DECISION

Pursuant to paragraph 104 (1)(a) of the

Health Information Privacy and Management Act

File HIP16-02I

Diane McLeod-McKay, B.A., J.D.

Information and Privacy Commissioner (IPC)

Custodian: **Department of Health and Social Services**

Date: **October 6, 2017**

Summary: After the time limits in section 103 of the *Health Information Privacy and Management Act* expired during a consideration of a complaint made by a complainant, the Department of Health and Social Services took the position that the IPC had lost jurisdiction to consider the complaint. After conducting an analysis to determine whether these subsections are mandatory or directory, the IPC concluded they are directory and found that, as a result, she did not lose jurisdiction to consider the complaint despite being out of time under section 103.

Statutes Cited:

Health Information Privacy and Management Act, SY 2013, c 16

Access to Information and Protection of Privacy Act, RSY 2002, c 1

Interpretation Act, RSY 2002, c 125

Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25

Personal Information Protection Act, SA 2003, c P-6.5

Cases Cited:

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, 1998 CanLII 837 (SCC)

Union des employés de service, local 298 v. Bibeault, [1988] 2 S.C.R. 1048

British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re), 1994 CanLII 81 (SCC)

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344, 1995 CanLII 50 (SCC)

Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner, 2007 ABQB 499 (CanLII)

Business Watch International Inc. v. Alberta (Information and Privacy Commissioner, 2009 ABQB 10

Edmonton Police Service v. Alberta (Information and Privacy Commissioner), 2009 ABQB 268

Order F2006-031, Edmonton Police Service, September 22, 2008 (AB IPC), Alberta Office of the Information and Privacy Commissioner website

Order F2007-014, Edmonton Police Service, October 10, 2008 (AB IPC), Alberta Office of the Information and Privacy Commissioner website

Order F2007-031, Grande Yellowhead Regional Division No. 35 (AB IPC), Alberta Office of the Information and Privacy Commissioner website

Order F2008-013, Edmonton Police Service, October 9, 2008 (AB IPC), Alberta Office of the Information and Privacy Commissioner website

Explanatory notes:

All references to sections, subsections, paragraphs and subparagraphs, as applicable, in this decision are to HIPMA unless otherwise stated.

I BACKGROUND

[1] On November 29, 2016, the Office of the Information and Privacy Commissioner (OIPC) received the following complaint from the Complainant under the *Health Information Privacy and Management Act* (HIPMA).

> *The Custodian is collecting and using personal health information from his physician's patient files for the purpose of remunerating his physician for services rendered contrary to HIPMA, and*
>
> *the Custodian does not have adequate security measures in place to protect the personal health information collected.*
>
> (Complaint)

[2] On December 8, 2016, the OIPC notified the Department of Health and Social Services (Custodian) of the Complaint.

[3] An investigator was assigned to try and settle the Complaint. On February 2, 2017, the investigator advised the IPC that settlement could not be achieved. The parties were informed and the registrar issued a Notice of Consideration dated February 8, 2017, indicating that the consideration (Consideration) would occur on March 8, 2017. Initial submissions were due on February 23, 2017. Reply submissions were due on March 8, 2017.

[4] Initial submissions were received from the Complainant on February 14, 2017, and from the Custodian on February 20, 2017. A reply submission was received from the Custodian on March 8, 2017. The Complainant did not submit a reply submission.

[5] After reviewing the submissions received from the parties, I decided to obtain a legal opinion about the interpretation of a specific provision of HIPMA raised by the Custodian in its submissions. I made this decision based on the fact that this Consideration was the first time HIPMA was being interpreted and I felt it prudent to obtain external advice about the interpretation of this provision. I prepared my retainer letter and sent the letter to counsel on May 1, 2017. On May 25, 2017, I received the legal opinion.

[6] Given that I planned on considering the legal opinion as part of the Consideration, to ensure fairness I decided I would provide a summary of the opinion to the parties and ask them to make submissions on it. By this time, I had more

thoroughly examined the submissions and determined that they were insufficient for me to decide the issues under this Consideration. I also determined that I required certain records from the Custodian and the physician (Physician).

[7] On my instruction, the registrar sent a letter to the Custodian dated July 27, 2017, wherein she provided a summary of the legal opinion and requested submissions both on the opinion and specific to the issues under this Consideration. Attached to the letter was a Notice to Produce records with a deadline of August 14.[1] On August 3, she also sent the Physician a Notice to Produce records dated August 3, 2017. The deadline to produce these records was August 18, 2017.

[8] The registrar received the records from the Physician on August 18, 2017. On August 28, 2017, she received a response from the Custodian alleging the IPC had lost jurisdiction to consider the complaint as a result of not completing the Consideration in accordance with the timelines in section 103. On the issue of loss of jurisdiction, the Custodian stated the following.

> *HIPMA subsection 102 (2)* [sic] *requires the commissioner to complete the consideration of a complaint within 90 days after receiving the complaint. That time period can be extended by up to 60 days by the commissioner (s. 102 (3)* [sic]).
>
> *Assuming that the commissioner gave herself the maximum extension, although again we received no notice of same, the total time within which consideration of the complaint was to have been completed was 150 days from the date of the complaint.*
>
> *That period ended late April or early May 0f 2017. As we are far past that date, there is no need to examine exactly when that period ended.*
>
> *The commissioner does not have inherent jurisdiction. Her jurisdiction is statutory. Having failed to complete consideration of the complaint within the permitted time frame, she has, in our respectful submission, lost jurisdiction to further consider this complaint.*

[1] The Notice to Produce gave the Custodian 15 days from the date of the Notice to produce the records. As day 15 landed on a Sunday, the next business day became the deadline.

Following from such loss of jurisdiction, the commissioner has also, we respectfully submit, lost jurisdiction to require the production of records further to her consideration of the complaint. As such, we must respectfully decline to comply with the Notice to Produce Records.

[9] On July 27, 2017, the registrar also provided a summary of the legal opinion to the Complainant for submissions. None were subsequently received.

[10] Upon being informed of the Custodian's position regarding the IPC's jurisdiction to consider the Complaint, I instructed the registrar to inform the parties that the IPC would need to decide whether she had lost jurisdiction and requested submissions from the parties on this issue.

[11] Submissions were received from the Complainant on September 5, 2017, and from the Custodian on September 13, 2017.

II JURISDICTION

[12] In considering a complaint under HIPMA, the IPC has the following authority.

104 (1) In considering a complaint under this Act, the commissioner

(a) may decide all questions of fact and law arising in the matter…

[13] Given that the question about whether the IPC has lost jurisdiction to consider the Complaint is a matter arising in the course of considering the Complaint, the IPC has authority under paragraph 104 (1)(a) to decide the issue set out below.

III ISSUE

[14] The issue that the IPC must decide is as follows.

Has the* [IPC] *lost jurisdiction to consider the complaint for not completing the Consideration of it within the statutory time limits provided for in section 103 of HIPMA?

IV DISCUSSION OF THE ISSUE

[15] The relevant provisions of HIPMA to this decision are as follows.

102 *The commissioner must take any steps the commissioner considers reasonably appropriate in the circumstances to resolve informally a complaint under this Act, and must try and settle, or may authorize a mediator to try to settle, any matter that is under consideration under this Act.*

103 *(1) If a complaint under this Act is not settled under section 102, the commissioner must, subject to subsection 101 (1), consider the complaint.*

(2) Unless subsection 3 applies, the commissioner must complete the consideration of a complaint under this Act within 90 days after receiving the complaint.

(3) If the commissioner considers that additional time is needed to attempt the informal resolution, settlement or mediation of a matter under section 102, the commissioner may extend the time provided under subsection (2) by up to 60 days.

109 *(1) After completing the consideration of a complaint under this Act, the commissioner must prepare a report that sets out the commissioner's findings, any appropriate recommendations and reasons for those findings and recommendations.*

112 *(1) Within 30 days after receiving a report of the commissioner under paragraph 109 (3)(b), a respondent must*

(a) decide whether to follow any or all of the recommendations of the commissioner; and

(b) give written notice of their decision to the commissioner.

(2) If a respondent does not give written notice within the time required by subsection (1), the respondent is deemed to have decided not to follow any of the recommendations of the commissioner.

(3) Upon receiving a notice from a respondent under subsection (1), or if the respondent does not give written notice within the time required by subsection (1), after that time ends, the commissioner must

(a) give written notice of the respondent's decision or deemed decision to the relevant complainant any other person who received a copy of the report under paragraph 109 (3)(c) or subsection 109 (4);

(b) …

(c) Inform the complainant of their right to appeal the respondent's decision or deemed decision to the Supreme Court under section 114.

114 *Where a report includes a recommendation, and the respondent decides, or is deemed to have decided, not to follow the recommendation, or having given notice of its decision to follow the recommendations has not done so within a reasonable time, the complainant may, within six months after the issuance of the report, initiate an appeal in the court.*

V SUBMISSIONS

[16] The Custodian provided the following submissions on the issue.

Subsection 103 (2) sets a mandatory time limit of 90 days from the date of receiving the complaint within which the commissioner ***must*** *complete the consideration of a complaint.* [Emphasis in original]

Subsection 103 (3) allows the commissioner to extend the time period within which she must complete the consideration of the complaint by up to 60 days if she considers that additional time is needed to attempt informal resolution, settlement or mediation.

Section 102 is a mandatory provision that requires the commissioner to take any steps she considers reasonably appropriate in the circumstances to informally resolve complaints under the HIPMA. The commissioner "must" try to settle any matter under consideration under HIPMA, either herself or through a mediator.

Section 102 and s. 103 (3) combine to make it likely that in most cases the commissioner will extend the 90-day period for a further 60 days, as the mandatory requirement in s. 102 to attempt to informally resolve complaints will invariably take time.

*Thus, the outside time within which the commissioner **must** complete her consideration of a complaint is 150 days from the date of receiving the complaint.* [Emphasis in original]

Note that there are no other provisions in the HIPMA providing for further extensions of time for consideration of a complaint.

[17] The Custodian added the following.

…the commissioner's jurisdiction is statutory, not inherent. As such, having failed to complete consideration of the complaint within the permitted time frame, she has, in our respectful submission, lost jurisdiction to further consider this complaint.

[18] The Custodian provided the following additional facts.

The Respondent provided its Initial Submissions within the required time limits.

The Respondent did not receive a copy of any Initial Submissions from the Complainant.[2]

The 150 days within which the commissioner was to complete her consideration of the complaint ended sometime late April 2017.

That did not occur, and the next correspondence received by the Respondent from the commissioner's office was dated July 27, 2017. That letter set out various requests for further submissions from the Respondent that included a Notice to Produce Records dated July 27, 2017.

As the July 27, 2017 was not copied to counsel for the Respondents, there was some delay in responding to it.

By letter dated August 28, 2017, counsel for the Respondent advised that the Respondent's position is that the commissioner's jurisdiction in relation to this complaint is spent and that it consequently respectfully declines to provide further submissions or to comply with the Notice to Produce Records.

[2] OIPC records indicate that a copy of the Complainant's initial submission was hand delivered to the Custodian on February 22, 2017.

[19] In the Complainant's submissions, he expressed his concern about the Custodian's position in relation to the allegation of loss of jurisdiction, adding to this that concern:

> *…HIPMA is a new act, a new set of rules that ensure the protection of rights of the individual while allowing greater and wider collaborative medical coverage within our electronic society. Changes to existing practices and procedures were anticipated and expected…*
>
> *Until the IPC confirms that HSS has an obligatory procedure in place that does not require, demand or request physicians to provide details of patient discussions in order to be paid I will continue to pursue all legal options I can.*
>
> *As such I respectfully resubmit my claim that the department of HSS has no right to request the details of discussions between patients and physicians for any purpose. What a patient says to their physician is privileged. For HSS to demand access or copies of full records is beyond the authority of HSS. HSS has no need to know. Also, there exists a belief that HSS does not have any security measures or practices in place to adequately protect (send, receive, store, or destroy) this personal and sensitive information…*

VI LAW

[20] In support of its position that the IPC has lost jurisdiction to consider the Complaint, the Custodian is relying on *Union des employés de service, local 298 v. Bibeault, [1988] 2 S.C.R. 1048.* It identifies that, in this case, the Supreme Court of Canada (SCC) stated the following.

> *... In Syndicat des employés de production du Québec et de l'Acadie, supra, at pp. 420-21 this Court had occasion to consider the nature of the errors which result in an excess of jurisdiction.*
>
> > *A mere error of law is an error committed by an administrative tribunal in good faith in interpreting or applying a provision of its enabling Act, of another Act, or of an agreement or other document which it has to interpret and apply within the limits of its jurisdiction.*
> >
> > *A mere error of law is to be distinguished from one resulting from a patently unreasonable interpretation of a provision which an*

> *administrative tribunal is required to apply within the limits of its jurisdiction. This kind of error amounts to a fraud on the law or a deliberate refusal to comply with it … An error of this kind is treated as an act which is done arbitrarily or in bad faith and is contrary to the principles of natural justice. Such an error falls within the scope of s. 28 (1)(a) of the Federal Court Act, and is subject to having the decision containing it set aside.*
>
> *A mere error of law should also be distinguished from a jurisdictional error. This generally relates to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an administrative tribunal, or which is [TRANSLATION] "intended to [page 1086] circumscribe the authority" of that tribunal, as Pigeon J. said in Komo Constructions Inc. v. Commission des relations de travail du Quebec, [1968] S.C.R. 172 at p. 175. A jurisdictional error results generally in excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible faith, will result nonetheless in the decision containing it being set aside…* [Emphasis in original]

In its decision a tribunal may have to decide various questions of law. Certain of these questions fall within the jurisdiction conferred on the tribunal; other questions however may concern the limits of its jurisdiction

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. *if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;*
2. ***If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.*** [Emphasis in original]

Section 103 of HIPMA is a provision "which describes, lists and limits" the powers of an administrative tribunal, namely the commissioner.

It is a legislative provision "limiting the commissioner's powers", meaning that a mere error will cause the commissioner to lose jurisdiction and subject her to judicial review.

It would be an error for the Commissioner to conclude that she has the power to continue to consider these complaints after nearly twice the legislatively allotted time within which she was statutorily required to "complete the consideration of the complaint" has gone by.

[21] In citing this case, the Custodian appears to be of the view that I have lost jurisdiction for failing to meet the precondition set out in section 103 that specifies the timelines in which I must complete a consideration. The SCC in *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*[3] addressed the issue of whether the failure to meet a preliminary condition in subsection 268 (2) of the *Railway Act* prevented the Governor in Council in that case from varying an order. To decide the matter, the SCC conducted an analysis to determine whether the precondition was mandatory or directory. Its comments in this regard follow.

> *To begin, I evince some concern about whether it is profitable to characterize s. 268(2) using the words "mandatory" or "directory" in a reverential way. These words, well-known to Anglo-Canadian jurisprudence, respond as best they can when the facts of a case involve failed procedural preconditions. Professor Wade introduces the topic of procedural conditions using the following language, in Administrative Law (6th ed. 1988), at pp. 245-46:*
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> > *If the authority fails to observe such a condition, is its action ultra vires? The answer depends upon whether the condition is held to be mandatory or directory. Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or defect which entails the drastic penalty of invalidity.*[4]

[22] The case cited by the Custodian does not address whether the time requirements in section 103, a precondition to the IPC's ability to complete the Consideration in this case, are mandatory or directory. In order for me to decide

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[3] 1994 CanLII 81 (SCC).

[4] *Ibid.* pgs. 121 and 122.

whether the IPC has lost jurisdiction as a result of not completing the Consideration in time, I will need to determine if this section is mandatory or directory.

[23] The SCC in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*[5] set out the test for determining whether a statutory provision is mandatory or directory.

> *When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only…*
>
> *…This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: British Columbia (Attorney General) v. Canada (Attorney General)*, 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41.[6]

[24] The courts in Alberta have examined the issue of whether the timelines set out in Alberta's public and private sector privacy legislation are mandatory or directory. While these decisions are not binding on me, they are informative. The first case was heard in 2007.

2007 Court of Queen's Bench Decision

[25] In 2007, Alberta's Court of Queen's Bench heard *Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner* (KBR).[7] In KBR, the Court examined whether subsection 50 (5) of Alberta's *Personal Information Protection Act* (PIPA) is mandatory or directory. This subsection states as follows.

> *An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner*

[5] [1995] 4 SCR 344, 1995 CanLII 50 (SCC).

[6] *Ibid.* 5, at para. 42.

[7] 2007 ABQB 499 (CanLII)

(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

[26] The relevant facts in KBR were that the Office of Alberta's Information and Privacy Commissioner (AB OIPC) received a complaint from an individual under PIPA on September 13, 2004. The complaint was that Kellogg Brown and Root Canada and Syncrude Canada Limited (Organizations) did not have authority to collect the complainant's personal information derived from pre-employment alcohol and drug testing.[8]

[27] Settlement of the complaint failed and on December 12, 2005, the complainant requested a formal inquiry. The Organizations were subsequently notified August 11, 2006, by the AB OIPC that the inquiry was proceeding. They never received a notification of an anticipated date for the completion of the investigation. The investigation was never concluded and no report was ever issued.[9] Organizations applied to the Court for a declaration that Alberta's Information and Privacy Commissioner (AB IPC) had lost jurisdiction and that he is prohibited from proceeding with the inquiry.

[28] Justice Belzil identified that "there is no uniform test to determine whether the legislation is mandatory or directory, but, rather, one must consider all of the circumstances in deciding the issue." The circumstances considered by Justice Belzil were as follows:

a. the wording and context of PIPA,

b. whether a finding that subsection 50 (5) is mandatory would have a negative operational impact on PIPA,

c. the impact on the complainant and Organizations,

d. whether there are alternative remedies available to the complainant and Organizations, and

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[8] *Ibid.* 7, at paras. 3 and 4.

[9] *Ibid.* 7, at paras. 12 to 15.

e. whether a finding that subsection 50 (5) is mandatory would be contrary to public interest,

[29] Following his consideration of these circumstances, Justice Belzil concluded that subsection 50 (5) is mandatory. He based his conclusion on his following.

a. PIPA requires the equal balancing of the rights of individuals to have their personal information protected and organizations to collect, use and disclose personal information for legitimate business purposes. Part of this balancing requires the impact of prejudice on both parties to an inquiry. The timelines in PIPA support that the legislature intended timely resolution of complaints. Use of the word "must" rather than "may" suggests the timelines are imperative. The wording of the subsection gives Alberta's Information and Privacy Commissioner (AB IPC) maximum flexibility with no temporal constraints in that he can control the timing of the inquiry simply by giving notice.[10] The Organizations argued they would suffer prejudice from the delay over which they would have no control if the subsection was found to be directory the effect of which would "skew" the balance of rights. There was no evidence to suggest the AB IPC would suffer hardship.

b. There is no risk, and no evidence was presented in support of a risk, that PIPA would suffer negative operational impacts if subsection 50 (5) is found to be mandatory.[11]

c. Organizations would otherwise be adversely affected by the delay with no remedy for timely resolution. The complainant loses the benefit of having his complaint resolved at inquiry but the result is "neutral" as to prejudice between the complainant and the Organizations.[12]

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[10] *Ibid.* 7, at paras. 45 to 53.

[11] At para. 67, Justice Belzil indicated that if a finding that subsection 50 (5) would create a negative operational impact on PIPA, this would strongly militate in favour of the provision being interpreted as directory and not mandatory. He added at para. 67 that "[a] negative operational impact would result if a mandatory finding would render Part 5 of PIPA unworkable or even unduly difficult to comply with."

[12] *Ibid.* 7, at paras. 73 to 75.

d. The complainant has alternative remedies through the human rights commission or a union grievance to have his complaint addressed whereas Organization has no remedies.[13]

e. It is in the public interest to have complaints resolved in a timely fashion. A finding that the subsection is directory would undermine public confidence whereas a finding that it is mandatory will enhance PIPA's credibility.[14]

[30] Organizations were awarded their declaration and order.

AB IPC'S DECISIONS POST-KBR

[31] Following the KBR decision, the jurisdiction of the AB IPC was challenged on four different occasions by public bodies in orders F2006-031, F2007-014, F2007-031 and F2008-013.

[32] In Order F2006-031[15] dated September 22, 2008, the Edmonton Police Service (EPS) alleged as part of its submission into an inquiry conducted by the AB IPC that he had lost jurisdiction for not completing the inquiry in accordance with the timelines in subsection 69 (6) of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIPPA). In that case, an applicant submitted a request for review of EPS's decision regarding his access to information request on June 30, 2005, under FOIPPA. Settlement failed and the AB IPC decided to conduct an inquiry and notified the parties about it on January 17, 2006. Due to a number of factors, including a request by the AB IPC to be provided with additional details from the EPS and extensions requested by the parties, the process of obtaining evidence for the inquiry ended sometime after April 14, 2008, but before September 22, 2008 (the date of the Inquiry Report).[16]

[33] The AB IPC found he had completed the inquiry in accordance with the timelines after determining that he had met the notice requirements for extension in

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[13] *Ibid.* 7, at paras. 76 to 78.

[14] *Ibid.* 7, at paras. 79 to 81.

[15] F2006-031, Edmonton Police Service, Office of the Information and Privacy Commissioner of Alberta (OIPC), September 22, 2008, OIPC website.

[16] The date of the inquiry was not indicated in the report.

the subsection. Despite this finding, he went on to conduct the five-part analysis put forth in KBR for determining if subsection 69 (6) is mandatory or directory.

[34] In the first part of his analysis, the AB IPC undertook a comparison between FOIPPA and PIPA. His comments in this regard follow.

> *It is clear* [in PIPA] *that the rights of individuals to have their personal information protected is primary; there is no corresponding reference to the rights of public bodies. As is the case under PIPA, public bodies must meet the requirements of the FOIP Act in order to have the authority to collect, use and disclose personal information, so that they are not in contravention of the FOIP Act.*
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> *Section 69(6) of the FOIP Act is a provision that is very similar in wording to one which the Court has already interpreted under section 50(5) of PIPA, relative to which the Court reached the conclusion that section 50(5) of PIPA was mandatory. In my view, if all of the elements of the purpose provision of PIPA are taken into account, it may be seen that the purpose provision of PIPA does emphasize the rights of individuals and does subordinate the needs of organizations to these rights, as is also the case for the comparable provision in the FOIP Act. "Rights" versus "needs" are precisely the words used in the purpose provision of PIPA.*
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> *Therefore, in interpreting section 69(6) of the FOIP Act, I find that I cannot be guided by the Court's interpretation of section 50(5) of PIPA, which was based on its assessment of the purpose provision of PIPA.*
>
> *The same observations apply to two other matters considered by the Court in Kellogg.*
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> *With regard to the "Impact on the Complainant and Affected Organizations", the Court engaged in an even balancing as between complainants and organizations, resulting in what was in its view a neutral result in terms of prejudice. Again, this conclusion also seems to overlook that the primary purpose of the legislation is to protect personal information, and consequently, I cannot take this part of the Court's analysis into account in interpreting section 69(6) of the FOIP Act.*
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> *As to the Court's consideration of whether a finding that section 50(5) of PIPA is mandatory would be contrary to the public interest, the Court's analysis*

again depended on the fact that it did not accord primacy to my role of protecting those who deal with organizations by ensuring that organizations deal with personal information in the restricted way prescribed by PIPA. Again, as section 69(6) of the FOIP Act gives primacy to the rights of individuals to have their personal information protected, I cannot analyze it in the same way that the Court analyzed section 50(5) under the "public interest" heading.

Thus, despite the conclusion about section 50(5) of PIPA that the Court in Kellogg reached when it took these matters into account, I will interpret section 69(6) of the FOIP Act independently of this part of the Court's analysis.[17]

[35] When conducting his purposive analysis of subsection 69 (6), the AB IPC considered the following.

Section 69(6) of the Act[18] *says that an inquiry "must" be completed within ninety days after receiving the request for review, unless the Commissioner extends that period. In this case, the ninety-day period was extended once, but was not extended again before it expired on October 30, 1998.*

Section 25(2)(c.1) of the Interpretation Act, R.S.A. 1980, c.I-7, says that "must" is to be interpreted as imperative, that is, as a command or compulsory. A "must" provision is also referred to as a "mandatory" provision.

On the wording alone, section 69(6) of the Act is a mandatory ("must") provision. However, the Act does not say what happens if there is non-compliance with this legislative requirement.

In Blueberry River Indian Band v. Canada, [1995] 4 S.C.R. 344 (S.C.C.), the Supreme Court of Canada has said that, regardless of the mandatory wording of a statutory provision, the Court may nevertheless interpret the provision as directory in its effect (that is, as a "may" provision) if certain factors are present. The Court quoted Montreal Street Railway Co. v. Normandin, [1917] A.C. 170 (P.C.) as the case that summarized those factors:

[17] *Ibid.* 15, at paras. 99 to 105.

[18] Now subsection 69 (6) following FOIPPA amendments.

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provision to be directory only…

The Court then went on to say:

> *This Court has since held that the object of the statute and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: British Columbia (Attorney General) v. Canada (Attorney General), [1994] 2 S.C.R. 41.*[19]

[36] The AB IPC's conclusion following this analysis was that subsection 69 (6) is directory.[20] Despite the concern he expresses about taking the other four factors into account, given that they are case-specific considerations, he went on to consider them.

[37] On the remaining four-factors, he concluded as follows.

ii. There are no alternate remedies available to the complainant to have his complaint addressed like there were in KBR. Nor are there any for the EPS. On this point, he noted that simply "[w]aiting for my decision about whether it had authority under the FOIP Act does not amount to jeopardy."[21]

iii. The prejudice claimed by EPS would not be suffered by the delay. He highlighted that "[t]he Public Body has already done the collection, use or disclosure that gave rise to the complaint and request for review. It is simply waiting to find out if it was right or not. Indeed, the prejudice, if any, accrues to the Complainant whose personal information continues to be held, used or disclosed, possibly in contravention of the FOIP Act."[22]

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[19] *Ibid.* 15, at para. 107.

[20] *Ibid.* 15, at para. 132.

[21] *Ibid.* 15, at paras. 151 to 161.

[22] *Ibid*. 15, at paras 162 to 168 with the direct quote being at para. 168.

iv. There are operational impacts as a result of the KBR decision. He indicated that the operational impact of the Court's decision "has been enormous" given that the decision resulted in "numerous" jurisdictional challenges and applicants and complainants "potentially losing rights." He added that "[a] finding that section 69(6) is mandatory has the potential to leave me without jurisdiction on all FOIP Act cases and inquiries in my Office, and render all FOIP Act orders of my Office a nullity, which would have a significant operational impact on the FOIP Act."[23]

v. Public interest is served if subsection 69(6) is directory. In reaching this conclusion he stated the following.

> *The Court in Rahman[24] found that the failure to commence a hearing within the prescribed time frame was not fatal to the jurisdiction of the Alberta College and Association of Respiratory Therapy. The Court observed that the purpose of the legislation was to resolve complaints as expeditiously as possible, serving the interests of the health profession, the public and the individual complainant. The committee charged with hearing the dispute was not merely adjudicating a private dispute. It was also responsible for serving and protecting the public interest. Considering the relative prejudices associated with an interpretation of the relevant provision as mandatory versus directory demonstrated no prejudice or at worst minimal prejudice if the provision was deemed directory, but substantial prejudice to the complainant and the public interest if the provision was deemed mandatory, in the Court's view. Accordingly, on balance the provision was to be interpreted as directory.*
>
> *Similarly, my role under the FOIP Act goes beyond providing remedies to complainants. As provided by section 53(1) of the FOIP Act, my role is also to ensure that the purposes of the FOIP Act are achieved, including the purpose set out in section 2(b), which is:*
>
> > *2(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a*

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[23] *Ibid.* 15, at para. 174.

[24] *Ibid.* 15, at para. 176. The AB IPC cited *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.).

> *public body may make of that information and to control the disclosure by a public body of that information,…*
>
> *I have addressed the balance of prejudice issue above. I have also already addressed the idea that I can avoid any problems by extending timelines and issuing completion dates. Thus, in my view, the conclusion in the Rahman case applies.*[25]

[38] The AB IPC added a sixth factor that he identified as "[d]egree of seriousness of the breach." For this factor, he indicated that if his extension letter did not meet the requirements of subsection 69 (6), then the breach was "merely technical or trivial" in that the parties were aware the procedure was ongoing and were engaged throughout the process. He added that "I find that my actions under 69 (6) should not be invalidated, based on the legislative intent regarding the consequences of non-compliance with subsection 69 (6)."[26]

[39] The AB IPC then decided, after considering the relevant factors in this case, that subsection 69 (6) was directory.

[40] Using the same approach, the AB IPC reached the same conclusion in the other three orders when the EPS, on two occasions, and another public body, on a different occasion, challenged him on his jurisdiction to complete an inquiry under subsection 69 (6).

2008 Court of Queen's Bench Decisions

[41] In 2008, Alberta's Court of Queen's Bench heard *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner)* (Business Watch) (decision issued January 2009)[27] and *Edmonton Police Service v, Alberta (Information and Privacy Commissioner)* (EPS) (decision issued in May 2009).[28]

[42] In Business Watch, the Court examined whether subsection 50 (5) of PIPA and subsection 69 (6) of FOIPPA[29] is mandatory or directory.

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[25] *Ibid.* 15, at paras. 177 to 179.

[26] *Ibid.* 15, at paras. 181 to 184.

[27] 2009 ABQB 10.

[28] 2009 ABQB 268.

[29] Subsections 50 (5) of PIPA and 69 (6) of FOIPPA are worded the same.

[43] The relevant facts in Business Watch are as follows.

a. A complainant made a complaint about the authority of pawnshops in Edmonton and the City of Edmonton (City) to collect personal information under PIPA and FOIPPA. The complainant was a pawn shop owner who initiated a test case to determine if the collection of personal information by pawnshops as required by a City bylaw and the subsequent collection of this information by the City, which uploads the information collected into a database in the custody of Business Watch International Inc., was authorized. The date of the complaint was January 30, 2006.

b. On February 28, 2006, the AB IPC informed the complainant that he would conduct an inquiry. In late 2006, the AB IPC sent Notices of Inquiry to the complainant, City, and Edmonton Police Service (Public Bodies).[30]

c. Between June 2006 and the hearing, which was held in January, 2007, a number of things occurred: submissions were exchanged; timelines for submissions were extended at the request of the parties; the complainant requested more time to retain and prep legal counsel for the oral hearing; the City requested the opportunity to submit affidavits of certain witnesses and time was extended to allow the affidavits to be prepared; and parties were provided the opportunity to update their submissions.

d. After a decision of the Ontario Court of Appeal[31] was made on a similar issue, the AB IPC reconvened the inquiry as a written inquiry and requested submissions on that decision.

e. The KBR decision was released on July 30, 2007.

f. On August 2, 2007, the AB IPC informed the parties that he was extending the deadline for completing the inquiry and that the anticipated review date was September 30, 2008.

g. On February 15, 2008, the AB IPC issued his decision.[32]

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[30] The Edmonton Police Service was determined to have access to the database where the personal information collected by Edmonton was stored.

[31] This decision addressed the authority to collect and disclose personal information by second-hand dealers for the purpose of law enforcement.

[32] *Ibid.* 27, at paras. 13 to 29.

[44] After determining that the standard of review of the AB IPC's decision is reasonableness, Justice Veit went on to conduct her analysis of whether the subsections are mandatory or directory. She identified the following as relevant in finding that the provisions are directory.

a. No timeliness purpose would be served by having the process restart, given that the matter could be restarted. In addition, if restarted, then the AB IPC would take care to meet the timelines.

b. The decision had been issued. Therefore, no remedy is available to address the delay in completing the inquiry.

c. It is in the best interest of the parties that the AB IPC has sufficient time to make necessary inquiries.

d. An application for prohibition, as was the case in KBR, is not a relevant factor.

e. The complainant did not complain about delay and a purposive analysis of PIPA and FOIPPA demonstrates that "one must conclude that the primary party for whose benefit deadlines were introduced was the complainant party: it is presumably that party who has the greatest interest in the prompt resolution of the complaint."

f. In certain circumstances, parties other than the complainant would have an interest in timely resolution of a complaint "where, for example, there might be a pall thrown over that party by the very existence of an inquiry." The applicants for judicial review, Public Bodies, did not contest the jurisdiction to embark upon the inquiry nor did they point to any prejudice suffered by a delay.[33]

[45] In EPS, the Court examined whether subsection 69 (6) of FOIPPA is mandatory or directory.

[46] The relevant facts in EPS are as follows.

a. On March 27, 2006, the AB IPC received a request to review a decision made by the Edmonton Police Service in response to an individual's

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[33] *Ibid.* 27, at paras. 58 to 59.

request for access to records (Applicant). After settlement failed, the Applicant asked AB IPC to conduct an inquiry.

b. A Notice of Inquiry dated June 13, 2007 was issued to the parties. Submissions were exchanged and timelines extended. The ultimate deadline for submissions and rebuttals was September 5, 2007.[34]

c. The KBR decision was released on July 30, 2007.

d. Letters dated August 1, 2007 were sent to the parties from the AB IPC indicting the AB IPC was extending the time to complete the inquiry with an anticipated completion date of February 1, 2009. On February 14, 2008, the AB IPC issued his decision.

e. Total time take by AB IPC was: 11 months to initiate the inquiry, 16 months to send the extension letters, and 22 and ½ months until the decision was issued.

[47] After determining he was not bound to follow the KBR decision, distinguishing it on the basis that KBR was an application for prohibition while the matter before him was a judicial review, Justice Nielsen went on to analyse whether subsection 69 (6) is mandatory or directory. In finding the subsection directory, he determined the following as relevant.

a. A finding that the subsection is mandatory would conclude the inquiry. "[T]here would be nothing to prevent [Applicant] from restarting the process again from the beginning." The positions of the party and decision of the AB IPC would be the same. It would only delay the inevitable decision.

b. It is in the interests of the parties that the AB IPC have sufficient time to "conduct whatever steps he deems necessary to complete the Inquiry" which could not have occurred within the 90 days. He could have extended the timeframe but didn't. Had he done so there would be no question of his jurisdiction, therefore, "no purpose would be served" by restricting the AB IPC's ability to extend the time to complete the inquiry.

c. The Applicant would suffer prejudice through no fault of his own.

[34] *Ibid.* 28, at paras 6 to 13.

d. Some of FOIPPA's purposes may be defeated if the subsection is mandatory given that the Applicant "may in fact not be willing or able to recommence the process if the [AB IPC] was found to have had no jurisdiction to complete the Inquiry." [35]

VII ANALYIS

Are the time requirements in section 103 mandatory or directory?

[48] I will begin my analysis with a purposive interpretation of this section.

[49] The modern approach to statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[36]

[50] In Yukon's *Interpretation Act*, it states that [e]very enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.[37]

[51] The purposes of HIPMA are set out in section 1 as follows.

> ***1*** *The purposes of this Act are*
>
> *(a) to establish strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information;*
>
> *(b) to establish rules for the collection, use and disclosure of, and access to, personal health information that protect its confidentiality, privacy, integrity and security, while facilitating the effective provision of health care;*
>
> *(c) subject to the limited and specific exceptions set out in this Act, to provide individuals with a right of access to their personal health information and a*

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[35] *Ibid.* 28, at *para*. 52.

[36] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21.

[37] *Interpretation Act*, RSY 2002, c125, at section 10.

right to request the correction or annotation of their personal health information;

(d) to improve the quality and accessibility of health care in Yukon by facilitating the management of personal health information and enabling the establishment of an electronic health information network;

(e) to provide for an independent source of advice and recommendations in respect of personal health information practices, and for the resolution of complaints in respect of the operation of this Act; and

(f) to provide effective remedies for contraventions of this Act.

[52] The protection of personal information privacy has been recognized by our highest court to be quasi-constitutional in nature. The SCC in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* stated that "[t]he importance of protection of privacy in a vibrant democracy cannot be overstated."[38] Personal health information goes to the biographical core of individuals. Therefore, it is the most sensitive personal information that exists. Health information laws were developed to facilitate the flow of personal health information to provide individuals with healthcare and to effectively manage Canada's public health system while taking into account that the information collected, use and disclosed by custodians for these purposes is the most sensitive type that, if breached, could result in significant harm to individuals.

[53] HIPMA is no exception. It is clear from the purposes in HIPMA that the drafters recognized that to facilitate the flow of personal health information for health care and health system management, strong controls and accountability mechanisms are necessary to maximize privacy and security and minimize the risk of harm. One of these mechanisms is the right to have complaints about non-compliance addressed independently by the IPC.

[54] The scheme of HIPMA is as follows.

[55] HIPMA applies to custodians. The term "custodian" is defined in section 2 to include the Department of Health and Social Services (HSS), the operator of a hospital or health facility, a health care provider, a prescribed branch, operation or program of a Yukon First Nation, and the Minister of HSS. Essentially, custodians are

[38] [2013] 3 SCR 733, 2013 SCC 62 (CanLII), at paras 20 to 22.

those persons or bodies in Yukon who engage in the provision of health care or who have responsibility for management of the health system.

[56] Section 6 indicates that the Yukon Government (YG) is bound by it. HSS is a YG department.

[57] Section 7 of HIPMA sets out that it applies to the collection, use and disclosure of personal health information by the Minister, HSS or "any other custodian, if the collection, use or disclosure is undertaken for the purpose of providing health care, the planning and management of the health system or research."

[58] Section 11 specifies that HIPMA prevails over an Act or regulation, the provisions of which, conflict with those in HIPMA unless expressly stated otherwise.

[59] Section 13 states that a person who is a custodian…may collect, use, disclose and access personal health information only in accordance with HIPMA or its regulations.

[60] Sections 14 to 17 establish limits for the collection, use or disclosure of personal health information by Custodians**.** Sections 19 to 23 establish rules that custodians must follow in managing personal health information. Sections 49 to 60 establish the authority for custodians to collect, use or disclose personal health information. There are also rules a custodian must follow in obtaining consent for the collection, use or disclosure of personal health information and require custodians to notify individuals where a breach may cause significant harm.

[61] HIPMA provides individuals with the right to access personal health information in the custody and control of custodians and to request a correction of this information. The access to information and correction request provisions in HIPMA specify the procedure and timelines that a custodian must follow when responding to these requests.

[62] The powers and duties of the IPC are set out in section 92. They are as follows.

> ***92*** *In addition to the specific duties and powers assigned to the commissioner under this Act, the commissioner is responsible for overseeing how this Act is administered to ensure that its purposes are achieved, and may*
>
> *(a) inform the public about this Act;*

(b) comment on the implications for access to personal health information and personal information, or for the protection of privacy, under this Act of existing or proposed legislative schemes or programs of the Government of Yukon;

(c) advise custodians and promote best practices;

(d) make recommendations with regard to this Act;

(e) authorize persons or classes of persons to enter into agreements referred to in paragraph 70(3)(e);

(f) exchange personal information and personal health information with any person who, under legislation of another province or Canada, has powers and duties similar to those conferred upon the commissioner under this Act or the Access to Information and Protection of Privacy Act;

(g) enter into information-sharing agreements for the purposes of paragraph (f) and into other agreements with the persons referred to in that paragraph for the purpose of coordinating their activities and exercising any duty, function or power conferred on the commissioner under this Act; and

(h) perform any prescribed duties or functions or exercise any prescribed power.

[63] Section 99 states that "[a]ny person may make a complaint to the commissioner if the person reasonably believes that a custodian has failed to comply with this Act or the regulations."

[64] Upon receiving a complaint, section 102 requires the IPC to "take any steps the commissioner considers reasonably appropriate in the circumstances to resolve informally a complaint under this Act, and must try and settle, any matter that is under consideration under this Act."

[65] Subsection 104 (1) sets out the powers of the IPC in considering a complaint as follows.

104*(1) In considering a complaint under this Act, the commissioner*

(a) may decide all questions of fact and law arising in the matter;

(b) has the powers of a board of inquiry under the Public Inquiries Act; and

> *(c) may require any record to be produced to the commissioner and may examine any information in a record, including personal health information and personal information.*

[66] Section 109 requires the IPC to prepare a report upon completing a consideration and to provide a copy of the report to the complainant, custodians, and others as authorized.

[67] Section 112 requires the custodian who receives the report to decide whether to follow the recommendations made and to notify the complainant of its decision.

[68] A complainant has the ability, under section 115, to appeal to the Yukon Supreme Court a decision by a custodian not to follow any recommendation.

[69] There are offence provisions in HIPMA that make non-compliance an offence with fines ranging from $500 to $100,000.

[70] The rules in HIPMA are also designed to facilitate control over one's own personal health information. In *Alberta (Information an Privacy Commissioner) v. United Food and Commercial Workers, Local 401*,[39] the SCC stated in reference to the objective of privacy laws that:

> *The focus is on providing an individual with some measure of control over his or her personal information…*
>
> *The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of democracy.*

[71] Control in HIPMA is exercised by individuals in a number of ways:

a. through the consent provisions that require custodians to obtain consent for the collection, use and disclosure an individual's personal health information except in limited and specific circumstances that authorize collection, use and disclosure without consent;

[39] 2013 SCC 62, at para. 19.

b. individuals must be informed about a custodian's information management practices;

c. they have the right to access their own personal health information;

d. they have the ability complain to the IPC when they have "a reasonable belief" that a custodian is not complying with the HIPMA and be informed of the outcome of the consideration of their complaint and any recommendations made by the IPC to remedy the contravention; and

e. they can appeal the decision of a custodian who decides not to follow the IPC's recommendations.

[72] The timelines in HIPMA for resolution of complaints set out in subsections 103 (2) and (3) were established to facilitate timely resolution of complaints. The Custodian submitted that the time period to resolve the Complainant's complaint in this case has expired.

[73] The facts show the following.

a. The complaint was received on November 29, 2016.

b. Settlement attempts were underway until February 2, 2017, when the investigator, assigned to attempt settlement, informed the IPC that settlement could not be achieved. As only 65 days had passed since the complaint was made, the investigator did not extend the time to complete the Consideration.

c. The Notice of Inquiry dated February 8, 2017, was sent to the parties indicating the Consideration would occur on March 8, 2017. Initial and reply submission were received by March 8, 2017. The time for Consideration of the Complaint expired on February 27, 2017, as no time extension occurred.

[74] Based on these facts, the time for the IPC to complete the consideration was February 27, 2017: 90 days after receiving the Complainant's complaint and not 150 days as indicated by the Custodian. Whether the drafters intended that I lose jurisdiction as a result of being out of time turns on whether the timelines in subsections 103 (2) and (3) are mandatory or directory.

[75] The consequences of a loss of jurisdiction are considerable. The Complainant's only recourse to have his Complaint addressed is through HIPMA, given that it is a complete governance scheme for the collection, use, disclosure and management of personal health information. The Complaint is that the Custodian is collecting and using personal health information for the purpose of processing the billing claims of the Physician contrary to HIPMA. He also complains that it is not adequately securing this information. The information at issue in the consideration is personal health information collected by the Physician in the course of providing psychiatric care. This information is highly sensitive and a breach of this information could cause the individuals, whose personal health information is collected by the Custodian, harm. More importantly, the Custodian is obligated to follow the rules in HIPMA for the collection, use and security of personal health information. The Complainant has the right, under HIPMA, to have his complaint addressed through the scheme in HIPMA that includes the right of independent investigation of his complaint. There is no other avenue for the Complainant to have his complaint addressed.

[76] If subsections 103 (2) and (3) are found to be mandatory, the Complainant would lose his ability to have his Complaint addressed and the Custodian would not be held accountable for potential non-compliance. There is no appeal mechanism available to the Complainant. Appeal under HIPMA can only occur after a consideration is complete, a report issued and when a Custodian refuses to follow the recommendations of the IPC. The prejudice to the Complainant, as a result of a finding that these subsections are mandatory, is clear. On the other hand, there is no prejudice to the Custodian which has collected or continues to collect this personal health information other than to wait for my decision in respect of the Complaints put forward.

[77] The time that has elapsed from the date the Complaint was received is, in my view, not significant. As can be seen from the facts, only nine months passed between the time the Complaint was received and the time the Custodian alleged that the IPC lost jurisdiction. During this time, the Consideration was evolving with the knowledge of the parties.

[78] The submissions for the Consideration were submitted by March 8, 2017. After analysing the submissions made by the Custodian, I sought a legal opinion to aid me in deciding the issues. This took a month to receive. Procedural fairness requires that I provide the parties with the opportunity to make submissions on the opinion. I had determined that the original submissions received were insufficient to

decide the issues. When I sent out the request for submission on the legal opinion summary, I also requested additional submissions and records from the Custodian. In addition, I determined that I required records from the Physician. It took another month to receive this information. In the intervening period between March and July, 2017, I evaluated the evidence received and performed my other mandated responsibilities.

[79] Under both HIPMA and the *Access to Information and Protection of Privacy Act* (ATIPP Act), the IPC is responsible for adjudicating complaints and reviews. The IPC is not authorized to delegate adjudications under the ATIPP Act or under HIPMA in certain circumstances. The amount of adjudications that the IPC is required to resolve at any one time is unpredictable and depends on the outcome of settlement attempts.

[80] When discharging my adjudication function, it is incumbent that I do so fairly and properly. When I receive submissions from custodians or public bodies for adjudication, I must evaluate the evidence received and take any steps necessary to ensure that my decisions have a sufficient evidentiary basis. If during the adjudication process I determine that I require additional evidence to decide the matter, then I must be free to take the steps I believe necessary to obtain the evidence. In this case, during the course of the adjudication, I determined that I could not discharge my function without additional evidence. If the time requirements in subsections 103 (2) and (3) are mandatory, then I would be prevented from obtaining the evidence I need, the result of which would cause me to make decisions without proper evidence or result in my inability to decide matters for lack of evidence. Surely, the legislature did not intend this result.

[81] The duty that I am responsible to perform as the IPC under HIPMA, including my adjudication function, is a public duty. It would be a neglect of this duty if, each time I considered a complaint under HIPMA, I risked losing jurisdiction and did so while trying to obtain sufficient evidence to properly consider a complaint or when accommodating various requests from parties, who may, for a number of reasons require additional time. It is clear that no benefit would be served if the IPC loses jurisdiction simply as a result of being out of time under subsections 103 (2) or (3). Additionally, a loss of jurisdiction would amount to serious injustice to complainants who have no control over the IPC's consideration process. The purposes of HIPMA would be seriously undermined if complainants are deprived of their only recourse to have their complaints about non-compliance addressed.

[82] In accordance with the test set out by the SCC in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),*[40] after considering the objects of HIPMA, together with the serious consequences that would flow from a determination that subsections 103 (2) and (3) are mandatory, I find that the Legislature intended that subsections 103 (2) and (3) are directory.

[83] The Court of Queen's Bench in Alberta addressed a number of factors in deciding whether the timelines in Alberta's PIPA and FOIPPA are mandatory or directory. Although, I am of the view that it is unnecessary to consider these factors given my finding based on the above analysis that subsections 103 (2) and (3) of HIPMA are directory, I will address these factors for the sake of completeness.

[84] In KBR, the Court identified five factors that, in the matter under Consideration, are:

a. the wording and context of the law;

b. whether a finding that a specific subsection is mandatory would have a negative operational impact on the law;

c. the impact on the parties;

d. whether there are alternative remedies available to the parties; and

e. whether a finding that a subsection is mandatory would be contrary to public interest.

[85] In KBR, the Court found after considering these factors that, on balance, the factors favoured a finding that subsection 50 (5) of PIPA is mandatory. My analysis of the Court's conclusions in respect of these factors, as compared to subsections 103 (2) and (3) of HIPMA, is as follows.

a. In KBR, the Court concluded that PIPA required a balancing of rights, including as the balancing pertained to the prejudice suffered by the parties if subsection 50 (5) of PIPA were found to be mandatory.

   A purposive analysis of HIPMA clarified that its purpose is to maximize the privacy and security of personal health information collected, used

[40] *Ibid.* 5.

and disclosed by custodians for health care and system management. HIPMA does not require a balancing of rights. Rather it requires the provisions be interpreted from the standpoint of maximizing the privacy and security of personal health information collected, used and disclosed by custodians. The result is that the interests of the complainants are elevated, as it is complainants who have the greatest interest in ensuring that custodians follow the rules designed to protect their personal health information. Consequently, the prejudice the Complainant will suffer, as a result of being deprived the ability to have his Complaint about non-compliance considered if subsections 103 (2) ad (3) are mandatory, is elevated over any prejudice that may be suffered by the Custodian if subsections 103 (2) and (3) are directory.

b. In KBR, the Court was presented with no evidence about an operational impact on PIPA and determined there was no such risk. Above, I identified there will be operational impacts on HIPMA if subsections 103 (2) and (3) are mandatory.

c. In KBR, the court concluded that the impact of finding subsection 50 (5) is mandatory or directory on the parties is neutral based on its purposive analysis that PIPA requires the balancing of any prejudice suffered.

   Above, I identified that there would be a negative impact on the Complainant, given that if the provisions are found mandatory he will have no recourse to have his complaint addressed. On the other hand, the impact on the Custodian is minimal, given that it only has to wait for my decision about whether it is compliant or not with HIPMA for the collection, use and security of personal health information collected from the Physician. Given that the interests of the Complainant are elevated under HIPMA, any negative impact that he suffers as a result of finding subsections 103 (2) and (3) mandatory are afforded greater weight than the impact suffered by the Custodian.

d. In KBR, the Court concluded there were alternate remedies for the Complainant to pursue through the human rights tribunal and work grievance procedure. In this case, I confirmed that there are no alternate remedies for the Complainant. As I stated above, HIPMA is a complete governance scheme for the collection, use, disclosure and management of personal health information for health care or system management by

custodians in Yukon. The Complainant's only recourse to have his Complaint addressed is through HIPMA.

e. In KBR, the Court concluded that it would be in the public interest to ensure the timely resolution of complaints. Commissioner Work, as he then was, highlighted the following words of the Court of Queen's Bench in *Rahman v. Alberta College and Assn. of Respiratory Therapy*[41] on the issue of public interest when deciding whether a provision is directory or mandatory.

> *… The committee charged with hearing the dispute was not merely adjudicating a private dispute. It was also responsible for serving and protecting the public interest. Considering the relative prejudices associated with an interpretation of the relevant provision as mandatory versus directory demonstrated no prejudice or at worst minimal prejudice if the provision was deemed directory, but substantial prejudice to the complainant and the public interest if the provision was deemed mandatory, in the Court's view. Accordingly, on balance the provision was to be interpreted as directory.*

The Complaint in this case extends beyond the specific Complainant as it is about the personal health information collected by the Custodian to process a specific physician's billing claims for all his patients. On December 6, 2016, shortly after the Complaints were made to the OIPC, CBC Radio ran a news story examining the issue.[42] In the story, and in response to it, members of the public and some physicians expressed concerns about the collection of personal health information by the Custodian to process physician' billing claims. If subsections 103 (2) and (3) are found to be mandatory, then there would be prejudice not only to the Complainant but to the Physician's other patients and the public if the IPC is prevented from considering the complaint as a result of losing jurisdiction. In contrast, a finding that the subsections are directory

[41]*Ibid.* 15, at para. 176. The AB IPC cited *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.).

[42] *Yukon gov't routinely demands to see patients' private medical records*, December 6, 2016, Thomson, N., CBC News, CBC website: http://www.cbc.ca/news/canada/north/yukon-medical-records-confidentiality-privacy-1.3882617.

would not prejudice any person, including the Custodian for the reasons already stated.

[86] I conclude, on the foregoing factors, that, on balance, these factors favour a finding that subsections 103 (2) and (3) are directory.

[87] In Business Watch and EPS, the Court found that, on balance, the following factors favour a finding that subsection 69 (6) of FOIPPA is directory.[43] My analysis of the Court's conclusions in respect of these factors, as compared to HIPMA and the issue under Consideration, is as follows.

[88] The Court considered whether a timeliness purpose would be served by finding the provision mandatory and determined that it would not. The Court determined that the matters could be simply restarted, in which case the AB IPC would take more care to meet the timelines. The same can be said here. The Complainant's complaint can simply be remade by him, the Physician or any of the Physician's patients. As such, no timeliness purpose in this would be served by finding subsections 103 (2) and (3) mandatory.

[89] The Court considered whose best interest it was in to ensure timeliness of decision-making and concluded that it was in the best interests of all the parties to ensure that the AB IPC has sufficient time to make any necessary inquiries. I arrived at the same conclusion as part of my analysis above.

[90] The Court in Business Watch considered the prejudice to the parties, concluding that it was the complainant who had the greatest interest in a prompt resolution of the complaint and that for the other parties (two public bodies in that case), "there might be a pall thrown over that party by the very existence of an inquiry." On this point, the Court noted that the public bodies did not contest the AB IPC's jurisdiction to embark upon the inquiry and did not give any evidence of delay.[44] On the issue of prejudice, the Court in EPS concluded that the complainant would suffer prejudice through no fault of his own. In this case, I determined that

[43] The Court also considered whether there is a judicial remedy for delay and that KBR involved an application for prohibition, which has different considerations than a judicial review. Neither of these factors are relevant to my decision. They are, therefore, not addressed herein.

[44] This was the conclusion reached by the Court in Business Watch.

the Complainant would be prejudiced by a finding that subsections 103 (2) and (3) are mandatory and that the Custodian would not.

[91] The Court in EPS concluded that the purposes of FOIPPA would be defeated if subsection 69 (6) is mandatory and the Applicant in that case does not recommence the process. The same risk exists in this case. Even though the Complainant or others *can* make the same Complaint, they may decide for a multitude of reasons not to do so. If this occurred, then the allegation that the Custodian is not in compliance will never be addressed and an essential measure of holding custodians accountable for compliance with HIPMA would be lost.

[92] My conclusions regarding these factors are that, on balance, they favour a finding that subsections 103 (2) and (3) are directory.

VIII FINDINGS

[93] My finding in respect of the issue is that subsections 103 (2) and (3) of HIPMA are directory. Consequently, the fact that the time requirements in section 103 expired on February 27, 2017, does not result in a loss of jurisdiction for the IPC to consider the Complainant's complaint.

[94] As a result of my finding, I will continue the Consideration of the Complainants Complaint and will inform the parties about next steps.

original signed

Diane McLeod-McKay, B.A., J.D.
Yukon Information and Privacy Commissioner

Distribution List:

- Custodian
- Complainant