



**Health and Social Services
PO Box 2703, Whitehorse, Yukon Y1A 2C6**

July 16, 2019

Diane McLeod-McKay
Yukon Information and Privacy Commissioner
Ste. 201 – 211 Hawkins Street
Whitehorse, YT Y1A 1X3



Dear Ms. McLeod-McKay:

**Re: Health Information Privacy and Management Act (HIPMA) Complaint
Your file: HIP18-24I**

Thank you for your June 14, 2019 letter.

With regard to the Consideration Report that your office provided to in relation to HIP18-24I (H-189). I am writing to indicate the following:

Recommendation 1:

The Department accepts this recommendation and will provide the Complainant with access to the remaining responsive records on or before July 29, 2019.

Recommendation 2:

The Department accepts this recommendation and will provide the Complainant with the responsive records in reasonable numbers as they become available prior to July 29, 2019.

Recommendation 3:

The Department accepts this recommendation and will provide the Complainant with sufficient reasons for any refusal of 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.

Recommendations 4-8:

The Department agrees to include the policy development, training and program analysis recommended into the Access and Information Management Unit's program plan and provide further updates to the Information and Privacy Commissioner as timelines are identified.

I acknowledge that the department's response is outside of the timeframe as identified in HIPMA; we were erroneously working to 30 working days, as opposed to 30 calendar days. I apologize for that error.

Sincerely,



Jennifer Potvin
Chief Information Officer



Yukon
Information
and Privacy
Commissioner

211 Hawkins Street, Suite 201
Whitehorse, Yukon Y1A 1X3
T: 867.667.8468
F: 867.667.8469
1-800-661-0408 ext. 8468
www.ombudsman.yk.ca

DELIVERED BY EMAIL

July 18, 2019

Stephen Samis
Deputy Minister
Department of Health and Social Services
Stephen.Samis@gov.yk.ca

Re: *Health Information Privacy and Management Act (HIPMA)*
Consideration of Complaint
Our File: HIP18-241

I am in receipt of the Department of Health and Social Services (HSS) response to the recommendations contained in my Consideration Report HIP18-241, which was delivered to the Department on June 14, 2019.

As you know, the deadline for the response was July 12, 2019. The response was delivered via email to me on July 16, 2019. This occurred only after I notified HSS about the expired timeline for response. I was informed by Ms. Potvin that the missed timeline occurred as a result of an administrative error. Give this, I strongly encourage HSS to examine its practices in regards to managing its responsibilities under HIPMA to prevent recurrence. Please note that I have an obligation to inform the complainant about the deemed refusal and response, in addition to their rights regarding appeal as a result of the deemed refusal.

I acknowledge in the response letter dated July 16, 2019 (Response), HSS indicated it is accepting my recommendations. From the Response it appears that HSS has modified my recommendations four through eight such that it is unclear if HSS has in fact accepted them and will implement the recommendations as made. These recommendations are as follows.

- 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.*
- 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.*

The response provided by HSS to these recommendations is as follows.

Recommendations 4-8:

The Department agrees to include the policy development, training and program analysis recommended in to the Access and Information Management Unit's program plan and provide further updates to the Information and Privacy Commissioner as timelines are identified.

It is unclear from this response if HSS accepts recommendations four through eight as written and will implement them. Please clarify.

Secondly, given the deadline for implementing recommendations one through three is nearing, I would also like to receive an update on their implementation.

Please provide the information requested herein by July 25, 2019.

If you have any questions about the foregoing, please contact me at 667-8468.

Kind regards,

A black rectangular redaction box covering the signature of Diane McLeod-McKay.

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

Cc. Jennifer Potvin, Chief Information Officer, Department of Health and Social Services



Health and Social Services
PO Box 2703, Whitehorse, Yukon Y1A 2C6

July 19, 2019

Diane McLeod-McKay
Yukon Information and Privacy Commissioner
Ste. 201 – 211 Hawkins Street
Whitehorse, YT Y1A 1X3



Dear Ms. McLeod-McKay:

Re: Health Information Privacy and Management Act (HIPMA) Complaint
Your file: HIP18-24I

Thank you for your July 18, 2019 letter.

Please find below further information regarding the Recommendations 4 through 8 of the HIP18-24I Consideration Report.

Recommendation 4:

The Department accepts this recommendation to, within 60 days, develop a policy that sets out how to handle the management of an application for access to personal health information.

Recommendation 5:

The Department accepts this recommendation to provide the IPC with a copy of the policy developed under recommendation 4 within 10 days of the policy's development.

Recommendation 6:

The Department accepts this recommendation to, within 15 days of the development of the under recommendation 4, to train staff who are responsible for managing and responding to access requests on the policy and develop a process that ensures these staff are refreshed on the policy on an annual basis.

Recommendation 7:

The Department accepts the recommendation to, within 90 days, evaluate our human, technical and financial resources to determine if they are sufficient to determine if they are sufficient to meet the operational demands of processing within legislative timelines, the volume of access requests it is receiving.

Recommendations 8:

The Department agrees the recommendation to, within 120 days, provide the IPC with the evaluation conducted under recommendation #7.

The applicant was provided with all remaining responsive records on July 18, 2019 and **Recommendations 1, 2 and 3** are fulfilled.

Sincerely,

A large black rectangular redaction box covering the signature of Jennifer Potvin.

✓ Jennifer Potvin
Chief Information Officer



**Health and Social Services
PO Box 2703, Whitehorse, Yukon Y1A 2C6**

August 23, 2019

Diane McLeod-McKay
Yukon Information and Privacy Commissioner
Ste. 201 – 211 Hawkins Street
Whitehorse, YT Y1A 1X3



Dear Ms. McLeod-McKay:

**Re: Health Information Privacy and Management Act (HIPMA) Complaint
Your file: HIP18-24I**

With regard to the Consideration Report that your office provided to in relation to HIP18-24I (H-189), I am writing to provide you with an update on recommendations 4 through 6.

Recommendation 4 and 5: see the attached policy (Policy ISB-001 – Managing Requests for Personal Health Information).

Recommendation 6: staff responsible for managing and responding to access requests have received training on the policy and will receive re-fresher training during the annual personal performance plan process.

Sincerely,



Jennifer Potvin
Chief Information Officer

Attachment(1)



Yukon
Information
and Privacy
Commissioner

211 Hawkins Street, Suite 201
Whitehorse, Yukon Y1A 1X3
T: 867.667.8468
F: 867.667.8469
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www.ombudsman.yk.ca

DELIVERED BY EMAIL

August 27, 2019

Jennifer Potvin
Chief Information Officer
Department of Health and Social Services
Jennifer.Potvin@gov.yk.ca

Dear. Ms. Potvin

**Re: Response to Recommendations Four through Six in the Consideration Report
Our File No. HIP18-241**

I acknowledge receipt of your response to recommendations Four and Five set out in the HIP18-241 Consideration Report and that the response to these recommendations was received within the time frame set out in the Report. I also acknowledge that HSS provided a response to recommendation number Six ahead of the deadline, which is September 9, 2019.

I have reviewed the policy and correspondence received from the Department of Health and Social Services (HSS) and offer the following comments.

COMMENTS

Recommendation Four (a)

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).

Having reviewed the policy "Managing Requests for Access to Personal Health Information, Policy ISB-001" (Policy) developed by HSS in respect of this recommendation, I am satisfied that HSS has implemented this recommendation. The comments that follow are for HSS's consideration.

Under the headings “2.2 Responding to Access Requests and 2.2.1 Activating an Access Request – 25 (2) and (3),” it states “[u]pon receipt of an application for access, HSS Access and Privacy Coordinator (Coordinator) or delegate shall: review the application for completeness [and] where the application is incomplete, the Coordinator shall provide assistance in completing the application.”

What constitutes “completeness” and “providing assistance” should be clarified in the policy or a corresponding procedure to ensure an application for access to personal health information meets the requirements of subsections 25 (2) and (3).

Under subsection 25 (2), an application will only be complete if the requirements in paragraphs (a) through (c) are met.¹

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

To operationalize this paragraph, HSS should specify in policy that all applications for access to personal health information must be made in writing and define the circumstances where an alternate to the ‘in-writing’ requirement will suffice and what alternatives are available, such as a verbal application. It should also set out in the policy or procedure, the rules employees are to follow when utilizing the alternative option, such as, for example, if they are to document the application in the case of a verbal application. It must also spell out for its employees in policy or procedure any other rules they are to follow to ensure there is sufficient evidence that an application is ‘complete’ in accordance with the requirements of subsection 25 (2).

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

The policy or procedure should clarify for its employees that they must be able to understand from the application precisely, to the degree possible, the personal health information sought by an applicant. Unless there is a very specific piece of personal health information that an applicant is seeking, arriving at a ‘complete’ application will involve a process of discovery between the employee and the applicant with the employee explaining the records it has containing the applicant’s personal health information and the applicant making decisions about the information sought. Applicants generally do now know what records a custodian has. It is up to HSS to inform applicants about its records so the applicant receives the personal health information sought, no more, no less. The process of completeness may take some time. Note that the time-period for responding to an access to information request does not start until the application is ‘complete’.

¹ I note that there are no prescribed requirements in regulation for paragraph (d) to apply.

(c) in a case where the applicant seeks a record of user activity of the applicant's personal health information, the application indicates that a record of user activity is sought;

To meet this requirement, the policy need only clarify that an application for a record of user activity will only be complete when the application indicates that such record is sought.

To meet the requirement of subsection 25 (3), the policy should inform its employees that HSS has a duty to assist applicants make an application for personal health information that is 'complete'. I will note that the duty to assist referenced in subsection 25 (3) will likely be met if a process that facilitates a complete application, such as that described above, is detailed in policy or procedure and is followed.

Recommendation Four (b)

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

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

Following my review of the Policy, I am not satisfied that this recommendation has been implemented. My reasons for this determination follow.

Paragraph 26 (2)(a)

Under the heading "2.2.2 Time Extensions – s.26(2)," the process for determining whether the requirements of paragraph 2 (a) of subsection 26 (2) are met is, in my view, deficient. The information provided does not properly explain the factors that must be taken into account to arrive at this decision and how each should be weighed. This section of the policy needs revision to avoid unauthorized extensions.

HSS should add a procedure to the policy that includes some scenarios to guide decision making about when the threshold required to meet this paragraph is or is not met. The four questions set out in the Consideration Report at page 27 must be asked and answered with appropriate evidence and analyses. The information currently in the policy does not provide any context and, in my view, will be of little to no assistance to an employee tasked with deciding whether they are authorized by paragraph 26 (2)(a) to extend the timeline to respond to an access request. Below is some information that may assist HSS more clearly define its process.

1) Is the human resource capacity of the public body sufficient to meet the operational demands of processing access requests generally?

To answer this question, HSS needs to assess its resources and ensure they are sufficient to meet the operational demands of processing access requests. It is not up to an individual employee to make this assessment. A benchmark must be established by HSS and used to weigh, on an ongoing basis, whether it has the appropriate resource capacity, in general, to process access to information requests. A finding that the resources are not sufficient will mean it is less likely that paragraph 26 (2)(a) will be available to extend a timeline to respond to an access request. If the resources are sufficient, other factors may be considered to determine if these resources are unreasonably taxed, such as, for example, when a spike in access requests occurs.

- 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?*

If the resources are generally sufficient to process access requests, an employee may consider the second factor. When an applicant makes a number of access requests in a short period that creates a spike, HSS's resources may be taxed to the degree that there is an impact on its ability to meet the timelines of all the access to information requests in progress. When this occurs, this factor may weigh toward a finding that HSS's operations are unreasonably interfered with. It must be remembered that it is not enough that the processing of an applicant's access requests interferes with the operations of HSS, it must "unreasonably" interfere with them.

- 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 [custodian] in the same time frame?*

In order for this factor to weigh toward meeting the "unreasonably interferes" threshold, the access request(s) must be significantly more complex than others. If all access requests received by HSS are complex, then this factor would weigh against meeting the threshold because HSS would be expected to resource to manage complex access requests. If, on analyses, the access request(s) proves more complex than others, the degree of complexity must be assessed to determine if this factor weighs towards a determination of unreasonable interference.

Where, as occurred in the case considered in the Consideration Report, a large number of records were sought which required review for removal of information, as permitted or required under HIPMA, it may be that processing such a request would unreasonably interfere with HSS's operations. When making this determination, a number of factors need to be taken into account, including any difficulty in searching and locating the records and the amount of review involved. I will note here that HSS must employ proper procedures that are systematic for searching and locating records. HSS must also have proper record keeping. Poor record keeping is not a factor that can be considered in determining whether there is a negative impact on resources required to process access requests. If HSS has poor record keeping and

does not employ a systemic process for searching for records subject to an access request, then it will likely be unable to rely on paragraph 26 (2)(a) to extend a timeline for response.

- 4) *Is the time spent in processing an applicant's access request(s) significantly disproportionate in comparison to all the other access requests being processed by the [custodian] in the same time frame?*

An access request that is complex will take time to process. This factor will weigh in favour of unreasonable interference when the time required will be significantly greater than other access requests because of its complexity. Factors to consider in making this determination are the anticipated hours it will take to search and locate the records and the amount of review required. Costs to include in the assessment is in employee' hours and the dollars associated therewith.

As was indicated in the Consideration Report, whether the threshold under paragraph 26 (2)(a) will be met depends on the totality of the circumstances. Where it is more probable than not that processing an access request will unreasonably interfere with HSS's operations after weighing the factors, then HSS may decide whether to extend the timeline or not. A finding of unreasonable interference is not enough to rely on the provision, HSS must exercise its discretion about whether to extend the timeline before it will be authorized by paragraph 26 (2)(a) to do so. HSS should document its exercise of discretion and the requirement to do so should be incorporated into the policy or procedure.

When working through the decision making process, some factors may weigh more greatly than others and must be assessed on a case-by-case basis. The policy and procedures need to be written in such a manner that employees are guided through the decision making process. Employees must be trained to ensure their decisions are supported by adequate evidence and the reasons for reaching a decision one way or the other must follow from the evidence. The policy and procedure should reflect this requirement.

Subsection 26 (3)

Under the heading "2.2.3 Notifying Application of a Time Extension – s.26(3)", it states that "[n]otification letters shall contain the following." Below this are four bullets which state:

- *reasons for the extension (cite appropriate section)*
- *summary of the reasons for the extension*
- *date of when the applicant can expect a response*
- *applicant's right to make a complaint to the Information and Privacy Commissioner*

Citing a section in HIPMA does not amount to providing reasons as to HSS's authority to extend the timeline for responding to an access request under paragraph 26 (2)(a). I note that the second bullet also requires a "summary of the reasons for the extension" be provided.

To ensure HSS meets the requirements of paragraph 26 (3)(a), it should provide its decision about the extension together with detailed reasons about its authority to rely on paragraph 26 (2)(a) so the applicant can make an informed decision about whether to have the decision considered by the Information and Privacy Commissioner. I have no comments in respect of the last two bullets.

Subsection 26 (4)

Under the heading “2.2.4 Responding to a Complete Application – s.26(4)” it states that “[u]pon completion of the review of the information associated with the complete application, the Coordinator shall notify the applicant. Notification (final response) shall contain:” There are four bullets thereunder. One of them states “reason(s) for refusing access in whole or in part (cite appropriate section and section summary).”

As stated previously, citing a section does not amount to providing reasons. The purpose of providing reasons to an applicant for refusal of records or information requested is to allow them to make an informed decision about whether HSS is authorized to refuse the information. An applicant cannot make an informed decision about whether to challenge a decision unless they are provided with sufficiently detailed reasons. This bullet should be revised to reflect that sufficient reasons about the refusal must be provided together with the provision relied upon. I have no comments about the other three bullets.

Missing under this heading is the requirement that the response to a processed access request must be provided within 30 days from receipt of a complete application or an additional 60 if an authorized extension occurred. HSS should add this requirement to the policy. The Policy should also point the reader to the deemed refusal section of the policy when a response will not be provided within the timeframe.

Subsection 26 (5)

What is missing from the section of the Policy entitled “2.2.5 Deemed Refusals – s.26 (5)” is when the deemed refusal notice is to be provided to the applicant. The Policy should require the notice be provided to the applicant the day on which the deemed refusal occurs. The Policy should also clarify how the notice is to occur, by letter, verbally or some other way. Where notice occurs verbally, employees should be instructed to document the conversation as evidence it met the requirement of paragraph 26 (4)(c).

Recommendations Five and Six

Recommendations Five and Six flow from the implementation of recommendation Four. They cannot be implemented until the Policy is revised such that it properly “sets out how to handle its response to a ‘complete application’ under subsections 26 (2) to (5), inclusive of how to answer the above fourfold questions in respect to paragraph 26 (2)(a)” as is stated in recommendation Four (b).

Revised Recommendations Timelines

As a result of the foregoing, below is the revised timelines for the implementation of recommendations Four (b), Five and Six.

- Recommendation Four (b) must be implemented on or before September 30, 2019;
- Recommendation Five must be implemented on or before October 10, 2019; and
- Recommendation Six must be implemented on or before October 15, 2019.

Should you have any questions, please contact me.

Kind regards,



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

Cc. Stephen Samis, Deputy Minister, Department of Health and Social Services



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Information
and Privacy
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DELIVERED BY EMAIL

October 17, 2019

Stephen Samis
Deputy Minister
Department of Health and Social Services
Stephen.Samis@gov.yk.ca

Dear Mr. Samis,

**Re: *Health Information Privacy and Management Act (HIPMA)*
*Recommendations in Consideration Reports HIP18-19I and HIP18-24I***

I am writing in regards to the Department of Health and Social Services (HSS) decision to follow the recommendations contained in the above noted Consideration Reports. As you know, when a custodian decides to follow recommendations contained in a consideration report, it is obligated to follow them as written.

As indicated in prior correspondence, failure to follow a recommendation within a reasonable period of time triggers the right of a complainant to appeal the failure to the Supreme Court of Yukon. Given this, part of my duties as the Information and Privacy Commissioner is to ensure the recommendations are followed and to report my conclusions to the complainant prior to the expiry of the appeal period, which is within six months after a consideration report is issued. Consideration Report HIP18-19I was issued on June 13, 2019. The appeal period for this Report expires on December 13, 2019. Consideration Report HIP18-24I was issued on June 14, 2019. The appeal period for this Report expires on December 14, 2019.

The status about whether HSS has followed the recommendations contained in the Consideration Reports is set out below.

HIP18-19I

There were two recommendations made in this Consideration Report. They are as follows.

1. *the Custodian trains its agents on the requirement to exercise discretion prior to using personal health information in its custody or control after it determines it has authority for the use under sections 55 or 56 and sections 15 and 16 of HIPMA; and*
2. *the Custodian advises me within 90 days of receiving this Consideration Report about the steps it has taken to meet the foregoing recommendation.*

In my letter to you dated October 7, 2019, I indicated that these recommendations have not yet been followed. My reason for this conclusion is contained in that letter. The letter is appended hereto for your ease of reference.

To date, I have received no response to this letter informing me about whether HSS intends to follow the recommendations or that it disagrees with my conclusion. The timeline to follow recommendation number two expired on September 12, 2019.

I will also note that in regards to my follow up email on September 19, 2019, to Ms. Potvin about the training materials referenced in her letter to me dated September 13, 2019, I have yet to receive a response.

HIP18-24I

There were eight recommendations made in this Consideration Report. They 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.*
2. *I recommend that the Custodian provide the Complainant with the Records in reasonable numbers as they become available prior to July 29, 2019.*
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.*
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.*

Recommendations one, two, three, and four (a) have been followed. To my knowledge, the rest have not been followed.

In my letter to Ms. Potvin dated August 27, 2019, I informed her that I am satisfied from the information she provided in response to recommendation four, that recommendation four (a) has been followed. However, I also informed her in the letter that I am not satisfied that recommendation four (b) has been followed. My reason for this conclusion is set out in that letter which I have attached for your reference.

As a result of my conclusion, I provided HSS with new timelines to respond to recommendation four (b), five and six. The revised timelines are set out on page 7 of the letter. To date I have received no response from Ms. Potvin, noting that all the revised timelines for recommendation 4 (b), five and six have now passed.

Recommendation seven was to be followed on or before September 12, 2019.

Recommendation eight was to be followed on or before October 15, 2019. I have not received any information from HSS about whether either of these recommendations were followed.

Next steps

My goal in writing this letter to you is to ensure that HSS follows the recommendations contained in my Consideration Reports. There are less than two months remaining before the Complainants who made the complaints that led to the Consideration Reports can initiate an appeal. I think we can both agree that the solution here is to ensure the recommendations are followed. To that end, please provide me with HSS's response about whether it will follow the recommendations by October 25, 2019. If HSS's response is that it will follow the recommendations, it must provide me with new dates, noting that, in any event, the recommendations must be followed no later than November 29, 2019.¹

If I do not receive HSS's response about whether it will follow the recommendations by October 25, 2019, I will assume that HSS has decided it will not follow the recommendations, at which time I will inform the Complainants about their right to appeal.

I wish to inform you that what has occurred in relation to these Consideration Reports, and both HSS's acceptance of the recommendations and failure to follow the majority of them, is cause for concern. HSS is Yukon's largest custodian and processor of personal health information. It is, therefore, essential that HSS is compliant with HIPMA and its obligations thereunder. Failure to do so has significant implications for Yukoners and others who access HSS's programs and services and provide personal health information to it for this purpose.



I would be pleased to meet with you to discuss the foregoing should you wish to do so.

Kind regards,



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

Attachments

Cc. The Honourable Pauline Frost, Minister of Health and Social Services (with attachments)
Jennifer Potvin, Chief Information Officer, Department of Health and Social Services

¹ The reason for the November 29, 2019, date is to allow me sufficient time to evaluate whether the recommendations were followed and to provide my conclusion to the Complainants. This timeline will ensure that if my conclusion is that all or some were not followed, the Complainants have sufficient time to initiate their appeal should they chose to do so.



**Health & Social Services
PO Box 2703, Whitehorse, Yukon Y1A 2C6**

October 25, 2019

Diane McLeod-McKay
Yukon Information and Privacy Commissioner
Ste. 201 – 211 Hawkins Street
Whitehorse, YT Y1A 1X3

Dear Ms. McLeod-McKay:

Thank you for the detailed advice provided in your letter of August 27, 2019 regarding the Department's management of requests for access to personal health information under HIPMA, and for your follow up correspondence on October 17, 2019. The Deputy Minister has asked me to respond to that correspondence.

With respect to this particular complaint, the Department notes that it has provided the requested records to the complainant and has accepted your recommendations, with the exception of posing and answering the specific "fourfold questions" as a way of satisfying the requirements of HIPMA.26(2)(a).

In the Department's view, reliance on HIPMA 26(2)(a) requires sufficient evidence of unreasonable interference with a custodian's operation, and it does not require any particular evidence.

Please see attached the Department's revised policy for the management of an application for access to personal health information, as well as the Department's evaluation of its resources as related to the operational demands of processing and responding to such applications. The Department considers that the provision of these two documents, along with its undertaking to train staff on the policy and to ensure that such training is refreshed on annual basis, satisfies your recommendations.

Please be assured that the Department values your advice and is using it in its ongoing efforts to improve its management of access to information requests.

Sincerely,



✓ Jennifer Potvin
Chief Information Officer
cc Stephen Samis, Deputy Minister



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and Privacy
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www.ombudsman.yk.ca

DELIVERED BY SFT

November 1, 2019

Stephen Samis
Deputy Minister
Department of Health and Social Services
Suite 201, 1 Hospital Road
Whitehorse, Yukon Y1A 3H7

Dear Mr. Samis:

**Re: *Health Information Privacy and Management Act (HIPMA)*
Recommendations in Consideration Reports HIP18-19I and HIP18-24I**

I am writing in response to the letter I received from Jennifer Potvin, dated October 25, 2019.

As you know, I wrote to you on October 17, 2019, setting out a number of concerns I have in relation to the Department of Health and Social Services (Department) response to the recommendations in the above noted Consideration Reports, highlighting that the timelines were missed in regards to the recommendations, several recommendations were not yet followed despite the Department's acceptance of them, and that responses to queries about the recommendations went unanswered by Ms. Potvin. I note that in the response I received from Ms. Potvin (attached), no explanation was provided by her in regards to these concerns. I would have appreciated being informed of the reasons for the foregoing.

HIP18-24I

In terms of the response received, and materials attached thereto, I am now satisfied that recommendations 4 (b), 5 and 6 as set out in Consideration Report HIP18-24I have been followed. However, I am not satisfied that recommendations number 7 and 8 have been followed. My reason for this conclusion is set out below.

Recommendation 7 and 8 in Consideration Report HIP18-24I state as follows.

- 7) *I recommend that, within 90 days of receiving this Consideration Report, the Custodian evaluates its human and technical and financial resources to*

determine if they are sufficient to meet the operational demands of processing, within the legislated time lines, 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.

- 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.*

Ms. Potvin provided me the attached document titled "Analysis of Health and Social Services Access to Information Program relating to Requests for Personal Health Information", that she claims, on behalf of the Department, satisfies recommendation 7. As you will see from your review of the document, it contains statistical information about the Department's access to information program and access to information requests received by the Department over a 10 year period. The document also identifies how a complex request is defined and the stats include the percentage of requests that are, according to this definition, complex or not. It also includes the resources it has to process access requests and who is responsible for managing the process. The document does not contain any evaluation of the Department's human and technical and financial resources to determine if they are sufficient to meet the operational demands of processing, within the legislated time lines, the volume of access requests it is receiving. Nor does it contain any evaluation of whether the degree of complexity is impacting the Department's ability to meet the timelines for responding to an access to information request under HIPMA. Given this, I disagree with Ms. Potvin and the Department that this recommendation has been followed.

Recommendation 8 requires the Department to provide me with a copy of the evaluation conducted under recommendation 7. Given that the evaluation is deficient for the reasons above mentioned, I consider this recommendation not followed.

As the timelines to follow recommendation 7 and 8 have passed, I will inform the applicant about the status of the recommendations.

HIP18-19I

The information provided by Ms. Potvin does not contain any information to indicate that the Department has followed recommendation 1 in Consideration Report HIP18-19I. The recommendation therein is as follows.

...I recommend that:

1. *the Custodian trains its agents on the requirement to exercise discretion prior to using personal health information in its custody or control after it determines it has authority for the use under sections 55 or 56 and sections 15 and 16 of HIPMA...*

As no information has been provided by the Department to demonstrate it has followed this recommendation, despite my repeated attempts to obtain this information, I consider this recommendation to not be followed.

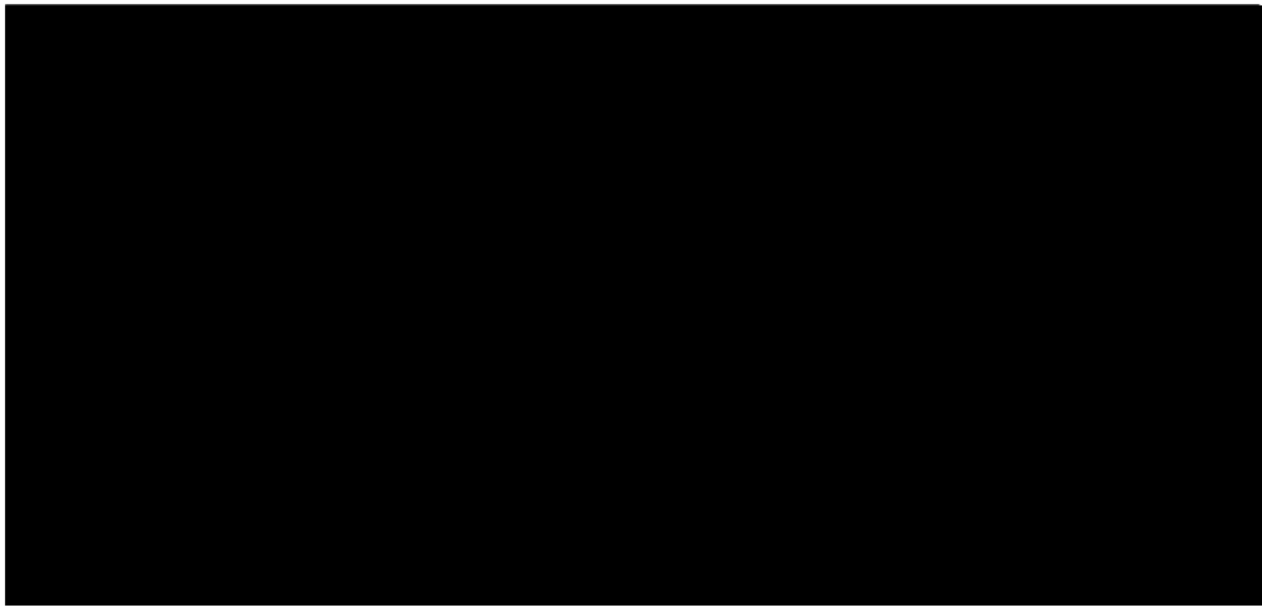
Recommendation 2 in this Consideration Report required the Department to provide me with the steps it has taken to meet recommendation 1. As no steps have been provided by the Department as to how it will meet recommendation 1, I consider this recommendation to not be followed.

As the timelines to follow recommendation 1 and 2 have passed, I will inform the applicant that neither recommendation in this Consideration Report was followed.

What has occurred in relation to these recommendations along with a number of other challenges my office is experiencing in trying to resolve matters involving the Department under both the ATIPP Act and HIPMA is very concerning.

It is not uncommon for the Department to be involved with my office given the nature of its programs and services. What is uncommon is the lack of cooperation by the Department in working with my office to bring these matters to successful resolution.

Most complaints or requests for review we receive under the ATIPP Act and HIPMA are first routed through our informal case resolution (ICR) team in an effort to informally resolve matters before us. Most files we open are resolved this way. Over the past year, we have experienced significant challenges in resolving matters with the Department. Our efforts have been plagued by a lack of response in most cases to obtain the evidence we require to resolve the matters. My ICR team has met with Ms. Potvin on two occasions to try and seek a resolution. The resolutions offered by Ms. Potvin have proved unsuccessful. As a result of our challenges, I have instructed the ICR team to track all responses or lack thereof associated with the Department's files. In addition, I have modified my business processes to address these issues. This is unprecedented in my office and is unique to the Department. We do not experience any of these challenges with other Yukon government public bodies, or any other body for that matter, that we deal with. All other public bodies and custodians work with us to resolve matters informally in a cooperative manner, with very few files moving to adjudication or investigation.



As a result of the foregoing, and in the spirit of working together to find a solution to the above noted challenges, I would like to meet with you and Ms. Potvin to discuss the same.

I will have my assistant contact you to arrange a meeting. In the meantime, if you have any questions, please feel free to contact me.

Kind regards,



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

Attachments

- Cc. The Honourable Pauline Frost, Minister of Health and Social Services (with attachments)
Jennifer Potvin, Chief Information Officer, Department of Health and Social Services



Yukon
Information
and Privacy
Commissioner

211 Hawkins Street, Suite 201
Whitehorse, Yukon Y1A 1X3
T: 867.667.8468
F: 867.667.8469
1-800-661-0408 ext. 8468
www.ombudsman.yk.ca

DELIVERED BY SFT

January 15, 2020

Stephen Samis
Deputy Minister
Department of Health and Social Services
Suite 201, 1 Hospital Road
Whitehorse, Yukon Y1A 3H7

Dear Mr. Samis,

**Re: *Health Information Privacy and Management Act (HIPMA)*
Our file Nos. HIP18-19i and HIP18-24i**

On November 20, 2019, I received an updated version of 'Analysis of Health and Social Services Access to Information Program relating to Requests for Personal Health Information'. Having reviewed the document, I am now satisfied that recommendations 7 and 8 in Consideration Report HIP18-24i have been implemented. I will inform the Complainant of this fact.

Please note that the appeal period for these considerations has now passed. I have not heard from either complainant about whether they have exercised their right of appeal.

Note that I am restricted from publishing a consideration report until the appeal period in relation to a consideration has passed. As the appeal periods for these considerations expired in December 2019, I will now publish the consideration reports on my website. I will also publish the correspondence between the Department of Health and Social Services and my office in respect of the recommendations as is consistent with past practice. My obligations in respect of publication are set out in sections 110 to 112 of HIPMA.

As these matters are concluded, I will now close these files.

Kind regards,



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

Cc. HIP18-24i Complainant