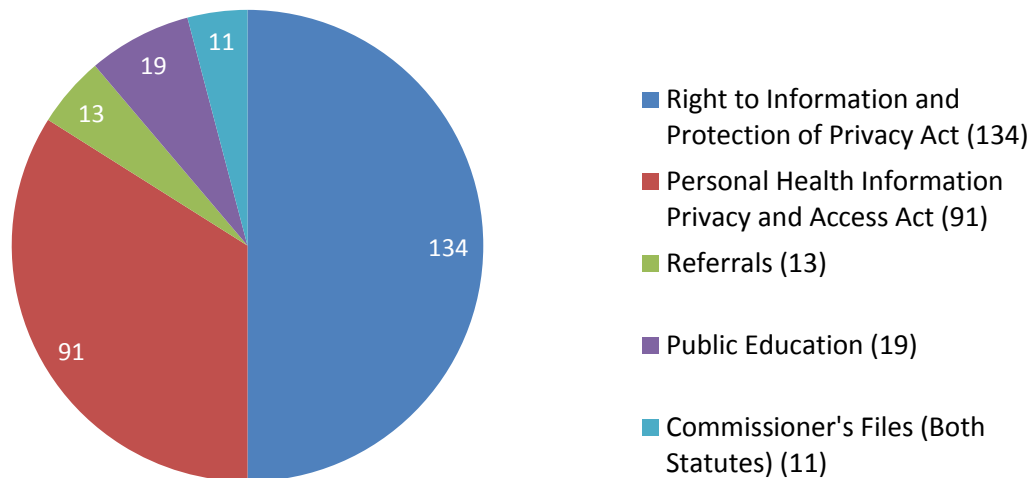
54 were answered by March 31st

Average time to reply: 12.9 days

OVERALL STATISTICS

While specific files regarding the two statutes made up the majority of those we received between September 1st, 2010 and March 31st, 2011, the Office of the Access to Information and Privacy Commissioner also dealt with other matters. These included the all-important public education events where the Commissioner was asked to speak to the new legislation and provide useful guidance on its applicability and compliance. Other matters of particular interest to the Office, referred to as Commissioner's Files, required investigations to seek answers to broader questions such as systemic issues regarding privacy in a particular setting. Lastly, we also tracked inquiries we received but for which other organizations were better suited to answer. Such files were called *referrals* and we directed those individuals to the appropriate sources, while explaining why we do so and gave them the correct contact information.

TOTAL FILES of 268: Both Acts and Other Matters FROM SEPTEMBER 1, 2010 TO MARCH 31, 2011



From the total number of 268 files we opened in the first seven months of our operations, 71 % of those files (190 files) were concluded by March 31st with an average time spent on the files of 16.1 days. As of March 31, 2011, 78 of those files remained open.

EVENTS and SPEAKING ENGAGEMENTS

New to the creation of this important Office and just beginning to establish its work, the Access to Information and Privacy Commissioner nevertheless accepted invitations to speak and give input on the Office's goals and objectives and her views on the path which lay ahead for implementation of the new laws.

Event	Date and Location
Annual National Canadian Information and Privacy Commissioners' Conference	September 1, 2010, Whitehorse YK
Canadian Bar Association – NB Branch: An Introduction to the <i>Personal Health Information Privacy and Access Act</i> (<i>Guest Speaker</i>)	September 17, 2010, Fredericton NB
Canadian Bar Association: Privacy and Access Rights in the Age of Technology: The State of Canadians' Information Rights in 2010 and Beyond (<i>Speaker</i>)	September 20, 2010, Ottawa ON
Canada Health Infoway Privacy Forum	October 4-5, 2010, Edmonton AB
Presentation to Nurses Association of NB (<i>Speaker</i>)	October 15, 2010, Fredericton NB
Attended Association of Records Managers and Administrators Fall Conference	October 20, 2010, Fredericton NB
Presentation to the Probus Club of Fredericton (<i>Speaker</i>)	March 1, 2011, Fredericton NB
Presentation to New Brunswick Nurses Union (<i>Speaker</i>)	March 2, 2011, Fredericton NB
Presentation to a Professional Association (Annual General Meeting) – (<i>Speaker</i>)	March 31, 2011, Saint John NB
<u>Law Society Presentations:</u>	
A Lawyer's Duties of Confidentiality and Privilege – Is there a Difference?	February 4 - 5, 2011
Public Forum: Facebook, Twitter.... UTube... What to know if you're On-line	

FINANCIAL INFORMATION

The budget expenditures during the period of September 1st, 2010 to March 31st, 2011 for the Office of the Access Information and Privacy Commissioner are reproduced below. The Office consists of one Commissioner and three full time staff.

Year End March 31, 2011 (commencing Sep 1, 2010, ending March 31, 2011)

EMPLOYEE SALARY & BENEFITS

187 809

OFFICE RENT, TRAVEL & OTHER SERVICES

103 414

MATERIALS & SUPPLIES

7 899

FURNITURE & EQUIPMENT

59 644

TOTAL EXPENDITURES

358 766

STAFF MEMBERS

From September 1st, 2010 to March 31st, 2011, the Office of the Access Information and Privacy Commissioner benefitted from a dedicated team of few staff, hard at work to set up, create, promote and undertake the significant work ahead.

The Commissioner is proud to introduce them in this Annual Report:

Legal Counsel and Investigators

Kara Patterson
Diane Haché Forestell

Intake Officer

Norah Kennedy

HOW TO CONTACT US

The Office of the Access to Information and Privacy Commissioner is ready to serve and to be helpful to those who need our assistance.

Please do not hesitate to contact us:

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