

February 18, 2022

Our File #:0038

The Registrar
Office of the Information and Privacy
Commissioner
3162 Third Avenue, Main Floor
Whitehorse Yukon Y1A 1G3

Telefax: 867-667-8469

Dear Mr. Pedlar,

Re: CONSIDERATION REPORT - RESPONSE
File HIP20-03i

I refer to the above matter and confirm that I have instructions from my client to reply to the Consideration Report and Recommendations made by the Privacy Commissioner.

Before dealing with the three recommendations, I have instructions to address the findings of the Privacy Commissioner on which the recommendations are based.

I will first deal with the background facts supporting the submissions relating to each finding.

It is not clear whether the underlying reality relating to the patient records, namely that the records are archived records and not active practice records, was considered by the Privacy Commissioner in the Consideration Report. It is my respectful opinion that HIPMA does not contain any specific guidelines how to deal with archived records as such. It can clearly not be dealt with as “active records” requiring my client to make any public statement as far as information practices are concerned at this stage. His Whitehorse clinic is now closed for a period of 3 years. It is not necessary to make a public notice about his information practices because he is not providing any psychiatric

services in an active practice in the Yukon anymore. There is no need for the public to know because no member of the public can access any psychiatric services by my client who has no active practice in Yukon.

It is further clear from the evidence, although not provided in written form (it does however exist in written form), that my client's office manager was his agent pursuant to HIPMA and its Regulations when my client was still operating an active clinic in Whitehorse, and she continues to be his agent assisting him with managing the archived records. He had and still has a written agreement with her as the only authorized person employed by him who had access to his former patients' records. She obtained personal knowledge of each former patient working as my client's office manager for 10 plus years while being the only authorized employee dealing with patient records and she is continuously bound by the agreement to keep her knowledge and medical information of former patients confidential. She currently has no access to the archived patient records in Whitehorse.

My client, not being present in Whitehorse, could not access the written confidentiality agreement with his office manager to attach a copy as an exhibit to his affidavit. The fact that he could not access it, does not mean that it does not exist.

When my client's office manager retired and moved to Creston, my client had to keep the key to the storage facility, where the archived records are located, accessible to a "trustworthy person" who could only access the records on his request if it was necessary to transfer any patient records on written request from a former patient to a current service provider as new custodian. This "trustworthy person" was authorized by my client as his agent to act on his behalf under such circumstances. The "trustworthy person" never accessed the records whereas the need for that never arose.

My instructions are that the storage facility is a secure facility with the following security features:

- A fob is required to enter the facility.

- A fob is required to use the elevator.
- Video surveillance.
- Metal doors to storage units equipped with two locks.
- Climate controlled for the proper preservation of the records.

My client is not residing in Canada, and this is the only way he could deal with the secure storage of the medical records and at the same time make provision for transfer of records in a safe and secure manner. There was at no time any security breach.

My instructions are that no transfer of records took place after his clinic's closure. He did not receive any request from former patients for transfer of records to other service providers pursuant to HIPMA. There was therefore no need for the "trustworthy person" to access the records at all.

Finding of a Security Breach

One would expect that the Privacy Commissioner would have contacted my client for clarification and further information before making such a serious finding as far as the relevant records are concerned.

No security breach relating to the archived records occurred. Section 19 of HIPMA and section 14 of the Regulations clearly apply to patient records in an active practice. Finding a security breach based on the requirements for an active practice is in my respectful opinion not correct. The two individuals who had access were fully authorized by my client pursuant to HIPMA.

My client is the custodian of archived health information of his former patients. He is the only person who has currently access to the archived records. As previously said, 75% of his former patients do not want their health information to be transferred to another service provider. My client will remain the custodian of the archived records to keep it accessible to former patients pursuant to the requirements for record management of the Yukon Medical Council.

Finding about not making a Public Statement pursuant to section 21 of HIPMA on closing of medical practice

Section 21 of HIPMA does not require a public statement to be posted on closing of a medical practice. The public statement should be available to the public in an active medical practice.

My client informed all his former patients personally, as well as their family physicians, of the closure of his medical practice.

My client is a custodian of archived records, not having an active medical practice in Whitehorse, Yukon anymore for 3 years.

Finding about Information Agreement with Plexia

The patient records with Plexia are limited to laboratory results, billing and appointment information. The Plexia records are also in the nature of archived records. Plexia never had any sensitive medical information about any of my client's former patients. That was clearly explained in my client's affidavit and no further submission about this issue was warranted.

My client has entered into an agreement with Plexia to provide him with the patient information in their possession on an encrypted hard drive, whereafter my client will be the custodian of those records to be accessed by him only.

Recommendations

My instructions are that in the light of the foregoing, my client will not follow the recommendations made by the Privacy Commissioner.

Kindly take note that I have broad instructions for this response but if this matter is taken on appeal my client will answer in full to every detail of the Consideration Report.

My instructions are to reiterate that my client cannot follow recommendations based on findings that:

- Are not clear whether the archived status of the records was considered.
- Assume a security breach where there was none and without seeking clarification on pertinent points.
- Are the basis for recommendations requiring further information which will make no difference to the secure status of the archived records.
- Are based on an interpretation of the relevant sections of HIPMA and Regulations that my client with respect disagrees with.

My instructions are that my client has the utmost respect for the security and confidentiality of his former patients' personal health information and that he took the utmost care to take all steps to keep it that way.

Yours truly,

Roothman & Roothman Lawyers



Susan Roothman