

Access to Information & Privacy Duty for the Enduring Power of Attorney

Introduction

This information is based on Parts 2 & 3 of the [Power of Attorney Act](#) of BC as amended September 1, 2011. It provides detail on **access to information and privacy requirements** for an attorney appointed in an **Enduring Power of Attorney (EPA)**.

As well as the right to access information, an attorney can release/provide information about the adult to others when carrying out their duties as attorney. However, an attorney also has a duty to keep the adult's information private except for necessary purposes.

This information is not intended for a 'Bank Power of Attorney.' A Bank Power of Attorney is very limited in the scope of authorities and may have different requirements depending on the particular financial institution.

This information is also not intended for a non-enduring Power of Attorney (PoA).

In BC, any type of power of attorney only covers financial and legal matters. A Representation Agreement is the legal planning document in BC for health care and personal care matters.

Getting to know terms, jargon

Enduring Power of Attorney (EPA or EPoA) is the name of the **document**.

There are **two roles** that can be appointed in an EPA: attorney and alternate attorney. Attorney does not mean lawyer—it is the name of the role.

Access to Information

BC Power of Attorney Act, section 32

Why is authority to access information important?

Privacy legislation prevents professionals and other third parties from discussing information or providing access to records about an adult.

If an adult is not capable to access information about themselves or grant permission to others, someone needs authority for this. The BC PoA Act says an attorney appointed in an EPA can access information and records about the adult.

What about separate consent forms by institutions?

If an adult is considered mentally capable, they can access information about themselves. They can also sign separate consent forms for each institution in order to give permission for others to access information about the adult.

However, it is hard to anticipate all the agencies or institutions where this may be required. These separate consent forms are a type of contract and require that the adult is mentally capable to sign it (the adult must understand what the consent is about and the effect of giving it).

If the adult is not capable to understand, then it is important that the BC Power of Attorney Act (PoA Act) provides an encompassing right to the attorney for accessing information.

What does the law say about access to information by the attorney in an EPA?

The BC PoA Act states that the attorney in an EPA can access information and records the adult is entitled to and that relate to:

- The adult's incapability, or
- An area of authority granted to the attorney.

Of course, it is necessary to check wording in the EPA to see if there are any restrictions on authorities granted to the attorney or if relevant additional authorities are granted.

For an attorney to access information, the EPA must be in effect—sometimes there is wording in the EPA to state that the EPA only comes into effect when the adult is incapable or upon some other triggering event. The trigger event would have to be confirmed before the EPA is in effect.

As of Sept. 1/11, an attorney must sign the EPA, and their signature must be witnessed, before their authority granted by the EPA is in effect.

What information is an adult entitled to?

Adults are entitled to see almost any information that concerns them. There are rare exceptions, such as when the release of a document would somehow compromise national security or an investigation by law enforcement, but in most cases adults may access all information and records that relate to themselves.

Does an alternate attorney appointed in the EPA have access to information?

No. Only the acting attorney has automatic right to access the adult's information.

The EPA might name an alternate attorney(s), but the alternate does not have automatic authority to access information from a third party unless or until they are acting as the attorney. Check the wording in the EPA for when an alternate would replace the attorney and how this is confirmed.

In some cases, the acting attorney may be able to grant others, like an alternate, access to the adult's information. The acting attorney is still responsible for the proper use, including privacy, of the information. See later heading.

Can the attorney access the adult's health care information?

Although an EPA only covers financial and legal matters an attorney may access health or personal care information if doing so is necessary to exercise their financial or legal authorities. For example, an insurance or compensation claim may rely on health care information.

If necessary, the attorney can access the adult's relevant medical records to gather information for the insurance claim—a legal authority. Although the attorney appointed in an EPA may access health and personal care information, the EPA cannot authorize the attorney to make health or personal care decisions for the adult. In BC, a Representation Agreement is the legal planning document that can authorize health and personal care decision-making.

An attorney appointed in an EPA is also entitled to information related to the adult's incapability. This means the attorney may access some health and personal care information, such as a doctor's assessment of the adult's mental abilities used for diagnosis and/or for treatment.

Can the attorney authorize someone else to have access to the adult's information?

In some cases, the acting attorney may be able to authorize someone else to access information about the adult's affairs. For example, the Canada Revenue Agency allows someone with legal authority to act on the adult's behalf to grant access to their tax information to another individual or business for the purpose of preparing the tax return.

Some third parties may not allow the attorney to authorize anyone else to access information. If this is the case, the best approach is for the acting attorney to be in good communication with everyone in the adult's life, especially any other attorney or alternate.

Accessing information versus decision-making authority

It is important to distinguish between allowing someone else to access information and delegating decision-making authority. Unless the EPA has specific wording to say otherwise, by default an attorney cannot delegate their authority for decision-making to anyone else, (except in the area of investments, and only to a qualified investment specialist).

For example, the acting attorney(s) may grant an accountant access to information about the adult's financial matters in order for the accountant to prepare the adult's tax return, but the attorney still has to approve the tax return and give the accountant permission to e-file it.

For example, others may be able to view information about the adult, but only the acting attorney(s) can correct or make decisions about the information.

Privacy Duty

BC Power of Attorney Act, section 33

Rules of Confidentiality – when may the attorney share the adult's information?

The law states that an attorney must not provide information or records about the adult that were obtained in the exercise of the attorney's authority except to the extent necessary:

- To perform duties as the attorney;
- For the purposes of an investigation by the Public Guardian and Trustee; or
- To make an application to or comply with an order of the Supreme Court of BC.

This means that an attorney may, for instance, provide an accountant with relevant information about the adult's finances in order for the accountant to prepare the adult's income tax return. (Ensuring the adult's taxes are filed would be considered a duty of an attorney.)

However, the attorney may not give the accountant information or records about the adult or the adult's affairs that are not relevant to preparing the tax return.

Also, while the acting attorney may provide certain financial information to an accountant for preparing the adult's tax return, the attorney may not discuss the adult's finances or tax return in conversation with a neighbour unless this disclosure is necessary to perform the attorney's duties. Otherwise, such disclosure may be considered a violation of the adult's privacy.

If the EPA names more than one attorney and/or an alternate, it is practical for the acting attorney to share information with these other persons as part of performing their duties to ensure the adult's affairs do not suffer if someone has to replace the acting attorney.

If the adult also made a Representation Agreement for health and personal care matters, an attorney will need to share information with the representative(s) and vice versa, in the course of performing their respective duties. (A representative(s) also has a duty to keep the adult's information private. But, some other duties are different for an attorney than for a representative.)

Example: Armand

A few years ago, Armand made an Enduring Power of Attorney (EPA) appointing his son Philippe as his attorney and his daughter Danielle as the alternate attorney. He also made a Representation Agreement for health care and personal care naming his son as representative and daughter as the alternate representative.

When Armand had a stroke, he was not able to do his banking for a period of time. Philippe knew his father had set up direct bill payment and direct deposit but he wanted to review the bank statements to be sure everything was taken care. Then he could also reassure Armand.

Armand had taken Philippe with him to the bank last year to meet with the bank manager and get the EPA on file.

Armand's EPA said it is in effect when he is capable and continues to be in effect if he becomes incapable. This meant no delay for Philippe to check on the banking.

INFORMATION AND RESOURCES

Where to find more resources?

Go to www.nidus.ca > Information (top menu bar) > select Enduring Power of Attorney or Representation Agreement or other topic.

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Philippe also wanted to check on Armand's health insurance to see if his father was eligible for benefits to cover rehabilitation and possibly renovations to his home.

Philippe was going out of town for a few days and he put in writing that he was not able to act as the representative. As the alternate representative, Danielle moved up to temporarily replace Philippe.

She accessed copies of Armand's medical records and medical test results; she also spoke with the doctor about Armand's current condition and the doctor's opinion about Armand's possible future health and personal care needs.

When Philippe returned, he resumed his role as representative and went over the information Danielle had gathered. They talked with Armand about rehabilitation options and home renovations. Armand was worried about costs and was relieved that Philippe and Danielle were looking into this for him.