Yukon
Information
and Privacy
Commissioner

**CONSIDERATION REPORT**

**File HIP18-24I**

**Pursuant to subsection 103 (1) of the**

***Health Information Privacy and Management Act***

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

**Information and Privacy Commissioner**

**Department of Health and Social Services (Custodian)**

**June 14, 2019**

## Summary

An applicant (Complainant) requested the Information and Privacy Commissioner (IPC), by way of complaint, to review a 'deemed refusal' by the Custodian to provide records responsive to their request by the statutory deadline, as per section 26 of the *Health Information Privacy and Management Act*.

After due consideration, the IPC found that the Complainant met their obligation to submit an access request in compliance with section 25. The IPC also found that the Custodian did not meet its obligation to provide any supporting evidence as a basis for relying on paragraph 26 (2)(a) to extend the initial timeline of 30 days by an additional 60-day period. As such, the extension was invalid and the Custodian was deemed to have refused to provide the Complainant with the requested records at the expiry of the 30-day timeline.

However, the Custodian did provide the Complainant with a substantial number of pages of records after the deadline expired. In view of this, the IPC recommended that it provide the remaining records by a specific deadline.

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## Statutes Cited

*Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, as amended (FIPPA).

*Health Information Privacy and Management Act*, SY 2016, c.16 (HIPMA).

*Interpretation Act*, RSY 2002, c.125.

## Cases and Decisions Cited

### Yukon

Decision ATP18-02, May 3, 2019 (YT IPC).

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

Department of Health and Social Services, HIP19-19I, June 13, 2019 (YT IPC).

### British Columbia

British Columbia (Ministry of Labour and Citizens' Services) (Re), 2006 CanLII 42644 (BC IPC).

Office of the Auditor General of British Columbia, Order F18-37, 2018 BCIPC 40 (CanLII).

### Northwest Territories

Northwest Territories (Health and Social Services) (Re), 2018 NTIPC 19 (CanLII).

### Ontario

Ontario (Transportation) (Re), 2014 CanLII 45078 (ON IPC).

### Court

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

*Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC).

## Complaint

[1] The Complainant submitted a complaint to the Office of the IPC alleging that the Department of Health and Social Services did not provide any records responsive to their access request in respect of their personal health information within the legislated timelines.

## Jurisdiction

[2] Subsection 103 (1) authorises me to consider a complaint made by a Complainant, in this case a complaint of failing to meet the requirements of section 26 in regards to the Complainant's Access Request, and for which no settlement between the parties was possible.

[3] In considering a complaint, section 104 authorises me, amongst other things, to decide all questions of fact and law arising in the matter.

[4] The Custodian is defined in subsection 2 (1) as the 'Department' which is, in turn, defined as the 'Department of Health and Social Services'.

[5] Subsection 7 (1) states "[e]xcept as provided in subsection (2), this Act applies to (a) the collection, use and disclosure of personal health information by (i) …the Department."

[6] Subsection 24 (1) states "[s]ubject to this Part, an individual has the right to obtain access to their personal health information contained in a record in the custody or control of a custodian."

[7] The Custodian acknowledges that it is a 'custodian' as defined in HIPMA and that the information collected by it qualifies as personal health information as defined in HIPMA. I agree that the Custodian is a 'custodian' and that the information collected by it is the Complainant's personal health information and I find the same.

## Explanatory Note

[8] All statutory provisions referred to below are to HIPMA, unless otherwise specified.

## I. BACKGROUND

[9] On August 16, 2018, the Complainant submitted an access request (Access Request) for the following records.

> *All records in continuing care, home care,* [care home]. *All email communication, meeting notes, chart records, etc. from homecare, home case management directors, managers, supervisors. All communication from ADMs of continuing care regarding my issue. From 2013 to present. July 22, 2018.*

[10] Later that day, the Custodian sent a registered letter to the Complainant confirming receipt of the Access Request, and stating that the Custodian had 30 days to respond; specifically, September 14, 2018. It also stated that the Custodian would contact the Complainant as soon as the requested records became available.

[11] On September 14, 2018, the Custodian sent a registered letter to the Complainant advising that, pursuant to paragraph 26 (2)(a), it was extending the response time a further 60 days to November 13, 2018. It also stated that the Custodian would contact the Complainant as soon as it had formulated its response to the Access Request. It further advised the Complainant that they could make a complaint about the extension to the [IPC], as per subsection 99 (1), and to refer it to the [IPC] in writing within 60 days. It then provided the IPC contact information.

[12] On September 20, 2018, the Complainant emailed the Custodian to inquire whether the Custodian could provide any records that had been gathered to date and, further, extend the timelines if the records were not available by November 13, 2018.

[13] On September 21, 2018, the Custodian replied that it was working hard to provide the Complainant with information as soon as it could and that it would contact the Complainant as soon as it became available. It did not specifically answer the Complainant's query about a possible extension after November 13, 2018.

[14] On September 24, 2018, the Complainant emailed the Custodian to request any records that had been gathered to date and whether the Custodian could extend the timelines beyond November 13, 2018.

[15] On September 25, 2018, the Custodian replied that it would contact the Complainant as soon as a partial package of information became ready and that an additional extension of time

was dependent on the size and complexity of the records. It further stated that it would work hard to provide as much of the information as possible by November 13, 2018.

[16] On October 20, 2018, the Complainant emailed the Custodian requesting an update on whether a partial package of records had been gathered. The Custodian did not reply.

[17] On November 4, 2018, the Complainant emailed the Custodian to inquire again about a possible partial package of records and whether the Custodian could extend the timelines beyond November 13, 2018.

[18] On November 5, 2018, the Custodian replied that it was still working on the Access Request and that it would contact the Complainant as soon as information becomes available. It further stated that a 'primary contact' would be out of the office that week [November 5-9] and advised the Complainant to contact the 'secondary contact' should they have any additional questions. It then provided the necessary contact information.

[19] On November 9, 2018, the Complainant tried unsuccessfully to contact the 'secondary contact'.

[20] On November 13, 2018, the Complainant tried unsuccessfully to contact the 'secondary contact'.

[21] On November 15, 2018, the 'secondary contact' emailed the Complainant to advise that the Custodian was continuing to review and prepare the records. The 'secondary contact' also advised that the volume of records was quite large and asked if the Complainant wanted them on a USB stick or hard copy. The 'secondary contact' did not respond to the Complainant's timeline extension query or the fact that the November 13, 2018, deadline had expired.

[22] On November 19, 2018, the following events occurred.

- The Complainant emailed the 'secondary contact', included both a summary timeline of events to date and the same extension query as before, and asked if the records would be available for pick-up that same day.

- The Custodian did not reply so the Complainant's authorised representative attended the Custodian's office and met with both the 'primary contact' and the 'secondary contact'.

- The Custodian admitted that it had received the Complainant's email but did not expect the Complainant to pick up the records that day. Further, there were no records available for pick-up at that point.

- The Complainant's authorised representative stated that the 90-day timeline had expired and that the Custodian had not advised of any additional extension.

- The Custodian's 'primary contact' admitted that they had been out of the office and that the Custodian had not notified the Complainant that the records, partial or otherwise, were still unavailable. They also stated that the current situation could be considered a 'refusal to give records' and that the Complainant could file a complaint to that effect. They further stated that the Custodian had been very busy, that it had a lot of record requests and that it had to spend time fairly on the other requests.

- Discussion occurred as to the best format to use for providing the records when available.

- The Complainant's authorised representative asked if they could provide a letter stating that the records were not available. They advised that they could provide the representative with a letter stating that they would review the situation with the Custodian's 'Chief Information Officer' and have an email reply for the Complainant later that day.

- After the meeting, the Custodian emailed the Complainant to advise that it had prepared a package of 650 pages of records and it was available for pick-up the following day (Interim Response #1). The email also stated that additional information was expected to be available for pick-up on or before December 3, 2018 and that the Custodian would notify the Complainant accordingly.

- A letter, also dated November 19, 2018, from the Custodian to the Complainant stated that it was providing the Complainant with [Interim Response #1]. Amongst other things, it advised that it would provide additional information as soon as the Custodian had formulated its response to the Access Request. It also reiterated that the Complainant could make a complaint to the [IPC] within 60 days.

[23] On November 20, 2018, the Complainant's authorised representative picked up Interim Response #1 in the form of a USB stick and printed copies. The Complainant subsequently experienced technical problems in respect of accessing the electronic format. The Custodian

advised, with apologies, that the records file was not put on the USB stick as initially thought and to access the file through its password-encrypted 'Secure File Transfer Service' (SFTS).

[24] On November 21, 2018, the Complainant tried unsuccessfully to access the SFTS.

[25] On November 22, 2018, the Office of the Information and Privacy Commissioner (OIPC) received a complaint from the Complainant under HIPMA in respect of a request for access to their personal health information. The complaint consisted of a nine-page chronological timeline, inclusive of questions to the OIPC concerning the Custodian's obligations under HIPMA about providing requested records by the Custodian's stated 'due date'.

[26] There is no one definitive statement that sets out the concise complaint but I have included a number of statements that provide the necessary information. They are as follows.[1]

> ***August 18, 2018*** – *I made a HIPMA records request with HSS for my Continuing Care records. The due date for the records was September 13* [sic].[2]
>
> ***September 14, 2018*** – *I received a letter informing me that Health and Social Services extended the time for responding to my request for records by 60 days to November 13 2018. This letter informing me of the extension was in accordance with the HIPMA act* [sic] *to my knowledge.*
>
> ***November 21st*** – *…The HIPMA act* [sic] *states that failure to provide records by the due date … is deemed a refusal to provide access to the records of personal health information. … No records were available by the due date of November 13th, 2018.*

[27] I reviewed the complaint and referred it to my office's 'Informal Case Resolution' process to attempt an informal resolution. I then notified the Custodian of the Complaint.

[28] On November 27, 2018, the Custodian's 'secondary contact' emailed the Complainant to inquire why they had not accessed the SFTS and downloaded the [Interim Response #1] file. He asked the Complainant to contact him if they were experiencing difficulties and that the file could be put on another USB stick if required.

[29] On November 29, 2018, the Complainant contacted the OIPC Intake Officer and provided the officer with the requested documentation in respect of the Complaint.

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[1] From the Complainant's attachment to their OIPC complaint form at 1 and 6. Emphasis in the original.
[2] According to the evidence, the initial 30-day timeline set out in subsection 26 (1) was September 14, 2018.

[30] On December 10, 2018, the Custodian provided the Complainant with a letter stating that 400 pages of records making up a portion of those associated with the Access Request were now available (Interim Response #2). Amongst other things, it advised that it would provide additional information as soon as the Custodian had formulated its response to the Access Request. It also reiterated the right of the Complainant to make a complaint to the [IPC], as per subsection 99 (1), and to refer it to the [IPC] in writing within 60 days.

[31] On December 18, 2018, the Custodian emailed the Complainant with instructions on where to pick up Interim Response #2.

[32] On December 20, 2018, the Complainant's authorised representative picked up Interim Response #2. It included a new USB stick. Later that day, the Custodian's Access & Privacy Coordinator emailed the Complainant with instructions on how to access the file on the USB stick.

[33] On January 16, 2019, the OIPC advised the Complainant that it was seeking additional information from the Custodian on how fulfilling the Access Request was 'interfering' with its operations. The OIPC also advised that it expected a response from the Custodian the following week. No response was forthcoming.

[34] On February 11, 2019, the 'Informal Case Resolution' investigator advised the IPC that settlement could not be achieved. The parties were informed and the Registrar issued a Notice of Consideration dated February 11, 2019, indicating that the consideration would occur on March 22, 2019 (Consideration).

[35] On February 27, 2019, the Custodian emailed the Complainant to advise that another package of information was available for pick-up in hard copy format (Interim Response #3). It also attached an electronic version via the password-encrypted SFTS. Later that day, the Complainant's authorised representative picked up Interim Response #3.

[36] On February 28, 2019, the Custodian provided the Complainant with a letter stating that 351 pages of records making up a portion of those associated with the Access Request [Interim Response #3] were now available.[3] Amongst other things, it advised that it would provide additional information as soon as the Custodian had formulated its response to the Access

[3] This letter followed the provision of Interim Response #3 to the Complainant's authorised representative the previous day.

Request. It also reiterated the right of the Complainant to make a complaint to the [IPC], as per section 99, and to refer it to the [IPC] in writing within 60 days.

[37] On March 8, 2019, the Custodian provided the IPC and the Complainant with its submission (Custodian's Submission). It stated within the submission that, amongst other things, it had identified a further 1,354 pages as possibly being responsive to the Access Request. It did not indicate when these pages would become available to the Complainant.

[38] On March 26, 2019, the Custodian emailed the Complainant to advise that another package of information was available for pick-up in hard copy format (Interim Response #4). It also attached an electronic version via the password-encrypted SFTS. The package contained 135 pages of records, leaving a further 1,219 pages of records identified by the Custodian as outstanding.

[39] On March 29, 2019, the date of the Complainant's response to the IPC as noted below, the Complainant did not indicate how many pages of records they had received in Interim Response #4 mentioned above.

## II. CONSIDERATION PROCESS

[40] After receiving the Custodian's Submission on March 8, 2019[,][4] [t]he Complainant provided the IPC with their written reply submission on March 29, 2019 (Complainant's Reply).[5]

[41] After evaluating the submissions received, the IPC requested both parties to provide additional information as to how many pages of records comprised the last disclosure by the Custodian to the Complainant immediately prior to receiving the submissions.

## III. ISSUE

[42] There is only one issue in this Consideration. It is as follows.

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[4] More fully, 'Initial Submission from the Respondent Custodian, Department of Health and Social Services, HIP18-24I (HIPMA Request H-189)'.
[5] More fully titled as 'Complainant's Response March 29, 2019'.

***Did the Custodian meet its obligations under section 26 in responding to the Access Request?***

## IV. BURDEN OF PROOF

[43] Section 106 establishes the burden of proof for a consideration. Paragraph 106 (1)(b) states as follows.

> *106 (1) In the consideration of a complaint under this Act*
>
> *(a) where the complaint relates to the complainant's access to or correction of their personal health information, it is up to the complainant to prove that they have complied with the relevant requirements under this Act; and*
>
> *(b) it is up to the respondent to prove they have acted in accordance with this Act and, if the review relates to their exercise of any discretion under this Act, that they exercised the discretion in good faith.*

## V. RECORDS AT ISSUE

[44] In response to the Access Request, the Custodian identified a total of 2,620 pages of records at issue and assigned a file number, 'H-189', to them.[6] As of March 22, 2019, the Consideration commencement date, the Custodian had disclosed to the Complainant 1,266 pages, leaving 1,354 pages outstanding.

[45] On March 26, 2019, the Custodian provided the Complainant with a further 135 pages of records, leaving a total of 1,219 pages outstanding.

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[6] As stated previously, the records at issue are described in the Access Request as "All records in continuing care, home care, [care centre]. All email communication, meeting notes, chart records, etc. from homecare, home case management directors, managers, supervisors. All communication from ADMs of continuing care regarding my issue. From 2013 to present. July 22, 2018."

## VI. SUBMISSIONS

**Custodian's Submission**

[46] The Custodian's Submission is as follows.

1) In response to the stated issue, 'did the Custodian meet its obligations under section 26 in responding to the Access Request', the Custodian "conceded that it did not meet the statutory timeline for a response."[7]

2) It set out nine fact statements, six of which reflected the facts as stated above on August 16, 2018, September 14, 2018, November 19, 2018 (insofar as the Custodian provided a letter to the Complainant about the availability of Interim Response #2), November 20, 2018 (insofar as the Complainant's authorised representative picked up Interim Response #2), December 10, 2018, February 27, 2019, and February 28, 2019.[8]

3) It additionally stated the following.

> *4.7 In total the Complainant has received 1401 pages of records.*
>
> *4.8 The Complainant has had a long relationship with the respondent Custodian. The number of different service interactions provided by the Respondent Custodian to the Complainant, volume of records from multiple sources and inclusion of third party comments and assessments has complicated the collection and analysis of information potentially responsive to* [the] *Complainant's request.*
>
> *4.9 A further 1354 pages of records have been identified as possibly responsive to* [the] *Complainant's request. The respondent Custodian continues to review these records and disclose the responsive records to the Complainant.*[9]

4) It attached as exhibits, by way of an Affidavit, its letters to the Complainant of August 16, 2018, September 14, 2018, November 19, 2018, December 10, 2018, and February 28, 2019.

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[7] Custodian's Submission at 2.
[8] *Ibid.* at 2. See heading '4. Facts & Evidence'; specifically, 4.1 to 4.6, as identified therein.
[9] *Ibid.* at 2-3.

**Complainant's Reply**

[47] The Complainant's Reply to the Custodian's Submissions is as follows.

1) It referred to section 106 ('Burden of proof') and stated that, pursuant to paragraph 106 (1)(a), where a complaint relates to an access request for personal health information, the Complainant has the burden of proof in respect of complying with the relevant requirements under HIPMA. It asserted that the Complainant had met this burden, as per below.

2) It referred to section 25 ('Application for access') and asserted that the Complainant had fulfilled the relevant application requirements under subsection 25 (2).

   *(a) it is made in writing, unless the custodian agrees otherwise;*

   It stated that the Complainant submitted their written Complaint to the Custodian on August 16, 2018.

   *(b) it contains sufficient detail to enable the custodian to identify the personal health information requested;…*

   It stated that the Complainant requested "[a]ll records in continuing care, home care, [care centre]. All email communication, meeting notes, chart records, etc. from homecare, home case management directors, managers, supervisors. All communication from ADMs of continuing care regarding my issue. From 2013 to present. July 22, 2018."[10] It further stated that if the detail was insufficient, then presumably the Custodian would have requested more information.

3) It referred to subsection 25 (3).

   *(3) If a custodian receives an application under this section that is incomplete, the custodian must offer to assist the applicant in completing the application.*

   It stated that the Custodian did not offer any of the above assistance so the Complainant assumed that their application was complete.

4) It referred to section 99 ('Making a complaint').

[10] Complainant's Reply at 2.

*99 (1) Any 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.*

*(2) A complaint made under subsection (1) must be made*

*(a) within 60 days after the alleged non-compliance that is the subject of the complaint;…*

It stated that the Complainant believed that the Custodian failed to comply with the Access Request and that the Complainant filed their Complaint within the above 60-day timeline.

5) It referred to section 26 ('Custodian's response to access request').

*26 (1) Except where the time for response has been extended under subsection (2), a custodian must respond to a complete application under section 25 within 30 days after receiving it.*

It stated that the Custodian concedes that it did not meet the statutory timeline for a response.

*(2) A custodian may extend the 30 day period referred to in subsection (1) by an additional 60 days, if*

*(a) completing the required work within the initial 30 day period would unreasonably interfere with the operations of the custodian; or*

*(b) the custodian reasonably believes that consultations are advisable before determining whether or how to comply with the request.*

It stated that the Custodian did not specify whether it was relying on paragraph 26 (2)(a) or (b).

*(3) A custodian who, under subsection (2), extends the 30 day period referred to in subsection (1) in respect of an application under section 25 must before the end of that 30 day period tell the applicant*

*(a) of the extension and the reasons for it;*

*(b) when the applicant can expect the custodian's response; and*

*(c) that the applicant may make a complaint to the commissioner under section 99 in respect of the extension.*

It stated that it did not contest the Custodian's application of subsection 26 (3). However, it noted that the Complainant assumed that "further extensions would need to follow these regulations *[sic]*, but now understand that section 26 (3) does not apply after 90 days as it is not specified in HIPMA."[11]

*(4) A custodian must respond to a complete application under section 25 by*

*(a) making the requested personal health information available*

> *(i) for examination, if doing so would not unreasonably interfere with the operations of the custodian, or*
>
> *(ii) by providing a copy to the applicant;*

It states that the requested information was not provided.

*(b) if a record containing the requested personal health information does not exist or cannot be found, so informing the applicant;*

*(c) refusing the request for access, in whole or in part, and informing the applicant of the refusal, the reasons for the refusal and the applicant's right to make a complaint to the commissioner regarding the refusal; or…*

It stated the following.

- The Complainant was somewhat unclear if the Custodian had to advise the Complainant, on expiry of the [full 90-day timeline] as of November 13 [2018] or subsequent due dates after the 90 days, that it was refusing to provide the records [at issue].
- "In some of the communication the Custodian informed the Complainant that [they] could make a complaint to the commissioner, but it was never made clear that the Custodian was refusing records and the reasons for refusal."[12]
- When the Complainant's authorised representative went to pick up [Interim Response #1] on November 19 [2018], they noted that the deadline had

[11] *Ibid.* at 4.
[12] *Ibid.* at 4.

passed, the Custodian had refused [to provide the records] and had not provided the Complainant with [any such notice of refusal].

- The Custodian conceded that this could be considered as 'refusing records' but this was not the case; it was just very busy.
- The Complainant asserted that it is irrelevant as to why records are not provided in deciding if they have been 'refused'. The Custodian had to clearly inform the Complainant of a refusal and the reasons why. While the Custodian was clear that it did not meet the deadline, it was [unclear if it] understood that this was [a 'deemed refusal'].

*(5) If a custodian does not respond to a request for access within the 30 day period referred to in subsection (1) (or, where it applies, the additional 60 day period referred to in subsection (2)), the custodian is deemed to have refused to provide access to the record of personal health information.*

It stated that the Custodian conceded that it did not meet the statutory timeline for a response. It further states that "if records are not provided by deadline [sic] it is a 'deemed refusal'."[13]

6) It asserted that while the dates provided by the Custodian in its Custodian's Submission are accurate, the Custodian did not include a significant amount of communication with the Complainant, such as emails, phone calls, person visits, etc. In the Complainant's view, this is relevant because the Custodian, as paraphrased by the Complainant, stated that its reasons for not meeting its [section 26 obligation] was that "the request is a [sic] complex, challenge to gather/prepare and large volume."[14] In the Complainant's view, many of the missing communications were confusing, unexplained by the given reasons, or both. The Complainant then attached to the Complainant's Reply the 'missing' communications.'[15]

7) It raised four questions.

   *i.* *If the Custodian was of the view that the access request was proving complex, challenging to gather/prepare and voluminous in scope, to the point that it*

[13] *Ibid.* at 5.
[14] *Ibid.* at 5.
[15] These are in the form of emails and are included in the fact pattern above.

*was not feasible to comply in a timely manner, then why did the Custodian repeatedly provide dates for producing the records and not meet them?*

ii. *If the Custodian was of the view that the access request was proving complex, challenging to gather/prepare and voluminous in scope, to the point that it was not feasible to comply in a timely manner, then why did the Custodian not disclose this in the 'Informal Case Resolution' process?*

iii. *Why did the Custodian continue to provide compliance dates in the 'Informal Case Resolution' process and then fail to meet them? Did it do so deliberately, knowing it could not meet them?*

iv. *If the Custodian understood its obligations under section 26, then why did it not clarify, in response to the Complainant's repeated queries, that section 26 did not enable it to extend the timeline beyond an additional 60 days?* [16]

## VII. DISCUSSION OF THE ISSUE

**Complainant's Burden of Proof**

[48] The Complainant has the burden of proving that they complied with the relevant requirements in respect of making their Access Request; in particular, section 25.

Section 25

[49] Section 25 sets out the factors that govern the making of an access request in the context of both applicant and custodian. It states the following.

*25 (1) An individual who seeks access to their personal health information contained in a record in the custody or control of a custodian may apply to the custodian in accordance with this section.*

*(2) An application under this section is only complete if*

*(a) it is made in writing, unless the custodian agrees otherwise;*

[16] Paraphrased for clarity.

*(b) it contains sufficient detail to enable the custodian to identify the personal health information requested;…*

*(3) If a custodian receives an application under this section that is incomplete, the custodian must offer to assist the applicant in writing in completing the application.*

Subsection 25 (1)

[50] Subsection 25 (1) establishes a process that an applicant can follow in seeking access to their personal health information in the custody or control of a custodian. The Complainant availed themselves of this process by means of subsection 25 (2).

Paragraph 25 (2)(a)

[51] The evidence shows that, on August 16, 2018, the Complainant submitted to the Custodian a one-page departmental form entitled 'Request for Access to Personal Information/Personal Health Information Records'.[17] The Complainant filled it out by hand and there is no evidence that the Custodian agreed otherwise. The information included their name and other identifying information, the request particulars and access format, their witnessed signature and the date thereof. I find that this met the requirement in paragraph 25 (2)(a).

Subsection 25 (2)(b)

[52] The Complainant described the requested information as "[a]ll records in continuing care, home care, [care centre]. All email communication, meeting notes, chart records, etc. from homecare, home case management directors, managers, supervisors. All communication from ADMs of continuing care regarding my issue. From 2013 to present. July 22, 2018."[18] There is no evidence that the Custodian took issue with the description provided by the Complainant. If the detail was insufficient, then presumably the Custodian would have requested more information. It did not make such a request. I find the description provided by the Complainant met the requirement in paragraph 25 (2)(b).

Subsection 25 (3)

[53] There is no evidence that the Access Request was incomplete in any way. Had it been the case, then it was incumbent on the Custodian, in writing, to offer the Complainant

[17] The Custodian's form contains, in the bottom left-hand corner, an identifying generic reference number: YG(6364)07/2016.
[18] *Ibid.*

assistance in completing the Access Request. It made no offer. I infer, therefore, that the Complainant's application was complete, as per subsection 25 (3), and I find the same.

[54] As stated earlier, the Complainant must prove that they complied with the relevant requirements in respect of making their Access Request. In this case, that means proving, on a balance of probability, that they complied with section 25. I find that the Complainant met their burden of proof.

[55] I will now turn to whether the Custodian met its burden of proof.

**Custodian's Burden of Proof**

[56] The Custodian has the burden of proving that it met its obligation to comply with section 26 in respect of the Access Request.

Section 26

[57] Section 26 sets out a process that a custodian must comply with to respond to a personal health information access request by an applicant. It states the following.

> *26 (1) Except where the time frame for the response has been extended under subsection (2), a custodian must respond to a complete application under section 25 within 30 days after receiving it.*
>
> *(2) A custodian may extend the 30 day period referred to in subsection (1) by an additional 60 days, if*
>
> *(a) completing the required work within the initial 30 day period would unreasonably interfere with the operations of the custodian; or*
>
> *(b) the custodian reasonably believes that consultations are advisable before determining whether or how to comply with the request.*
>
> *(3) A custodian who, under subsection (2), extends the 30 day period referred to in subsection (1) in respect of an application under section 25 must before the end of that 30 day period tell the applicant*
>
> *(a) of the extension and the reasons for it;*
>
> *(b) when the applicant can expect the custodian's response; and*

*(c) that the applicant may make a complaint to the commissioner under section 99 in respect of the extension.*

*(4) A custodian must respond to a complete application under section 25 by*

*(a) making the requested personal health information available*

*(i) for examination, if doing so would not unreasonably interfere with the operations of the custodian, or*

*(ii) by providing a copy to the applicant;*

*(b) if a record containing the requested personal health information does not exist or cannot be found, so informing the applicant;*

*(c) refusing the request for access, in whole or in part, and informing the applicant of the refusal, the reasons for the refusal and the applicant's right to make a complaint to the commissioner regarding the refusal; or*

*(d) notifying the applicant of the identity of any other custodian who the custodian reasonably believes has the custody or control of the requested personal health information.*

*(5) If a custodian does not respond to a request for access within the 30 day period referred to in subsection (1) (or, where it applies, the additional 60 day period referred to in subsection (2)), the custodian is deemed to have refused to provide access to the record of personal health information.*

<u>Subsection 26 (1)</u>

[58] In subsection 26 (1), use of the word 'must' rather than the word 'may' indicates that the requirement to respond to a complete application for access, as per section 25, within 30 days after receiving it is mandatory; there is no discretion for a custodian to do otherwise.

[59] In the case at hand, the Custodian sent the Complainant a letter on August 16, 2018, stating that it had received the Access Request, assigned it a file number, had 30 days until September 14, 2018, to respond and would contact the Complainant when the records became available. I infer from this latter part that the Custodian intended to 'respond' by way of providing the Complainant with a copy of the records at issue by the deadline.

[60] During this period, the Custodian did not provide any records. What did occur was that the Custodian sent the Complainant another letter on September 14, 2018, the stated deadline to comply with the Access Request, advising that it was extending the period by a further 60 days. It quoted paragraph 26 (2)(a) verbatim and added that the Complainant would be contacted as soon as the Custodian had formulated its response to the Access Request.

[61] I must now consider if the Custodian properly extended the initial timeline, as per subsection 26 (2).

Subsection 26 (2)

[62] In subsection 26 (2), use of the word 'may' rather than the word 'must' indicates that a custodian has a choice to extend the initial 30-day period in subsection 26 (1) by a further 60 days if it is of the view that it cannot complete the required work within the initial timeline for one of the two following reasons.

a) It determines that the work required to provide the applicant with all the records responsive to an access request within 30 days of receiving it would unreasonably interfere with its operations.

b) Alternatively, it reasonably believes that it is prudent to consult with affected parties before deciding if it should comply with the access request and, if so, how to comply.

A custodian can chose one or the other as grounds for a timeline extension. It is not necessary to choose both.

[63] The Custodian indicated in its submission that it was relying on the first reason, as per paragraph 26 (2)(a). In order to meet the burden of establishing that it had authority to extend the initial timeline to respond by an additional 60 days under this paragraph, the Custodian has to establish that completing the work required to process the Access Request within the initial 30 day timeline would unreasonably interfere with its operations.

***Would completing the Access Request within 30 days 'unreasonably interfere' with the operations of the Custodian?***

Paragraph 26 (2)(a)

[64] What constitutes 'unreasonable interference' is not defined in HIPMA. As such, I will undertake a purposive analysis of paragraph 26 (2)(a) to determine how it is to be interpreted.

[65] 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.[19]

[66] In the *Interpretation Act*, it states "[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."[20]

[67] The relevant purposes of HIPMA are set out in paragraphs 1 (b), (c), (e) and (f).

> *(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;…*
>
> *(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.*

[68] In my decision issued about my jurisdiction to consider a Complaint, I stated the following about the context in which the provisions in HIPMA must be interpreted.

> *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." 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, used and disclosed by custodians for these*

[19] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21.
[20] RSY 2002, c 125, section 10.

> *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…*[21]

[69] HIPMA is a complete governance scheme for the collection, use, disclosure and management of personal health information by custodians.[22] To this, I would add that the privacy rights afforded to individuals under HIPMA include the right to access one's own personal health information that is in the custody or control of a custodian. HIPMA establishes this right of access and requires the custodian to meet specific obligations in terms of providing a response, including that it must do so in accordance with the timelines set out therein.

[70] The phrase 'unreasonable interference with the operations of the custodian' sets a threshold. Once met, the custodian then has the discretion to extend the initial timeline of 30 days in subsection 26 (1) by a further 60 days, during which period it must finalise the processing of the access request.

[71] Black's Law Dictionary defines 'operation' as, amongst other things, "the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity."[23] A custodian under HIPMA is responsible for collecting, using and disclosing personal health information on behalf of individuals. It has to balance the resources available not just for processing access requests but for all its obligations under HIPMA, as well as other statutes to which it must adhere in delivering health care service to individuals.

[72] In the course of this balancing act, there is a point at which the processing of an access request unreasonably interferes with the custodian's operations. This point will vary from custodian to custodian, depending on the nature and scope of their particular operations but I am of the view that it will, in each case, become a factual determination based on supporting evidence.

[73] To this end, I will refer to some decisions that have examined the term 'unreasonable interference' in the context of information access and privacy legislation, noting that I am

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[21] Department of Health and Social Services, HIP16-02I, October 6, 2017 (YT IPC) at paras. 52 and 53.
[22] *Ibid.* at para. 75.
[23] *Black's Law Dictionary*, 6th ed., *s.v.* "operation".

satisfied that the reasoning is sufficiently analogous to the term in paragraph 26 (2)(a) as to be persuasive.

[74] In my decision issued about a public body that sought from the Information and Privacy Commissioner (IPC), under paragraph 43 (1)(a) of the *Access to Information and Protection of Privacy Act*, to disregard seven access to information requests submitted by an applicant, I looked at two decisions from British Columbia.[24]

[75] In the first one, the British Columbia Supreme Court stated the following about the meaning of the term 'unreasonable interference in the operation of a public body' under its FIPPA.

> *The determination of what constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers.*[25]

[76] In the second one, the British Columbia Information and Privacy Commissioner (BC IPC) looked at what amounted to three contributing factors in deciding that an 'unreasonable interference with the operations of a public body' had been made out. They are as follows.[26]

1) The size of the access and privacy branch in the public body, noting that the size (i.e. number of employees) must be sufficient to meet the operational demands of processing access to information requests generally.

2) The number of requests by the applicant as compared to the total number received in a specific time period, noting that that the requirement to process a large number of records, although a factor, is not enough to cross the threshold of what is an unreasonable interference with a public body's operations.

3) The degree of complexity associated with the request and the time spent related thereto.

[77] To the above two decisions, I would add the following.

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[24] Department of [redacted], ATP18-02, May 3, 2019 (YT IPC).
[25] *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC), at para. 37.
[26] British Columbia (Ministry of Labour and Citizens' Services) (Re) [MLCS], 2006 CanLII 42644 (BC IPC), at paras. 37-41. I have distilled these factors from the BC IPC's analysis.

[78] In an appeal upholding an Ontario Ministry's decision to refuse access to records for operational interference reasons, an adjudicator referred to a previous decisions by [then] Assistant Commissioner Brian Beamish. In *Order PO-2752*, he looked at a number of orders and their findings in respect of the term and noted the following.

> *In order to establish "interference," an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities." These orders have also noted that, where an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on "limited resources" as a basis for claiming interference. Although government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed, an institution must provide sufficient evidence beyond stating that extracting information would take "time and effort" in order to support a finding that the process of producing a record would unreasonably interfere with its operations.*[27]

[79] In agreeing with this approach, the adjudicator found that the Ministry had provided sufficient evidence in support of the reasons it gave for refusing to produce the record.[28]

[80] In an October 1, 2018, decision by the Northwest Territories Information and Privacy Commissioner in *Review Report 18-191*, a public body extended the timeline for providing records, noting that the access request might result in a high number of documents that had to be reviewed and that it could not process the volume of records involved within the initial 30-day period.[29]

[81] The public body submitted that a key person, who could have searched more effectively and quickly than others, was absent. This meant that a less experienced employee would have to seek technical assistance in understanding how the file system worked and then review far more records than the absent person to satisfy themselves that the responsive records had been sufficiently identified. In addition, other access requests were pending. The IPC found that while it may have been operationally impossible for the particular employee to respond to the request within the initial timeline, that situation did not apply to the public body as a whole.

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[27] Ontario (Transportation) (Re), 2014 CanLII 45078 (ON IPC) at para. 23.
[28] *Ibid.* at para. 28.
[29] Northwest Territories (Health and Social Services) (Re), 2018 NTIPC 19 (CanLII).

[82] In view of these decisions, I note that the first purpose in the *Access to Information and Protection of Privacy Act* (ATIPP Act) is to make public bodies more accountable to the public and to protect personal privacy by *giving the public a right of access to records* [my emphasis].[30] Subsection 5 (1) gives effect to that purpose by stating that a person who makes an access request has the right of access, with limited exceptions, to any record in the custody or control of a public body, including access to their own personal information. The timelines for responding to an access request in the ATIPP Act are included because the right of access encompasses the right to receive the information requested in a timely manner; specifically, within the timelines specified. Failure to meet these timelines undermines one of the ATIPP Act's key purposes in respect of establishing the right of access to information.

[83] If a public body asserts that completing the work required to respond to an access request within the initial 30-day period would unreasonably interfere with its operations, then it must make a determination to that effect. Such a determination first requires engaging in a process that brings forward evidence sufficient in breadth and depth to support its assertion. I am of the view that the following four questions adapted from the BC IPC's MLCS decision above frames that process.

1) Is the human resource capacity of the public body sufficient to meet the operational demands of processing access requests generally?
2) How do the number of access requests by the applicant compare with the total number of access requests that the public body must process in the same time frame?
3) What is the degree of complexity presented by the applicant's access request(s) in comparison to all the other access requests being processed by the public body in the same time frame?[31]
4) Is the time spent in processing the applicant's access request(s) significantly disproportionate in comparison to all the other access requests being processed by the public body in the same time frame?[32]

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[30] RSY 2002, c.1, subparagraph 1 (1)(a).
[31] For example, must multiple sources be canvassed, a significant volume of information be examined due to a long service relationship, third party input be identified and assessed, and so forth?
[32] For example, does the access request require the public body to extract the requested information from electronic records and, if so, does it require a complex system log search, execution by senior analyst and the creation of specific data-analysis programs to produce a readable format? Are those specialists required to

[84] In answering these four questions, it is the totality of the circumstances specific to each case that determines whether a public body's assertion of unreasonable operational interference can be sustained. For example, not allocating sufficient resources to the processing of access requests, having to process a large volume of access requests at the same time or having to accommodate the complexities of a given access request are not enough, on their own, for a public body to make its case. However, it is these types of circumstances taken together, with supporting metrics and explanation, that combine on a balance of probability to meet the extension threshold.

[85] For the reasons stated, these same factors would, in my view, apply to a determination by a custodian about whether it has authority, under paragraph 26 (1)(a), to extend the 30-day timeline to respond to an access request by an additional 60 days.

[86] The Custodian conceded in its Custodian's Submission that it did not meet the statutory timeline for a response. Its concession was no more specific than this statement.

[87] The Complainant, in their submission, stated that they acknowledged the Custodian's right to extend the initial timeline by an additional 60 days provided it that it did so in accordance with subsections 26 (2) and (3).

[88] The evidence shows that the Custodian, in its letter of September 14, 2018, to the Complainant, merely invoked paragraph 26 (2)(a) by way of statement, as if that were sufficient, on its own, to constitute its authority to extend the initial timeline.

[89] In my view, that fell short of the Custodian's obligation set out in this provision. Simply quoting the provision with no supporting facts does not allow a reasonable person to consider the Custodian's response in an objective manner and make an informed decision to accept or challenge the result. From the Complainant's perspective, providing a rationale for not being able to meet the initial 30-day timeline is, in my opinion, the most important part of a custodian's response.

[90] It is for this reason that a custodian, in extending the initial timeline as per paragraph 26 (2)(a), must provide sufficient evidence in answer to the above four questions so as to furnish its necessary authority, in the totality of the circumstances, for doing so.

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analyse the data also the ones who support, on a daily basis, the public body's computer systems, such that diverting them to these searches significantly compromises their essential duties? See Ontario (Transportation) (Re), 2014 CanLII 45078 (ON IPC) at paras. 14-16.

[91] As to the first question, there is no evidence that the alleged operational interference was due to not having enough staff to meet the practical demand of having to process the Access Request.

[92] As to the second question, there is no evidence that the Access Request adversely compromised the Custodian's obligation to process any of the other access requests it might have had to process at the same time. There is only a statement by the Complainant's authorised representative on November 19, 2018, alleging that they heard the Custodian tell them that it was not refusing to provide records in response to the Access Request but that its tardiness was due to its being very busy, that it had a lot of record requests, and that it had to spend time fairly on the other requests. Notwithstanding the hearsay context, the Custodian provided no facts to support these potentially mitigating contentions.

[93] As to the third question, there is also no evidence that the Access Request imposed on the Custodian a degree of complexity significant enough to affect its operations in a detrimental manner. The only information available on this point is contained in the Custodian's Submission at 4.8. Citing a long relationship with the Complainant, the Custodian states that the following "has complicated the collection and analysis of information potentially responsive to the Complainant's request."[33]

- The number of different service interactions provided by the Custodian to the Complainant.
- The volume of records from multiple sources.
- Inclusion of third party comments and assessments.

[94] The only metric that is known is the volume of records provided to the Complainant between November 19, 2018, and March 26, 2019. It amounts to 1,401 pages of records with a further 1,201 outstanding. Retrieving these records may have been complicated by the number of different service interactions or the inclusion of third party comments and assessments but there is nothing to give any purchase to these factors.

[95] As to the fourth question, there is no evidence that the Access Request imposed on the Custodian a burden of time significant enough to tax its operations to an unreasonable extent. There are no metrics that set out the number of hours staff spent, in one capacity or another, identifying, examining and providing records responsive to the Access Request and what effect

[33] Custodian's Submission at 3.

that expenditure of resources may have had on the ability of staff to do their jobs under HIPMA, inclusive of responding to other applicants' access requests.

[96] As stated earlier, the Custodian must prove, on a balance of probability, that it complied with the relevant requirements in respect of responding to the Access Request. In this case, that means specifically proving that it met its obligation to comply with paragraph 26 (2)(a) in respect of extending the initial timeline.

[97] Given the application of the above four questions and the lack of evidence, I am of the view that the totality of the circumstances does not support the Custodian's implied assertion in its September 14, 2018, letter that it had the necessary authority under paragraph 26 (2)(a) to extend the initial timeline by an additional 60 days.[34] I also take note of the Custodian's own concession that it did not meet the statutory timeline for a response.

[98] Even if the Custodian had provided the necessary evidence in respect of answering the above four questions, then it would have had to provide subsequent evidence that it exercised its discretion in paragraph 26 (2)(a). Recall that this provision states a custodian 'may' extend the initial timeline.

[99] In my decision issued about a complaint concerning the alleged use, disclosure, access and retention of personal health information contrary to HIPMA, I stated the following about a custodian's exercise of discretion in a provision containing the word 'may'.[35]

[100] In *Attaran v. Canada (Foreign Affairs)*,[36] Justice J.A. Dawson, writing for the Federal Court of Appeal (FCA), stated the following about a similar situation faced during an appeal before the FCA concerning the Department of Foreign Affairs and International Trade's application of section 15[37] of the Federal *Access to Information Act*.

> *In the present case, there is nothing in the public or the ex parte record before the Court, including the affidavits filed on behalf of the respondent, which expressly demonstrates that the decision-maker considered the existence of her discretion. However, the absence of such evidence is not determinative of the issue. The same situation existed in*

[34] The Complainant asked four related questions in their Complainant's Reply, as set out in para.7 above. I am unable to respond to them due to this same lack of evidence.

[35] Department of Health and Social Services, HIP19-19I, June 13, 2019 (YT IPC), at para. 104 concerning subsection 55 (1).

36 2011 FCA 182 (CanLII).

37 Section 15 of the *Access to Information Act* is a discretionary exception to the right of access to information under that Act.

> *Telezone where the Court examined the record before it, including internal departmental documents, in order to be satisfied that the decision-maker understood that there was a discretion to disclose documents.*
>
> *Conversely, just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. In every case involving the discretionary aspect of section 15 of the Act, the reviewing court must examine the totality of the evidence to determine whether it is satisfied, on a balance of probabilities, that the decision-maker understood that there was a discretion to disclose and then exercised that discretion. This may well require the reviewing court to infer from the content of the record that the decision-maker recognized the discretion and then balanced the competing interests for and against disclosure, as discussed by the Court in Telezone at paragraph 116.*[38]

[1] Based on the foregoing, I am satisfied that the fact that the Custodian did not submit anything on the exercise of its discretion, as required by paragraph 26 (2)(a), is not determinative of the issue. However, in the absence of evidence, I am unable to infer that the Custodian exercised its discretion after determining, which it did not, that it had the authority to extend the initial timeline by an additional 60 days.

[101] Had the Custodian first determined, with supporting evidence, that complying with the Access Request in the initial timeline would have unreasonably interfered with its operation, it would also have had to provide evidence in support of recognising its duty to exercise its discretion prior to extending the initial timeline.

[102] Given the foregoing, I am unable to find that the Custodian met its burden of proving that it exercised its discretion as required by paragraph 26 (4)(a).

[103] Although I have determined that the Custodian did not have authority to grant the initial extension, I will, for the sake of completeness, evaluate whether it met the notice requirements in subsection 26 (3).

[104] Subsection 26 (3) requires the custodian, where it extends the initial timeline for response, to tell the applicant, prior to the expiry of that period, about the extension and the supporting reasons, when the applicant can expect a response, and that the applicant can make

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38 *Ibid*., at paras 35 and 36.

a complaint to the IPC about the extension as per section 99. Since these three components are joined by the conjunctive 'and', all of them must be met.

***Did the custodian tell the applicant about the extension and reasons for it?***

Subsection 26 (3)(a)

[105] Paragraph 26 (3)(a) is comprised of two parts: notice of the extension and the reasons for the extension. A custodian must meet both parts.

[106] In the Custodian's letter of September 14, 2018, it told the Complainant that it had extended the 'time limit' for responding to their Access Request to November 13, 2018. As such, the Custodian met the first part.

[107] It then cited paragraph 26 (2)(a) as its reason for this extension. It did not, however, include any supporting evidence in the letter for its action and I found earlier that the totality of the circumstances were insufficient to establish it had authority for the extension. As such, the Custodian did not meet this part.

[108] My finding that the Custodian did not meet paragraph 26 (3)(a) is sufficient to obviate any need to consider the rest of subsection 26 (3) but I will continue my analysis.

***Did the custodian tell the applicant about when they can expect a response?***

Paragraph 26 (3)(b)

[109] In the Custodian's letter of September 14, 2018, it told the Complainant that they would be contacted as soon as it had formulated its response to the Access Request.

[110] The evidence shows that the Custodian also advised the Complainant to that effect on three more occasions during the extended 60-day timeline.[39] On none of these occasions did the Custodian provide any specific information, such as a date of availability.

[111] The Custodian did not meet the requirements of paragraph 26 (3)(b).

***Did the custodian tell the applicant that they can make a complaint to the IPC about the extension?***

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[39] September 21 and 25, 2018; November 5, 2018. This also continued on November 15, 2018, two days past the 60-day day expiry.

<u>Paragraph 26 (3)(c)</u>

[112] In the Custodian's letter of September 14, 2018, it told the Complainant that they could contact the IPC with a complaint, as per subsection 99 (1), in respect of the extension. It also provided the necessary IPC contact information. The Custodian met the requirements of paragraph 26 (3)(c).

[113] Since the Custodian only met one of the above paragraphs and not all three as required, I find that it failed to meet subsection 26 (3).

***Did the Custodian respond to the Access Request by making the information available or providing a copy?***

[114] For the same reasons noted above, I will determine whether the Custodian met the requirements of paragraphs 26 (4)(a) and (c) in responding to a complete access request, as per section 25.[40] Since these paragraphs are joined by the conjunctive 'or', they each stand on their own.

<u>Paragraph 26 (4)(a)</u>

[115] Paragraph 26 (4)(a) states that a custodian must respond to a complete application by making the requested personal health information available to an applicant, either by way of examination, with some limitation, or by way of a copy.

[116] The evidence shows that the Custodian did not make available any records responsive to the Access Request by way of examination or copy in either the initial 30-day period or the additional, albeit unauthorised, 60-day period.

[117] I find that the Custodian did not meet the requirements of paragraph 26 (4)(a).

***Did the Custodian refuse access in whole or in part and inform the Complainant of the reasons for refusal and the right to make a complaint to the IPC in regards thereto?***

<u>Paragraph 26 (4)(c)</u>

[118] Paragraph 26 4(c) provides a custodian with another choice from a suite of options in subsection 26 (4).[41] It states that a custodian must respond to a complete application by

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[40] Subsection 26 (4) sets out four options on a custodian receiving a complete application, as per section 25. However, paragraphs 26 (4)(b) and (d) are not relevant to this Consideration. I have already determined that the Access Request was complete.

[41] As stated earlier, only paragraphs 26 (4)(a) and (c) are relevant to this Consideration.

refusing an access request, in whole or in part, provided that it informs the applicant of the following:

a) the refusal;

b) the reasons for the refusal; and

c) the applicant's right to make a complaint to the IPC about the refusal.

[119] There is no evidence to show that the Custodian informed the Complainant about a refusal when the initial or, for that matter, the unauthorised extended timeline expired, its reasons for it, and the Complainant's right to make a complaint to the IPC.

[120] I find that the Custodian did not meet the requirements of paragraph 26 (4)(c).

[121] That said, the evidence does show that the Custodian provided the Complainant with a first package of records responsive to the Access Request on November 19, 2018. This came after the Complainant's authorised representative challenged the Custodian about the missed deadlines and not advising of any additional extension, notwithstanding that the Complainant had inquired unsuccessfully about this possibility and that HIPMA did not provide for one.

[122] The Custodian then continued to provide the Complainant with packages of records responsive to the Access Request on December 10, 2018, February 28, 2019, and March 26, 2019, for a total of 1,410 pages of records. As of March 29, 2019, the Custodian had identified a further 1,219 pages as possibly responsive but they remained outstanding at the time of this Consideration.

[123] Given these subsequent actions, it is unlikely that the Custodian intended to refuse the Access Request, notwithstanding the legislated timelines. However, it remains a fact that it did not provide any records responsive to the Access Request within those timelines. For the reasons that follow, this has a real connection to subsection 26 (5) below.

***Was the Access Request deemed to have been refused by the Custodian?***

Subsection 26 (5)

[124] Subsection 26 (5) sets out the effect of not meeting either subsections 26 (1) or (2). A failure on the part of a custodian not to respond to the request for access in the allotted timelines is a 'deemed refusal'.

[125] The Custodian, in its letter of August 16, 2018, advised the Complainant that it had 30 days until September 14, 2018, to respond to the Access Request. By the expiry of that deadline, the Custodian had not made available to the Complainant any such records.

[126] Since I have already determined that the Custodian did not meet the requirements of paragraph 26 (2)(a) to extend the initial timeline by an additional 60-day period, I find that the records at issue were 'deemed to have been refused' as of September 14, 2018.

[127] Given this finding, I am of the view that the Custodian then had an immediate duty, under paragraph 26 (4)(c), to notify the Complainant that it had refused the Access Request. This would have included the reasons why it failed to meet the 30-day deadline, the consequences of which were a 'deemed refusal', and that the Complainant could make a complaint to the IPC.

[128] If there were no substantive linkage between paragraph 26 (4)(c) and subsection 26 (5), then the Custodian would be under no obligation to advise the Complainant about the 'deemed refusal', thus leaving it to the Complainant to figure out the significance of this state and what legislated options were still available to them. It would amount to an absurdity if a custodian could simply wait out the initial timeline and then remain silent when it is deemed to have refused to provide access to the requested records. A right of access must include the right to a transparent process.

<u>Section 26</u>

[129] As stated earlier, the Custodian must prove, on a balance of probability, that it complied with the relevant requirements of section 26 in meeting its obligation in respect of the Access Request. For the reasons stated, I find that the Custodian did not meet its burden of proof.

## VIII. FINDINGS

[130] My findings in respect of the issue in the Consideration are as follows.

**<u>The Complainant</u>**

[131] For the foregoing reasons, I find that the Complainant:

a) made their Access Request in writing as required by paragraph 25 (2)(a);

b) that the Access Request contained sufficient detail to enable the Custodian to identify the records at issue as required by paragraph 25 (2)(b); and

c) that the Access Request was complete as required by subsection 25 (3).

**The Custodian**

[132] For the foregoing reasons, I find that the Custodian:

a) did not have the necessary authority required by paragraph 26 (2)(a) to extend the initial timeline by an additional 60 days;

b) did not meet subsection 26 (3) because, while it advised the Complainant about the right to make a complaint to the IPC about an extension, it did not provide any evidence supporting the extension nor did it tell the Complainant when they could expect a response to the Access Request;

c) did not meet paragraph 26 (4)(a) because it did not make available to the Complainant any records responsive to the Access Request during the initial timeline;

d) did not meet paragraph 24 (4)(c) because it did not advise the Complainant about its refusal to provide records in response to the Access Request, the reasons for refusal, nor the right to make a complaint to the IPC concerning a refusal; and

e) was deemed, as per subsection 26 (5), to have refused access to the requested records as of September 14, 2018, thus triggering a duty to notify the Complainant, as per paragraph 24 (4)(c), which it did not do.

## IX. RECOMMENDATIONS

[133] Subsection 109 (1) authorizes me to make 'any appropriate recommendations.' Subsection 109 (2) specifically authorizes me to recommend, amongst other things, that the [Custodian]

*(a) give the complainant access to all or part of their personal health information contained in a record in the [Custodian's] custody or control;*

*(b) …*

*(c) respond to the complainant's application for access under section 25…*

*(d) modify, cease or not implement a practice, policy or procedure, where the commissioner determines that the practice, policy or procedure contravenes this Act or a regulation;*

*(e) implement a practice, policy or procedure, where the commissioner determines that the practice, policy or procedure is reasonably necessary for the respondent to comply with this Act or a regulation;…*

[134] Pursuant to section 109, my recommendations in respect of the issue are as follows.

1) **I recommend that the Custodian provide the Complainant with access to the 1,201 remaining pages of records (Records) responsive to the Access Request on or before July 29, 2019**.[42]

Given the total pages of records provided by the Custodian to the Complainant from August 16, 2018, to March 26, 2019, the 'rate of record provision' was approximately 44 pages/week over a 32-week period.[43] By simple extrapolation, the time frame to provide a further 1,219 pages at the above rate, as of the date of the Notice of Consideration, would be another 28 weeks.[44] That coincides with the first week in October 2019. This is unacceptable.

Had the Custodian met the bar to extend the initial timeline, it would have had a maximum of 90 days to provide the Complainant with a response to the Access Request. Assuming the response consisted of providing copies of the sought-after records, as can be inferred from its actions between November 19, 2018, and March 26, 2019, then the Custodian would have been obliged to provide the Complainant with a total of 2,620 pages by November 13, 2018.[45]

90 days is approximately 12.9 weeks. The rate of provision would have to be approximately 203 pages/week over that statutory period.[46] There are 1,219 pages of records outstanding to date. At this rate, the Custodian would have had six weeks to provide them to the Complainant.[47]

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[42] The deadline of July 29, 2019, is six weeks from the date of delivery of this Consideration Report to the Custodian.
[43] 1,401 pages/~32 weeks = ~44 pages/week.
[44] My 'Notice of Consideration' stated that this Consideration would occur on March 22, 2019.
[45] 1,401 + 1,219 = 2,620 pages of records.
[46] 2,620 pages/~12.9 weeks = ~203 pages/week.
[47] 1,219 pages/203 pages/week = 6 weeks.

2) **I recommend that the Custodian provide the Complainant with the Records in reasonable numbers as they become available prior to July 29, 2019.**[48]

3) **I recommend that the Custodian provide the Complainant with sufficient reasons for any refusal of their personal health information in the records requested as required by paragraph 26 (4)(c), inclusive of advising the Complainant of their right to make a complaint to the IPC about such refusal.**

4) **I recommend that within 60 days of receiving the Consideration Report, the Custodian develops a policy that sets out how to handle:**

   a) **the management of an application for access to personal health information under subsections 25 (1) to (3); and**

   b) **its response to a 'complete application' under subsections 26 (1) to (5), inclusive of how to answer the above fourfold questions in respect of paragraph 26 (2)(a).**

5) **I recommend that the Custodian provides the IPC with a copy of the policy developed under recommendation #4 within 10 days of its development.**

6) **I recommend that, within 15 days of developing the policy under recommendation #4, the Custodian:**

   a) **trains its staff responsible for managing and responding to access requests on the policy; and**

   b) **develops a process that ensures these staff are refreshed on the policy on an annual basis.**

7) **I recommend that, within 90 days of receiving this Consideration Report, the Custodian evaluates its human, technical and financial resources to determine if they are sufficient to meet the operational demands of processing, within the legislated timelines, the volume of access requests it is receiving. The evaluation must take into account the degree of complexity involved in processing access requests for personal health information.**

[48] As per paragraph 1 (f).

8) **I recommend that, within 120 days of receiving this Consideration Report, the Custodian provides the IPC with a copy of the evaluation conducted under recommendation #7.**

## Custodian's Decision after Consideration

[135] Subsection 112 (1) requires that, within 30 days after receiving this Consideration Report, the Custodian 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.*

[136] Subsection 112 (2) states that "[i]f [the Custodian] does not give written notice within the time required by subsection (1), [the Custodian] is deemed to have decided not to follow any of the recommendations of the commissioner."

## Complainant's Right of Appeal

[137] The Complainant's right of appeal is set out in section 114. It states as follows.

*114 Where a report includes a recommendation, and [the Custodian] decides, or is deemed to have decided, not to follow the recommendation, or having given notice of its decision to follow the recommendation 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.*

**ORIGINAL SIGNED**

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

Distribution List:

- Complainant
- Custodian

## *Post Script*

### The Records at Issue

The Complainant inquired, on numerous occasions, if the Custodian could extend the timeline beyond what amounts to a maximum 90-day period but the Custodian did not provide a clear answer in reply, specifically, that HIPMA prohibited a second extension for any period. This left the Complainant, a layperson navigating through a very complex piece of legislation, in a position of not understanding that the Custodian's failure to provide the records by September 14, 2018, and certainly by November 13, 2018, had the extension been applied properly, was a 'deemed refusal' on which the Complainant could make a complaint to the IPC.[49] Instead, the facts show an inordinate number of emails between the parties in which the Custodian replies with vague assurances that records would be forthcoming in time; effectively, a time of its own convenience.

In view of this concern, I suggest that the Custodian, on receipt of an access request, informs an applicant about the initial timeline set out in subsection 26 (1) and its ability, with sufficient justification, to extend that timeline, inclusive of directing them to the Office of the IPC, as set out in subsection 26 (2).

[49] Although the Custodian's letter to the Complainant on September 14, 2018, purporting to extend the initial timeline, stated that they could make a complaint to the IPC pursuant to subsection 99 (1), the Complainant did not do so because evidence shows they believed the Custodian would provide the records within the extended period.