Yukon Information and Privacy Commissioner

DECISION

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

Health Information Privacy and Management Act

File HIP17-08I

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

Information and Privacy Commissioner (IPC)

Custodian: **Yukon Hospital Corporation**

Date: **November 14, 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, Yukon Hospital Corporation took the position that the IPC had lost jurisdiction to consider the complaint. After conducting an analysis to determine whether these time limits 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

Access to Information and Protection of Privacy Act, SNL 2002, C A-1.1 (repealed)

Cases Cited:

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

Oleynik v. (Newfoundland and Labrador) Information and Privacy Commissioner, 2011 NLTD 34 (CanLII).

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

HIP16-02I Decision, Department of Health and Social Services, October 6, 2017, (YT IPC).

Explanatory Notes:

All statutory provisions referenced below are to the *Health Information Privacy and Management Act* (HIPMA) unless otherwise stated.

I BACKGROUND

[1] On April 19, 2017, the Office of the Information and Privacy Commissioner (OIPC) received a complaint from an individual (Complainant) dated April 18, 2017 wherein she alleged Yukon Hospital Corporation (YHC) disclosed her and her child's personal health information to a community health centre operated by the Department of Health and Social Services (Health Centre) contrary to the HIPMA. In her complaint, the Complainant indicated she learned of the disclosure after returning to her community following the birth of her child when she was contacted by an employee of the Health Centre who had detailed knowledge about her care and treatment at Whitehorse General Hospital (Hospital). She further indicated she did not give her consent for the disclosure.

[2] An investigator was assigned to notify YHC about the Complaint and attempt settlement. In a letter dated April 26, 2017, YHC was informed about the Complaint and the settlement and consideration procedure.

[3] On July 27, 2017, using her delegated authority the investigator extended the timeline in subsection 103 (2) 60 days to allow more time to attempt settlement.

[4] On August 25, 2017, the investigator informed the IPC that she was unable to settle the Complaint. YHC was informed the same day of the failed settlement.

[5] After considering whether any of the factors in subsection 101 (2) apply in respect of the Complaint and deciding they do not, I instructed the registrar to notify the parties of the consideration.

[6] The registrar prepared the Notice of Consideration on August 25, 2017 and sent it to the parties. The date for consideration in the Notice was September 22, 2017.

[7] Initial submissions for the consideration were received from the Complainant on September 12, 2017 and from YHC on September 14, 2017. The submissions were exchanged and a reply received from both on September 21, 2017.

[8] In the submissions received from YHC was an objection to the IPC completing her consideration of the Complainant on the basis that she has lost jurisdiction as a result of being out of time under section 103. Given this, before continuing to consider the Complaint, I must decide whether I have lost jurisdiction as a result of being out of time under section 103 as a preliminary issue.

[9] The submissions of the Custodians included that "the Commissioner ought to dismiss the Complaint on the basis that the Complaint is not well-founded because YHC's disclosure to the [Health Centre] of records containing personal health information of the Complainant and the Newborn was clearly authorized by HIPMA and clearly complied with the applicable requirements of HIPMA."

[10] I will not address this matter as part of the consideration as a preliminary issue in this Report given that after settlement failed, part of the IPC's consideration process is to consider whether any of the circumstances under subsection 101 (1) applies to the issues under consideration. I followed this procedure in this consideration and, prior to instructing the registrar to issue the Notice of Consideration, decided that none of the circumstances in that subsection apply. I will add that if I were to dismiss the Complaint on the basis suggested by the Custodian, it would be an abdication of my responsibilities and a neglect of my public duty under HIPMA given that the very heart of the issues are whether the Custodian met its obligations under HIPMA in disclosing this information and whether the Complaint is well founded, which can only be determined through consideration.

III JURISDICTION

[11] YHC is "the operator of a hospital" and as such it is a custodian as defined in section 2 (Custodian). Subparagraph 7 (1)(a)(ii) indicates that HIPMA applies to the collection, use and disclosure of personal health information by "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." The Complaint made by the Complainant is

that the Custodian disclosed her and her child's personal health information to the Health Centre for the purpose of providing her with post-partum health care. As such, I find that HIPMA applies to the disclosure by the Custodian.

[12] Subsection 103 (1) states that subject to subsection 101 (1) the IPC is required to consider the Complaint received from the Complainant under section 99 that cannot be settled under section 102. As I indicated above, I determined that none of the factors in subsection 101 (1) apply in respect of the Complaint and that attempts to settle the Complaint failed.

[13] With respect to the preliminary issue, under paragraph 104 (1)(a) the IPC may decide all questions of fact and law arising in the matter under consideration. The question about whether the IPC has lost jurisdiction for not completing the consideration in accordance with the timelines in section 103 is a question arising in the matter under consideration.

III PRELIMINARY ISSUE

[14] The preliminary issue that I must consider is as follows.

> ***Has the IPC lost jurisdiction to consider the Complaint as a result of not completing the consideration of the Complaint in accordance with the timelines set out in section 103.***

Submissions from the Parties

[15] The Custodian provided the following submissions on the preliminary issue.

> *…HIPMA section 103 provides that the Commissioner must complete the consideration of the Complaint within no more than 150 days after the Commissioner received the Complaint.*
>
> *HIPMA section 103 is mandatory. HIPMA does not give the Commissioner any discretion to extend the date for completion of consideration of the Complaint beyond 150 days after the Commissioner received the Complaint.*
>
> *The mandatory nature of HIPMA section 103, and the maximum 150-day period for completion of consideration of the Complaint, is consistent with the interests of the*

parties to a complaint, and the public generally, in the timely resolution of complaints under HIPMA.

The Commissioner's Office advised YHC that the Complaint was received by the Commissioner on April 19, 2017, although correspondence attached to the Fact Report indicates that the Complaint was received by the Commissioner on April 18, 2017. The maximum 150-day period specified in HIPMA section 103 will end on September 16, 2017. [Emphasis in original]

It is not possible for the Commissioner to complete consideration of the Complaint before the 150-day period ends, because that would deprive the parties of their statutory right, under HIPMA section 105(c), to make reply submissions and would violate principles of natural justice and fairness. The Notice of Written Consideration provides that the parties have until September 22, 2017 to exercise their statutory right to deliver their reply submissions to the Commissioner.

YHC respectfully submits that after expiration of the 150-day period (on September 16, 2017), the Commissioner will no longer have jurisdiction to consider the Complaint or to issue any decision regarding the Complaint.

YHC has not found any court decision that has considered HIPMA section 103 or the effect of a failure by the Commissioner to complete consideration of a complaint within the maximum 150-day period specified in HIPMA section 103.

There are a number of court decisions considering section 50(5) of the Alberta Personal Information Protection Act, which (at the time of the decisions) required the Alberta commissioner to complete an inquiry within 90 days unless the Alberta commissioner extended that period. Those decisions are not entirely consistent. It is important to note, however, that Alberta PIPA section 50(5) was significantly different from HIPMA section 103, because Alberta PIPA section 50(5) allowed the Alberta commissioner to indefinitely extend the due date for a decision, whereas HIPMA section 103 limits the permissible extension (up to 60 days) for a maximum total of 150 days.

> *Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner, 2007 ABQB 499 (CanLII); appeal dismissed as moot Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company, 2007 ABCA 426 (CanLII).*

> *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner), 2009 ABQB 10 (CanLII).*
>
> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, (2011] 3 SCR 654, 2011 sec 61 (CanLII).*

Section 48 of the Newfoundland and Labrador Access to Information and Protection of Privacy Act, SNL 2002 (repealed), which required the commissioner to issue a report within 90 days after receiving a request for review, was judicially considered in 0leynik v. (Newfoundland and Labrador) Information and Privacy Commissioner. In that case, the court held that a report delivered by the commissioner after the expiration of the 90-day period cured the commissioner's failure to comply with the time limit. It is important to note, however, that the parties to that proceeding were aware of the commissioner's delay and there is no indication that the parties made any objection to the delay until after the report was issued. That is an important circumstance that distinguishes the 0leynik case from this proceeding.

> *0leynik v. (Newfoundland and Labrador) Information and Privacy Commissioner, 2011 NLTD 34 (CanLII); appeal dismissed 0leynik v. Newfoundland and Labrador (Information and Privacy Commissioner), 2012 NLCA 13 (CanLII); application for leave to appeal dismissed Anton Oleynik v. Information and Privacy Commissioner of Newfoundland and Labrador, 2012 CanLII 56168 (SCC).*

YHC submits that the reasoning in the Kellogg Brown decision is sound and most applicable, and ought to be followed by the Commissioner.

For those reasons, YHC respectfully submits that the Commissioner will no longer have any jurisdiction regarding this matter after September 16, 2017, and for that reason the Commissioner is obligated to terminate this proceeding and should not issue any decision regarding the Complaint.

[16] The Complainant did not provide any submissions on the preliminary issue.

Analysis

[17] The relevant provisions of HIPMA to this issue 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.*

[18] In HIP16-02I,[1] a recent decision, I considered whether the timelines in section 103, more specifically subsections 103 (2) and (3), are mandatory or directory based on the following test set out by the Supreme Court of Canada (SCC) in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*.[2]

> *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.[3]

[1] HIP16-02I Decision, Department of Health and Social Services, October 6, 2017, (YT IPC).

[2] [1995] 4 SCR 344, 1995 CanLII 50 (SCC).

[3] *Ibid.* 2, at para. 42.

[19] After considering the objects of HIPMA together with the "serious consequences" that I determined would flow from a finding that these subsections are mandatory, I found that subsections 103 (2) and (3) are directory.[4] My reasoning in support of this finding follows.

> *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 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.*
>
> *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."*

[4] *Ibid.*1, at para. 82.

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.

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.

The scheme of HIPMA is as follows.

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

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."

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

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.

*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.*

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.

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.

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."

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."

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.

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.

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.

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.

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

The rules in HIPMA are also designed to facilitate control over one's own personal health information. In Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, the Supreme Court of Canada 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.*

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;*

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* [to] *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.*

The timelines in HIPMA for resolution of complaints set out in subsections 103 (2) and (3) were established to facilitate timely resolution of complaints.[5]

[20] The facts in HIP16-02I were as follows.

a. The complaint was received on November 29, 2016 and the timeline in subsection 103 (2) expired on February 27, 2017. The submissions were received after the time period expired in March and in July the IPC requested additional submissions and ordered the production of records from the Department of Health and Social Services (HSS) and a physician. In August 2017, HSS took the position that the IPC lost jurisdiction to consider the complaint.

b. The complaints made by the Complainant in that consideration were that HSS is collecting and using personal health information from his psychiatrist for the purpose of processing his psychiatrist's billing claims contrary to HIPMA and that HSS is not adequately securing this information.

[21] I stated the following about the process of consideration in that case.

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.

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

[5] *Ibid.* 1, at paras 51 to 72.

> *receive this information. In the intervening period between March and July, 2017, I evaluated the evidence received and performed my other mandated responsibilities.*[6]

[22] I stated the following about the consequences of a loss of jurisdiction for being out of time under subsections 103 (2) and (3).

> *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 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.*
>
> *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.*

[6] *Ibid.*1, at paras 77 and 78.

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.

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.

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.[7]

[7] *Ibid.*1, at paras. 75, 76, and 79 to 81.

[23] On the specific facts of this case, it is clear that the timelines in subsection 103 (3) expired on September 16, 2017. Only seven months has passed since the OIPC received the Complainant's complaint on April 19, 2017. Settlement attempts were underway for four of the seven months until August 25, 2017. To allow enough time for submissions, the consideration was set for September 22, 2017. The parties had knowledge of the proceedings throughout including the timelines. The Custodian has not indicated it would suffer any prejudice if subsections 103 (2) and (3) are directory and the consideration is not completed in accordance with the timelines in section 103. Nor do I see it would suffer any given that it only has to wait a short time beyond the timelines for my decision about whether it complied with HIPMA when it disclosed the Complainant's and her child's personal health information to the Health Centre. On the other hand, if subsections 103 (2) and (3) are mandatory, the Complainant would be prejudiced by losing her only opportunity to have her complaint about the Custodian's alleged non-compliance with the HIPMA addressed. She has no other recourse as HIPMA is a complete governance scheme that the Custodian is required to comply with for the collection, use, and disclosure of personal health information for the purposes of providing health care to individuals, including the Complainant.

[24] For these reasons together with those identified in HIP16-02I, I find that subsection 103 (3) is directory.

[25] Three of the court cases relied on by the Custodian are from Alberta. I considered these cases in HIP16-02I as I find them to be informative although they are not binding on me. In these cases, Alberta's Court of Queen's Bench had occasion to consider whether Alberta's Information and Privacy Commissioner (AB IPC) lost jurisdiction as a result of not completing an inquiry on a review under subsection 69 (6) of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIPPA) or a complaint under subsection 50 (5) of Alberta's *Personal Information Protection Act* (PIPA). Subsection 69 (6) of FOIPPA is below. Both laws contain similar wording.

> ***69 (6)*** *An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*
>
> > *(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and*

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

[26] In reaching the conclusion in one case that subsection 50 (5) of PIPA is mandatory and in subsequent cases that subsection 50 (5) of PIPA and 69 (6) of FOIPPA are directory, the Court considered a number of factors. As I indicated in HIP16-02I, while I am of the view that it is unnecessary to consider these factors having already found that subsection 103 (3) is directory in accordance with the test set out by the SCC, for the sake of completeness I will consider these factors here as well as the arguments made by the Custodian in respect of these decisions.[8]

[27] The Custodian stated in its submissions that the reasoning in *Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner* (KBR)[9] "is sound and most applicable, and ought to be followed by the Commissioner." It also indicated in reference to all the Alberta decisions that "[t]hose decisions are not entirely consistent" noting that subsection 50 (5) of PIPA is "significantly different from HIPMA section 103, because Alberta PIPA section 50 (5) allowed the Alberta commissioner to indefinitely extend the due date for a decision, whereas HIPMA section 103 limits the permissible extension (up to 60 days) for a maximum of 150 days."

[28] KBR was heard in 2007 by Alberta's Court of Queen's Bench. The Court considered five factors in reaching its decision that subsection 50 (5) of PIPA was mandatory. These factors are 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

[8] *Ibid.*1, at para. 83.

[9] 2007 ABQB 499 (CanLII)

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

[29] I will consider the Court's application of these factors in the context of the preliminary issue and Complaint under consideration. As part of my analysis of these factors, I will determine whether they weigh in favour of or against a finding that subsections 103 (2) and (3) are mandatory. In HIP16-02I, I stated the following about the first four factors.

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 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 [sic] *(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 [is] *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.*

[30] My findings in respect of the first four factors for the preliminary issue are the same here as they were in HIP16-02I including about the degree of prejudice that will be suffered by the Custodian. The Custodian in this case has not made any submissions about any prejudice it will suffer as a result of delay and nor do I believe it will suffer any. As I stated previously, only seven months have passed since the complaint was made and the IPC is only two months over the time period in 103 (3). Like the custodian in HIP16-02I, it only has to wait for my decision about whether it is disclosing personal health information contrary to HIPMA and nothing more. Also, as was the case in HIP16-02I, the Complainant has no other remedy to have her Complaint addressed. The consideration process is her only avenue.

[31] In terms of the fifth factor, the Complaint in this case involves the personal health information of two individuals. In reference to this factor, Commissioner Work, as he then was, pointed out that his role as Commissioner under FOIPPA "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…[10] Under section 92 of HIPMA, I am responsible to ensure that HIPMA's purposes are achieved. As such, it is in the public interest that the IPC is able to exercise her oversight role so that custodians are held accountable for

[10] Order F2006-031, Edmonton Police Service, September 22, 2008 (AB IPC), Alberta Office of the Information and Privacy Commissioner website, at para. 178.

following the rules designed to protect the personal health information of individuals who are members of the public.

[32] One item that I did not address in HIP16-02I that I will address here given the submissions made by the Custodian, is the flexibility afforded to the AB IPC in subsection 50 (5) of PIPA.

[33] As was pointed out by the Custodian, section 103 of HIPMA is different from subsection 50 (5) of PIPA. Subsection 50 (5) of PIPA allows the AB IPC one year[11] to complete an inquiry and allows her to extend the timeline for completion simply by notifying the parties and providing an "anticipated" date for completion. In my view, the Court's consideration of the flexibility afforded to the AB IPC to define her own timeline for inquiry in this subsection contributed significantly to its finding that subsection 50 (5) of PIPA is mandatory. The Court's comments about this flexibility follows.

> *The wording of s. 50(5) clearly signifies that the section was designed to give the Commissioner maximum flexibility and has a built-in saving provision in that if the inquiry cannot be completed within 90 days, the Commissioner merely has to give notice of an anticipated completion date. Not only does the Commissioner control the timing, there is no need to set a definite response time but only an anticipated response time, which provides even more flexibility.*
>
> *As noted by Lambert, J.A. of the British Columbia Court of Appeal, writing in dissent, in Doucet v. British Columbia (Adult Forensic Psychiatric Services), 2000 BCCA 195[12] at para. 13, one must examine the entirety of the legislative provision under review in determining if it is to be construed as mandatory or directory.* [Emphasis in original]
>
> *When one looks at the entirety of s. 50(5), it is clear that the Legislature wanted to ensure timely resolution of complaints while allowing the Commissioner maximum flexibility. I do not accept that the Legislature intended that giving the Commissioner a*

[11] In KBR, this provision only allowed the AB IPC 90 days to complete an inquiry. Subsequent amendments to PIPA increased the timeline to one year.

[12] *Doucet v. British Columbia (Adult Forensic Psychiatric Services)* (2000), 2000 BCCA 195 (CanLII) (Doucet) was considered by the Yukon Supreme Court in *R. v. Scurvey*, 2002 YKTC 48 in which the Court adopted the reasoning in *Doucet* to determine whether provisions of the Criminal Code were mandatory or directory.

great deal of flexibility meant that the Legislature intended that no temporal constraints would be placed on the Commissioner in completing inquiries.

In enacting this legislation, the Legislature could have deliberately set no time limit for OIPC to complete an investigation and inquiry, leaving these issues in the unfettered discretion of the Commissioner. The Legislature could have said nothing about these issues.

The Legislature could have said, notwithstanding s. 3, the rights of affected organizations would be subordinated to the rights of individuals for the purposes of responding to complaints.

The Legislature chose none of these options, rather, it chose to enact a provision which promotes the timely resolution of complaints while maintaining maximum flexibility.

This militates in favour of s. 50(5) being interpreted as mandatory and not directory.[13]

[34] The Court added that:

It is difficult to imagine a provision which could be easier to comply with, particularly bearing in mind that compliance is solely within the control of the Commissioner.[14]

[35] The maximum flexibility afforded to the AB IPC in PIPA must be contrasted with the lack of flexibility afforded to the IPC in HIPMA. The IPC has no flexibility in HIPMA to extend the time to consider a complaint other than that allowed for under section 103, which allows her to extend the time by 60 days if more time is needed to attempt settlement.

[36] The maximum time the IPC has to consider a complaint in HIPMA is 150 days. In most cases, the 150 days are used up by a combination of settlement attempts and initial/reply submissions. If subsections 103 (2) and (3) are mandatory and the IPC determines she needs additional evidence to properly consider a complaint and she is at the 150 day mark by the time she receives the parties initial and reply submissions, she would be prevented from obtaining the evidence she needs to properly consider the complaint. She would also be prevented from addressing any other issues that may arise in the course of a consideration.

[13] *Ibid*. 9, at paras. 48 to 54.

[14] *Ibid*. 9, at para 65.

Her inability to address these matters would have a significantly detrimental effect on her ability to perform her public duty under HIPMA. It is my view that, while the timelines in subsections 103 (2) and (3) were established to facilitate timely resolution of complaints, the lack of flexibility in these subsections could prevent the IPC from performing her public duty if they are found to be mandatory.

[37] The two other Court of Queen's Bench decisions that followed KBR are *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner)* (Business Watch),[15] and *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)* (EPS).[16] These decisions considered some additional factors in arriving at their respective conclusion that subsection 69 (6) of FOIPPA is directory. The Court in Business Watch also concluded that subsection 50 (5) is directory applying the same factors.

[38] The Courts considered whether a timeliness purpose would be served by finding the provision(s) mandatory and determined that it would not. The Courts 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 in this case. Others who have similar concerns to that of the Complainant can make a similar complaint or the Complainant can simply reissue her Complaint as a general complaint about the Custodian's disclosure practices. As such, no timeliness purpose would be served by finding subsections 103 (2) and (3) mandatory.

[39] 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 above and in HIP16-02I.

[40] 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

[15] 2009 ABQB 10.

[16] 2009 ABQB 268.

upon the inquiry and did not give any evidence of delay.[17] 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 concluded that the Complainant would be prejudiced by a finding that subsections 103 (2) and (3) are mandatory and that the Custodian would not.

[41] 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 a similar 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.

[42] My conclusions regarding the factors considered by the Alberta Court of Queen's Bench in KBR, Business Watch and EPS in deciding whether a statutory provision is directory or mandatory are that, on balance, they weigh in favour a finding that subsections 103 (2) and (3) are directory.

[43] The Custodian also cited *Oleynik v. (Newfoundland and Labrador) Information and Privacy Commissioner* (Oleynik)*,*[18] a case in which the Supreme Court of Newfoundland and Labrador considered whether Newfoundland and Labrador's Information and Privacy Commissioner (NL IPC) lost jurisdiction as a result of issuing his report after the timelines to complete his formal review process under Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* (NL ATIPPA) expired. This case is also not binding on me but it too is informative. Consequently, I will consider it in the context of the preliminary issue.

[44] This facts of the Oleynik case are that the applicant was seeking an order of *mandamus* or *certiorari* from the Court to enforce the responsibilities of the NL IPC under NL ATIPPA) in respect of his formal review process (Review). As a preliminary matter to evaluating whether *mandamus* was open to the applicant as a remedy, the

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

[18] 2011 NLTD 34 (CanLII).

Court considered whether the NL IPC had lost jurisdiction as a result of not issuing his report before the timelines in subsection 46 (2) of NL ATIPPA[19] which stated as follows:

> ***46.*** *(2) Where the commissioner is unable to informally resolve a request for review within 30 days of the request, the commissioner shall review the decision, act or failure to act of the head of the public body and complete a report under section 48.*

[45] In order to determine if the NL IPC lost jurisdiction to complete his Review, the Court considered if the timeline in subsection 46 (2) was mandatory or directory. In doing so they stated the following.

> *There are certain circumstances where failure to comply with a statutory time limit could raise the issue of whether or not the "late" action would still be legally valid.*
>
> *Under section 48 of the Act, the Commissioner "shall complete a review and make a report under section 49 within 90 days of receiving the request for review."*
>
> *The request for formal review was made on May 4, 2009 and the report was issued on April 28, 2010, nearly nine months beyond the statutory time limit. Counsel for the respondent acknowledged that the Commissioner was clearly late in issuing the report. The investigation, according to the affidavit filed, took approximately one month to complete; however, the Commissioner's formal review and report took many more months to complete due to staff shortages and the backlog of files being processed at the time by the office of the Commissioner.*
>
> *Consideration of whether or not the Commissioner's "late" report filed on April 28, 2010 is still legally valid depends on whether the statutory time limit is mandatory or directory.*
>
> *Our Court of Appeal canvassed the law regarding this issue in Newfoundland (Royal Newfoundland Constabulary Public Complaints Commission) v. McGrath, 2002 NLCA 74. The Court noted at paragraph 16: Notwithstanding section 11 (2) of the Interpretation Act, R.S.N.L. 1990, c. I–19 which states that "[t]he word "shall" shall be construed as imperative and the word "may" is permissive and empowering", the question of whether a particular statutory provision containing the word "shall" is mandatory or directory does not always have a ready reply. Nor is the question easily answered because it has been asked for so long and so often. There is, nevertheless, an*

[19] ATIPPA version SNL 2002, c A-1.1 which has been repealed and replaced.

> *accepted analysis at the end of which, in most cases the answer becomes obvious.* [Emphasis in original]
>
> *After reviewing a number of legal authorities, the court concluded that in determining whether a statutory provision is mandatory or directory, each case must be considered having regard to the nature of the particular requirement and the requirement's importance in the overall statutory scheme. (See Newfoundland (Royal Newfoundland Constabulary Public Complaints Commission) v. McGrath at paragraph 36).*
>
> *In this case, given the non-binding nature of the review and report, the lack of any prescribed consequences for failure to meet the deadline and the general purpose of the legislation, I am satisfied that the 90 day time limit in section 48 is directory rather than mandatory. Accordingly, I do not find there is a basis in the circumstances of this case to attach any legal consequences, such as invalidating the report, to the failure of the Commissioner to provide his report within 90 days.*[20] [Emphasis mine]

[46] The Court added that:

> *Since the Commissioner did in fact file his report, any delay was cured when the statutory duty was performed by the release of the report and the failure to comply with the time limits does not, in these circumstances, carry any legal consequences.*[21]

[47] The Oleynik case lends further support that subsections 103 (2) and (3) are directory rather than mandatory. The purpose of HIPMA, as provided above, together with the IPC's authority to recommend remedies for non-compliance that a custodian can simply decide not to follow and the lack of prescribed consequences in HIPMA for the IPC failing to complete a consideration within the timelines in subsections 103 (2) and (3) favour a finding that these subsections are directory.

[48] I disagree with the Custodian that the finding in Oleynik was that the "report delivered by the commissioner after the expiration of the 90-day period cured the commissioner's failure to comply with the time limit." The finding of the Court was that subsection 46 (2) is directory and, therefore, there were no consequences, such as finding the report invalid, for the NL IPC's failure to meet the timelines. What was cured by the delivery of the report was

[20] *Ibid.*18, at paras. 54 to 59.

[21] *Ibid.* 18, at para. 61.

the "delay." If the report had not been delivered to the applicant and the public body by the time the application for *mandamus* was made, the delay in doing so would have been grounds for the applicant to apply for *mandamus*.

IV FINDING

[49] On the preliminary issue I find that subsections 103 (2) and (3) are directory and, therefore, the IPC has not lost jurisdiction to consider the Complaint as a result of not completing the consideration of it in accordance with the timelines set out in those subsections.

[50] As a result of my finding, I will continue the consideration of the Complainant's Complaint and will inform the parties about next steps.

_____

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