



Yukon  
Information  
and Privacy  
Commissioner

## **CONSIDERATION REPORT**

**File HIP20-03i**

**Pursuant to subsection 103 (1) of the  
*Health Information Privacy and Management Act***

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

**Dr. Armando Heredia**

**January 21, 2022**

## Summary

A person made a complaint to the Information and Privacy Commissioner (IPC) alleging that a breach of the *Health Information Privacy and Management Act* (HIPMA) had occurred because a physician, Dr. Armando Heredia, left the Yukon without securing a successor custodian for the patient records within his custody or control, the location of which are unknown, and failed to notify anyone of their subsequent location.

The IPC identified four issues for investigation concerning the transfer provisions of HIPMA, the security obligations of HIPMA, the duty to make a statement of a custodian's information practices available to the public, and the duty to enter into an information manager agreement with an information manager.

The IPC found that, while the custodian retained custody or control of the records after closing his medical practice, the custodian had no obligation to transfer his patient's records on closing his medical practice. She further found that the custodian did not meet his obligations to properly secure his patients' records that are stored in a storage unit, that he failed to make available a written statement about his information practices available to the public as required, and that he failed to enter into an information agreement with Plexia, his information manager, for his electronic patient records.

To remedy the non-compliance with HIPMA, the IPC recommended that the custodian provide her with the custodian's current contact information, the location of the records, the identity of any persons who had or has access to the records, and documents demonstrating his compliance with HIPMA. She also recommended that the custodian take immediate steps to address the breaches of security that she identified as having occurred or are occurring because of the custodian failing to meet his obligations to establish agency relationships with those persons accessing the records contrary to HIPMA's provisions and to provide a report containing the custodian's assessment about whether any of his patients are at risk of significant harm because of the security breaches. She gave the custodian 60 days to provide her with the documentation identified in her recommendations.

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## Statutes Cited

*Health Information Privacy and Management Act*, S.Y. 2013, c. 16, as amended.

*Health Information General Regulation*, Yukon O.I.C. 2016/159, as amended.

*Public Interest of Disclosure of Wrongdoing Act*, S.Y. 2014, c. 19, as amended.

## Explanatory Note

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

### I COMPLAINT

[1] On October 22, 2020, the Registrar of Medical Practitioners (Complainant) made a complaint to the Office of the Information and Privacy Commissioner (IPC) alleging that a breach of HIPMA may have occurred because a physician, Dr. Armando Heredia (Custodian), left the Yukon without securing a successor custodian for his patient records within his custody or control (Records), the location of which are unknown, and failed to notify anyone of their subsequent location (Complaint).<sup>1</sup>

### II CONSIDERATION PROCESS

[2] The IPC assigned the Complaint to an investigator for settlement purposes. A settlement could not be achieved. On being notified of this result on March 15, 2021, the IPC considered if any of the circumstances in subsection 101 (1) applied and determined that they did not apply.<sup>2</sup>

[3] On March 18, 2021, the IPC delivered a 'Notice of Consideration' (NOC) to the Complainant and Custodian. The IPC amended that NOC and subsequently delivered it to the same recipients on March 25, 2021.

[4] Also on March 18, 2021, the IPC issued a 'Notice to Produce Records' (NTPR) to the Custodian and his legal counsel (Counsel) to obtain the records relevant to this consideration (Consideration). The NTPR required the Custodian to produce the following records on or before April 2, 2021.

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<sup>1</sup> Please see my comments at the end of this Consideration under 'Postscript'.

<sup>2</sup> Subsection 101 (1) sets out the conditions under which the IPC may decline to consider a complaint.

1. *All correspondence related to the transfer of all the patient records, paper and electronic, that were created or that otherwise exist for patients of [medical practice] (Patient Records) including but not limited to:*
  - a. *any information manager agreements or other agreements entered into with any person associated with the transfer;*
  - b. *the agreement entered into with the successor custodian to relinquish custody and control of the records to the successor custodian; and*
  - c. *a copy of any letters sent to patients notifying them of the transfer.*
2. *All correspondence related to the storage and/or management of the Patient Records that are in your custody or control, including but not limited to:*
  - a. *storage agreements; and*
  - b. *information manager agreements.*
3. *A copy of your written statement of your information practices. Include with this document where it was accessible to the public.*
4. *Any agreements entered into with Plexia concerning the Patient Records that are stored electronically therein and any correspondence with Plexia about the transfer or management of the electronic Patient Records.*

[5] On April 6, 2021, the IPC received a letter from the Custodian's Counsel which requested that, since the matter before the IPC had already been dealt with by the Yukon Medical Council (YMC), the IPC should cease to consider the Complaint.

[6] On April 12, 2021, the IPC replied to the Counsel by letter that she had considered the request but, based on the facts in the amended NOC, decided to continue with her Consideration. In her view, the issues set out therein had not been resolved and, as such, remained live.

[7] On April 26, 2021, the IPC received the Custodian's affidavit from the Counsel on the issues for Consideration identified in the amended NOC.

[8] On April 29, 2021, the IPC received the Custodian's submission from the Counsel on the issues for Consideration identified in the amended NOC.

[9] On April 30, 2021, the IPC provided the above affidavit/submission to the Complainant.

[10] On May 14, 2021, the IPC received an affidavit from the Complainant.

[11] On June 9, 2021, the IPC received a statutory declaration from the Complainant.<sup>3</sup>

[12] On June 17, 2021, the IPC received the Custodian's reply submissions from the Counsel.

### III JURISDICTION

[13] The definition of 'custodian' includes a person who is (c) a health care provider. The definition of 'health care provider' includes (a) a medical practitioner. The Custodian in this Consideration was registered as a medical practitioner in the Yukon prior to closing his medical practice, which occurred on or around October 1, 2019. As a registered medical practitioner in the Yukon, he is captured as a custodian under HIPMA. Sometime following the closure of his medical practice, he was struck from the register as a medical practitioner, which occurred in or around November of 2019. Although being so struck, he maintained custody or control of the personal health information of his patients (Records). He is, therefore, deemed by subsection 23 (1) to be a custodian of the personal health information. The Custodian has acknowledged that he is a custodian for the purposes of this Consideration.

### IV ISSUES

[14] The issues for this Consideration, as identified in the amended NOC, are as follows.

- 1) After closing his medical practice in the Yukon:
  - (a) Did the Custodian transfer the Records in accordance with subsection 23 (1) and section 60?
  - (b) Did the Custodian fulfil his obligation to protect the Records in accordance with section 19, as well as section 14 of the *Health Information General Regulation* (Regulation)<sup>4</sup>?
  - (c) Did the Custodian fulfil his obligation to make available a public written statement in accordance with section 21?
- 2) Did the Custodian fulfil his obligation to enter into an information agreement with Plexia in accordance with subsection 51 (1), as well as section 21 of the Regulation?

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<sup>3</sup> The Complainant's affidavit and statutory declaration contained identical substantive information.

<sup>4</sup> O.I.C. 2016/159, as amended.

## V BURDEN OF PROOF

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

1) *In the consideration of a complaint under this Act*

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.*

[16] Given that the Complaint is about the Custodian's alleged failure to transfer the Records, protect the Records, provide patients with a statement of his information practices concerning their personal health information within the Records, and enter into an appropriate information manager agreement with an information manager, the Custodian has the burden of proving that he met these obligations in accordance with HIPMA.

## VI RECORDS AT ISSUE

[17] As the issues for inquiry are not about access to personal health information, there are no records at issue in this Consideration.

## VII SUBMISSIONS

[18] The submissions of the parties will be set out as they are relevant to each issue.

## VIII DISCUSSION OF THE ISSUES

### Issue 1 (a)

**After closing his medical practice in the Yukon, did the Custodian transfer the Records in accordance with subsection 23 (1) and section 60?**

#### Custodian's Submission for Issue 1 (a)

[19] The Custodian asserted the following in his affidavit.<sup>5</sup>

31. *"I identified a retired registered nurse as a willing custodian of my patient records but was informed by the IPC office that the transfer should be done to [an identified*

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<sup>5</sup> Custodian's affidavit, at 7.

medical practice (the Other Medical Practice)]<sup>6</sup> because several of my previous patients are now patients at this [medical] clinic.”<sup>7</sup>

33. [The Other Medical Practice] was unaware of the pending transfer as is clear from email correspondence between their office manager and [HSS] on February 23 [through] March 8, 2021.<sup>8</sup>

34. I replied to the above [email] correspondence setting out my preferred way to deal with the transfer of records [in a letter from the Custodian to the Other Medical Practice, marked as Exhibit “I”].

36.1 A true copy of the correspondence between the office manager of [the Other Medical Practice] [and HSS], dated February 23 – March 8, 2021, marked as Exhibit “H”.<sup>9</sup>

38.1. I have no documents to disclose because as requested in [NTPR] 1. a, b and c no transfer of patient records took place so far.<sup>10</sup>

[20] The Custodian also asserted the following in his submission.<sup>11</sup>

2.4 Although the Complainant referred in an email that she identified a willing [medical] practice for the [Custodian] to consider, she never communicated this to the [Custodian].<sup>12</sup>

3.5 At the time of the [Custodian’s] forced [medical practice] closure the newly [HSS] appointed [psychiatrists] did not accept any outpatient referrals.

3.6 There was no successor custodian available to whom [the Custodian] could transfer any records at that time.<sup>13</sup>

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<sup>6</sup> I have not named this ‘other medical practice’ for reasons of confidentiality.

<sup>7</sup> Please see my comments at the end of this Consideration under ‘Postscript’.

<sup>8</sup> The March 8 email sent by the Other Medical Practice does not indicate the identity of the recipient.

<sup>9</sup> *Ibid.* [March 8 email recipient identity]

<sup>10</sup> This part of the NTPR required the Custodian to produce all correspondence related to the Records transfer.

<sup>11</sup> Custodian’s submission, at 2-4.

<sup>12</sup> This assertion is also contained in the Custodian’s affidavit in statement 23, at 5. The Custodian stated “Just before the [Complainant] took the necessary steps for the complaint before the YMC, she advised the YMC that a willing practice was identified for the transfer of my patient records in an email dated December 16, 2019. She never communicated to me any information of the ‘willing practice for transfer of my patient records’ that she identified.” The Custodian then asserted in statement 24 of his affidavit that “nothing happened with the transfer” because the Complainant took a ‘medical practice’ closure complaint to the YMC.

<sup>13</sup> As previously mentioned, the Custodian stated in statement 31 of his affidavit, at 6, that “I identified a retired registered nurse as a willing custodian of my patient records but was informed by the IPC office that the transfer should be done to [the Other Medical Practice] because several of my previous patients are now patients at this [Other Medical Practice] clinic.” [Please see my comments at the end of this Consideration under ‘Postscript’.]



5. *HIPMA does not mandate the [Custodian] to transfer [his] patient records to another custodian, not in section 23 (1), nor in section 60.*<sup>14</sup>

Complainant's Submission for Issue 1 (a)

[21] The Complainant made the following submission.<sup>15</sup>

23. *On 17 December 2019, I sent an email to [the Custodian] advising ... that [the Other Medical Practice] ... is willing to take custody of [the Custodian's] patient records. I attach a copy of that email to this [statutory declaration] as **Exhibit 4**.* [Bolding in the original]

Custodian's Reply Submission for Issue 1 (a)

[22] The Custodian asserted the following in his reply submission.<sup>16</sup>

9. *The veracity of the information, about the willingness of the [Other Medical Practice] to take custody of the [Custodian's] patient records conveyed to the [Custodian] as stated in paragraphs 22 and 24 of the Complainant's statutory declaration, is questionable considering what transpired when the Custodian tried to set in motion the transfer of records to the [Other Medical Practice] (see paragraphs 32 to 36 of the [Custodian's] affidavit as well as the referenced exhibits).* [Round brackets in the original text]

**Analysis**

[23] Subsection 23 (1) states as follows.

*The duties imposed under this Act on a custodian with respect to personal health information, and records containing personal health information, in the custody or control of the custodian apply to the custodian until the custodian transfers custody and control of the personal health information or the records to a successor of the custodian in accordance with section 60 or to a prescribed person in accordance with the prescribed requirements, if any.*<sup>17</sup>

[24] Section 60 states as follows.

1) *In this section*

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<sup>14</sup> This assertion is substantively repeated in the Custodian's submission in statement 16, at 5.

<sup>15</sup> Complainant's statutory declaration, at 4.

<sup>16</sup> Custodian's reply submission, at 2.

<sup>17</sup> There is no prescribed person and there are no prescribed requirements.

*'potential successor' of a particular custodian means a person who*

- b) contemplates entering into an agreement with the particular custodian under which the particular custodian will relinquish to the person the custody and control of personal health information, and*
- c) is a custodian or can reasonably be expected, if it enters into the agreement described in paragraph (a), to become a custodian;*

*'successor' of a particular custodian means another custodian to whom the particular custodian has, under an agreement between them, relinquished the custody and control of personal health information.*

[Emphasis mine]

- 2) A custodian may, without an individual's consent, disclose the individual's personal health information to a potential successor of the custodian for the purpose of allowing the potential successor to assess and evaluate the operations of the custodian, if the potential successor first enters into an agreement with the custodian to keep the personal health information confidential and secure and not to retain it longer than is necessary for the purpose of the assessment or evaluation.*
- 3) A custodian may transfer a record of an individual's personal health information to the custodian's successor unless the individual expressly instructs the custodian not to make the transfer.*
- 4) If, under subsection (3), a custodian transfers a record of an individual's personal health information to the custodian's successor and an instruction of the individual prevents the custodian from transferring all the individual's personal health information that the custodian has reasonable grounds to believe is necessary for the provision of health care to the individual, the custodian must notify the successor of that fact.*
- 5) A custodian must make reasonable efforts to give notice to an individual before transferring a record of the individual's personal health information to the custodian's successor or, if that is not reasonably possible, as soon as possible after transferring the record.*

[25] Subsection 23 (1) is clear in that all duties imposed on the Custodian by HIPMA in respect of the Records that are within the Custodian's custody or control apply with one exception. If the Custodian were to transfer the Records to a successor in accordance with section 60, then such duties would end.

[26] The successor requirements found in subsection 23 (1) and section 60 are in HIPMA to protect a patient's personal health information (PHI) when a custodian, such as a medical practitioner,<sup>18</sup> closes their practice. They are designed to ensure, amongst other things, that where this event occurs, the transfer of PHI to a successor custodian, if such transfer occurs, enables the patient to receive continuity of care. These provisions are also designed to ensure the protection of the PHI and to provide certainty to patients concerning the secure location of their PHI post-closure, as well as ongoing access to it.

[27] There is, however, no provision in HIPMA that obligates a custodian to transfer their patient records to a successor custodian either within a reasonable period after practice closure or at any other time prior to destroying the records in accordance with their records retention policy.

[28] There is also no provision in HIPMA that requires the Minister responsible for HIPMA (HSS Minister), following a practice closure and a reasonable elapsed time thereafter, to exercise their authority to have a custodian's records transferred to a successor custodian. The HSS Minister's authority under subsection 23 (2) is only triggered when a custodian fails to carry out their duties under HIPMA. So long as a custodian adheres to their obligations under HIPMA in respect of any records containing PHI that are retained following the closure of a medical practice, the Minister has no authority to facilitate the transfer of the records.

[29] It is a fact that the Custodian closed his medical practice effective October 1, 2019. The letter advising his patients of this closure and date is contained in Exhibit D of the Custodian's affidavit. It also a fact that the Custodian has not, as of the date of writing this report (Consideration Report), transferred the Records.

[30] According to the Custodian, he did not transfer the Records because there was no available successor custodian to whom the Custodian could transfer the Records at the time of the closure and, moreover, the Other medical specialists newly appointed by HSS located at the Other Medical Practice<sup>19</sup> were not accepting outpatient referrals. There is no contradicting evidence on these points.

[31] There is, however, evidence that the Custodian found a retired registered nurse willing to act as a custodian for the Records, should the Custodian have chosen to transfer them. That said, the Custodian would not have any authority to transfer the Records to this nurse if the

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<sup>18</sup> In this Consideration, the Custodian is a 'health care provider' and more particularly a 'medical practitioner' in accordance with the definitions of those terms in subsection 2 (1).

<sup>19</sup> I did not test the veracity of this statement and have no knowledge of the relationship, if any, between HSS and the Other Medical Practice specialists.

nurse were no longer licenced to practice in the Yukon. Without a current licence, the retired nurse would not qualify as a custodian under HIPMA.

[32] There is also evidence that the Complainant found a 'willing' successor custodian to receive the Records, noting that she was under no obligation in HIPMA to help the Custodian in this respect. The Custodian asserted, however, that the Complainant did not subsequently identify this entity to the Custodian. The evidence is otherwise. The Complainant submitted as her Exhibit 4 an email dated December 17, 2019, that identified the Other Medical Practice and, moreover, that this potential successor custodian was willing to take custody of the Custodian's Records, if the Custodian so chose to transfer them.

[33] After receiving the above email, the Custodian certainly knew the identity of the Other Medical Practice because the Custodian attempted to 'set in motion' the transfer of his Records to the Other Medical Practice, an attempt that included the subsequent 'miscommunication' issues identified in the February 23 to March 8, 2021, email exchange marked as Exhibit H.

[34] It appears, therefore, that the Custodian was interested, at the time of his medical practice closure, in transferring his Records to a successor custodian. In fact, he said as much to the Complainant in a letter to her dated November 28, 2019, that was sent in an email message to her on November 29, 2019, wherein he stated "I am aware of my responsibility to my patients as it pertains to their medical records. I will plan to transfer records in accordance with HIPMA standards with appropriate requests in writing only."<sup>20</sup>

[35] It also appears that the Custodian became aware of what he considered to be two potential successor custodians to that end: a retired registered nurse<sup>21</sup> and the Other Medical Practice. It is uncertain, however, whether the Other Medical Practice was a willing transferee, based on the Custodian's Exhibit H.

[36] That said, the Custodian did not transfer the Records to a successor custodian at any material time in respect of this Consideration,<sup>22</sup> asserting that neither subsection 23 (1) nor section 60 requires the Custodian to transfer the Records to another custodian. I agree. Moreover, there is no other provision in HIPMA to the same end.

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<sup>20</sup> Custodian's affidavit, Appendix F.

<sup>21</sup> See comment above at para 31 of this Consideration Report.

<sup>22</sup> This is based on the evidence I have pursuant to the Complaint.

**Finding – Issue 1 (a)**

[37] For the reasons above noted, I find, on the balance of probabilities, that the Custodian did not violate HIPMA for not transferring the Records to a successor custodian after closing his medical practice because he was not legally obligated to do so.

**Issue 1 (b)**

**After closing his medical practice in the Yukon, did the Custodian fulfil his obligations to protect the Records in accordance with section 19, as well as section 14 of the Regulation?**

**Custodian’s Submission for Issue 1 (b)**

[38] The Custodian asserted the following in his affidavit.<sup>23</sup>

15. *I took steps to secure my patients’ medical information in secure and safe storage and informed [my patients] as such.*<sup>24</sup>

16. *Although I envisioned to reopen my clinic at another location in Whitehorse, it became financially impossible, and I decided to return to the United States to find work.. I had planned to go back to Whitehorse as soon as I was financially viable to deal with patient records amongst others but could not do so since the border closure between USA and Canada because of the COVID-19 pandemic.*<sup>25</sup>

18. *The [Complainant] contacted me on November 20, 2019, by email, we also had a telephone discussion and I wrote her an email dated November 28, 2019, explaining my clinic closure issues and the steps taken to secure patient medical records and access. I clearly stated that patients can direct requests for access or transfer of their records to [his medical practice’s] address. I arranged a P.O. Box connected with that address and all mail to that address was transferred to the mailbox which mailbox was monitored by my previous office manager.*<sup>26</sup>

22. *I did what I thought was best to secure patient information and future care...*<sup>27</sup>

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<sup>23</sup> Custodian’s affidavit, at 6-7.

<sup>24</sup> *Ibid.*, at 3.

<sup>25</sup> *Ibid.*, at 4.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

37. *I confirm that at all relevant times in the past and currently continuing that my patients' medical records were and currently are safe, secure and that no breaches occurred.*<sup>28</sup>

38.2. *I have no documents to disclose as requested in [NTPR] 2. a and b because the patient records are under my control and the storage is done under a standard storage unit rental agreement with no disclosure of what is stored to the storage company.*<sup>29</sup> *Only my former office manager had access to the storage facility unit. Currently the key to the unit is in secure possession of a trustworthy person who can access the unit only on my request.*

39. *I confirm that the privacy and security of my former patients' medical information continue to be secure in my possession as custodian pursuant to HIPMA.*

[39] The information that follows that is relevant to this issue is contained in the Exhibits attached to the Custodian's affidavit.

[40] Exhibit C includes a letter dated September 16, 2019, sent by the Custodian to referring physicians. In the letter, the Custodian states that "[a]ll mail will be forwarded and the telephone line [phone number] will be open for messages during [the three months the clinic would be closed]." The telephone number provided was for the Custodian's medical practice that was in Whitehorse.

[41] Exhibit D is an undated letter sent by the Custodian to his patients wherein he states that he will be closing his medical practice on October 1, 2019, and that "[a]ll patient files have been put into secure storage."

[42] Exhibit E is a letter within an email that was sent to the Complainant. The letter is from the Custodian to the Complainant. In the letter, the Custodian states:

*I maintained the [medical practice] address and phone number during my absence. All messages for [my medical practice] were forwarded until November 13, 2019 ... We only received two calls requesting files. All other messages were for the referred care patients trying to contact their physicians ... The only other message received was a text message from a patient or her spouse concerning medical records. It appears it was not the patient who texted, and I have tried to contact the patient to verify identity and have not received a call back. I will continue to follow up.*

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<sup>28</sup> *Ibid.*, at 8.

<sup>29</sup> This part of the NTPR required the Custodian to produce all correspondence related to the storage and/or management of the Records in the Custodian's custody or control.

*...Given [] unforeseen circumstances I arranged for storage of the records in a secured, climate-controlled storage facility. The facility has limited access and locked storage. The facility is in the Yukon.*

*...I am aware of my responsibility as it pertains to [my patients'] medical records. I will plan to transfer the records in accordance with HIPMA standards with appropriate requests in writing only. Requests can be sent to the old [medical practice] address and records will be sent to the family physician or specialist as requested. I will not respond to phone requests as I cannot verify identity. I would request that my personal cell phone number not be provided to patients. I am trying to get the [medical practice] phone number back up. If this is not possible, I will establish a new number as quickly as I have the funds to do so. I hope to have it up early next week. Then patients will have phone availability again.*

[43] Exhibit G is a letter from the Custodian to his patients dated January 31, 2021. In the letter he states "...I have been directed to provide your full Medical Records from my office to the offices of the [Other Medical Practice]. This will occur on March 20, 2021. Unless instructed otherwise the transfer will take place. If you choose to refuse your refusal may be emailed via email at [email address belonging to Custodian<sup>30</sup>] or mailed to [address], Creston B.C. [postal code].

[44] Exhibit I is an undated document from the Custodian to a representative of the Other Medical Practice and a representative of HSS wherein he states the following.

*I have sent letters to all of my patients advising them that I was instructed by the [IPC] office to send my records to [the Other Medical Practice]. The patients were also given the option to refuse to have their records sent. The records would then remain archived. Approximately 75% of my patients have refused to have their records moved. I WILL RESPECT THEIR WISHES. [Emphasis is original text]*

*I will not be sending any medical records to [the Other Medical Practice]. If [the Other Medical Practice] have patients that were at [the Custodian's medical practice] and wish their records sent to [the Other Medical Practice] please supply a list of those patients with their written request for transfer. I will then endeavor to send their medical records as soon as possible.*

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<sup>30</sup> This same email address is used by the Custodian to send documents relevant to the Consideration to his Counsel. See Exhibit H. Given this, I assume that this email is being used by the Custodian in relation to his prior medical practice given that its name appears in the email address.

[45] The Custodian asserted the following in his submission.<sup>31</sup>

2.6 *The [Custodian] had to return to the USA to find work as a [medical practitioner]...*

3. *The pertinent facts about how the [Custodian] dealt with patient records...are summarized as follows.*

3.1 *The [Custodian] sent letters to all [his] patients advising of the [his medical practice] closure, advising further that all patient files are stored securely...*

3.3 *The [Custodian] in his November 28, 2019 email to the Complainant stated that requests for transfer of medical records by patients can be sent to the address of [medical practice]. He arranged for the forwarding of such mail to a mailbox that was regularly monitored by his office manager.*

3.4 *The [Custodian] informed the Complainant in his email of November 28, 2019, that: "I am willing to work with any recommendations to help in the transfer of patient information."*

3.7 *The patient records are in safe and secure storage and no breaches occurred.*

3.8 *All patients have current contact particulars to direct any queries to, i.e., the [Custodian's] secure email address and his previous office manager's mailing address.*

7. *[The Custodian] took reasonable steps under the circumstances of [his] forced [medical practice] closure to safeguard [his] patients' medical records and to put a plan in place to support continuity of care of his patients.*

8. *[The Custodian] will remain the custodian of [his] patient records until such time when a patient makes a request in writing for the transfer of his/her record to another physician.*

17. *The [Custodian] complied and still complies to protect the patient records in [his] possession of which [he is] the legitimate custodian pursuant to HIPMA and the Regulation.*

18. *The [Custodian] sent letters to all his patients about secure storage of their records... All patients have up to date contact information for the [Custodian].*

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<sup>31</sup> Custodian's submission, at 2-5.



20. *The [Custodian] is the only person managing the patient records with the assistance of his previous office manager. The assistance of the office manager is limited to administrative tasks and does not include access to the patient records.*

Complainant's Reply for Issue 1 (b)

[46] The Complainant's reply to the Custodian's submission was in the form of a statutory declaration. The only information contained in the statutory declaration that is relevant to this issue is that "the [YMC] and [HSS] were both getting calls from patients seeking guidance on what to do, and how to access their records."<sup>32</sup>

[47] The Complainant attached four Exhibits to her statutory declaration. Only one has information that is relevant to this issue.

[48] Exhibit 4 is an email from the Complainant to an email address that I assume belongs to the Custodian. In the Custodian's Exhibit E, there is a response to this email that contains the same name as appears in this email address although the first name differs from that of the Custodian's. However, the last name is the same. In the Complainant's email, dated December 17, 2019, she states, amongst other things, the following.

*Dear [Custodian],*

*I have been directed by the [YMC] (surrogate committee) to work with [HSS] to find a solution to the ongoing problem of your patient records, in particular patient access and /or transfer of these records in order to support continuity of care. You continue to have responsibility for those patient records, and have confirmed in the past that they are securely stored. That said, we do not see a means for patients to be able to request their records from you – the office is closed, the phone line still is not operational, and the email is not being returned.*

*...I'm sure you are aware that there is urgency regarding continuity of patient care, and for this reason we strongly recommend you take action to enable access to records.*

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<sup>32</sup> Complainant's statutory declaration, at 11.

Custodian's Reply Submission for Issue 1 (b)

[49] The Custodian reasserted the following in his reply submission.<sup>33</sup>

4. *The [Custodian] again confirms the steps [he] took as set out in [his] affidavit filed in response to the complaint and emphasizes the fact that the patient records in [his] custody are safe and securely stored...*

[50] What I can ascertain from this evidence, as it relates to this issue, is the following.

- a. Sometime prior to leaving the Yukon to find work in the United States of America (USA), the Custodian stored the Records in a storage unit that is located somewhere in Whitehorse.
- b. Prior to closing his medical practice in October of 2019, he sent a letter to referring physicians informing them that while his medical practice is closed, all his medical practice's mail will be forwarded, and his office telephone number will be open for messages. His medical practice was located in Whitehorse, Yukon.
- c. He also sent a letter to his patients informing them that his practice was closing and that the Records were put into what he referred to as 'secure storage'. There was no contact information provided to his patients in the body of the letter. His medical practice address and phone number appeared on the letterhead for his medical practice that was used for the letter.
- d. He had planned to return to Whitehorse to deal with the Records but could not do so due to the [then] closure of the borders between Canada and the USA resulting from the COVID-19 pandemic.
- e. His asserted that:
  - i. the storage unit that he stored the Records in is safe and secure and that no breaches of the Records have occurred;
  - ii. he is in control of the Records;
  - iii. the storage is done under a standard storage unit rental agreement and that the storage company does not know that the Records are stored in the unit;
  - iv. his former office manager had access to the storage unit;

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<sup>33</sup> Custodian's reply submission, at 2.

- v. a 'trustworthy person' now has the key and can access the unit and only accesses the unit on his request;
  - vi. all his patients have his current email address and the mailing address of his former office manager to direct queries about their Records;
  - vii. he took reasonable steps in the circumstances to safeguard the Records and put in place a plan to support continuity of care of his patients;
  - viii. he will transfer the Records of his patients on their request only;
  - ix. he is in compliance with HIPMA and the Regulation for the protection of the Records that are in his custody or control;
  - x. he is the only person managing the Records with the assistance of his former office manager; and
  - xi. the 'administrative tasks' performed by the former office manager does not include access to the Records.
- f. After being contacted by the Complainant in November of 2019 about his practice and management of the Records, he informed her that:
- i. he had maintained his medical practice address and phone number since leaving the Yukon;
  - ii. all messages were forwarded until November 13, 2019, when the phone line, unbeknownst to him, went out of service;
  - iii. he received only two calls from his patients requesting their Records;
  - iv. he received other messages that were from his referred care patients who were trying to contact their physicians;
  - v. he is aware of his obligations under HIPMA regarding the Records;
  - vi. he plans to transfer the Records in accordance with HIPMA with appropriate requests in writing only; and
  - vii. requests for his patients to have their Records transferred can be sent to his former medical practice address and the Records will be sent to the medical practitioner identified by the patient.

- g. The Complainant emailed the Custodian in December of 2019 wherein she identified that she was seeking a solution, on behalf of YMC, for patients to access their Records and have them transferred. In the email she indicated that patients had no means to contact the Custodian because the Custodian's medical practice was closed, the phone line was not operational, and emails were not being returned. The Complainant asserted that the YMC and HSS were both receiving calls from patients seeking information about their Records, including about how to access them.
- h. In January of 2021, the Custodian informed his patients by letter that he would transfer their Records to the Other Medical Practice in Whitehorse unless a patient refused the transfer. In the letter, he provided an email address that contained the name of his prior medical practice. He also provided a mailing address for his patients to mail any refusal. The mailing address was in Creston, B.C. The letter sent was not on his former medical practice's letterhead.
- i. Sometime following the January 2021 letter to his patients, he wrote to a representative of the Other Medical Practice and a representative of HSS and informed them of the following:
  - i. approximately 75% of his patients refused the transfer and that he would not transfer these Records to them;
  - ii. if the Other Medical Practice had patients that were his, then the Other Medical Practice was to supply a list of patients with each patient's written request for transfer; and
  - iii. on receipt of the documentation requested, he would endeavor to send their records to the Other Medical Practice as soon as possible.
- j. There was no contact information provided by the Custodian in this document and it was not sent on his former medical practice's letterhead.

**Analysis**

[51] This issue relates to the Records that are stored in the storage unit.

[52] HIPMA sets out a rigorous governance structure to, amongst other things, protect both the privacy of individuals in respect of their PHI and the PHI itself.<sup>34</sup> It is common ground that the risks to an individual's PHI are significant if not properly protected because PHI goes to the core of an individual's physiological and psychological identity.

[53] As such, the rules regulating the protection of PHI, including access, are designed to protect its confidentiality, privacy, integrity and security while facilitating the effective provision of health care.<sup>35</sup>

[54] Section 19 establishes the rules that a custodian must comply with to protect PHI in their custody or control. It states as follows.

- 1) *A custodian must protect personal health information by applying information practices that include administrative policies and technical and physical safeguards that ensure the confidentiality, security, and integrity of the personal health information in its custody or control.*
- 2) *The information practices referred to in subsection (1) must be based on the standards that are prescribed for this purpose.*
- 3) *Without limiting subsection (1), a custodian must, in relation to personal health information in its custody or control*
  - a) *implement measures that protect the confidentiality, privacy, integrity and security of personal health information and that prevent its unauthorized modification;*
  - b) *implement controls that limit the individuals who may use personal health information to those specifically authorized by the custodian to do so;*
  - c) *implement controls to ensure that personal health information cannot be used unless*
    - i) *the identity of the individual seeking to use the personal health information is verified as an individual the custodian has authorized to use it, and*
    - ii) *the proposed use is authorized under this Act;*
  - d) *take all reasonable steps to prevent a security breach;*

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<sup>34</sup> Subsection 1 (a) 'Purposes'.

<sup>35</sup> Subsection 1 (b) 'Purposes'.

- e) *provide for the secure storage, disposal and destruction of records to minimize the risk of unauthorized access to, or disclosure of, personal health information;*
- f) *develop policies which provide that personal health information is retained in accordance with the prescribed requirements, if any;*
- g) *establish a procedure for receiving and responding to complaints regarding its information practices; and*
- h) *meet the prescribed requirements, if any.*

[55] Subsection 14 (1) of the Regulation imposes the following additional requirements on a custodian as a measure to protect PHI in the custodian's custody or control.

- 1) *For the purposes of section 19 of the Act, a custodian must, in respect of personal health information that is in the custodian's custody or control*
  - a) *for each of the custodian's agents*
    - i) *determine the personal health information that the agent is authorized to access,*
    - ii) *ensure that the agent signs a pledge of confidentiality that includes an acknowledgment that the agent is bound by the Act and is aware of the consequences of breaching it, and*
    - iii) *where appropriate, provide privacy and security orientation and ongoing training;*
  - b) *ensure that the custodian has, in writing*
    - i) *policies in relation to the collection, use and disclosure of personal health information,*
    - ii) *a policy on security breaches that describes how the custodian complies with Division 5 of Part 3 of the Act, and*
    - iii) *a policy in relation to individuals' access to and correction of their personal health information;*
  - c) *at least every two years, conduct an audit of the custodian's security safeguards, including their information practices and procedures;*

- d) as soon as possible, identify and address any deficiencies identified in an audit conducted under paragraph (c);*
  - e) ensure that removable media used to record, transport or transfer personal health information are
    - i) appropriately protected when in use, and*
    - ii) stored securely when not in use;**
  - f) ensure that personal health information is maintained in a designated area and is subject to appropriate security safeguards;*
  - g) limit physical access to designated areas containing personal health information to authorized persons;*
  - h) ensure that a written record is created of all security breaches; and*
  - i) address the privacy and security risks of an agent's remote access to the custodian's information system, including through the use of the agent's own mobile electronic communication device.*
- 2) The information practices referred to in section 19 of the Act (including, for greater certainty, those described in this section) must be based on the standard of what is reasonable, taking into account the sensitivity of the personal health information.*

[56] Under HIPMA, a person will only be authorized to access PHI that is in the custody or control of a custodian if they are an agent of the custodian and the authority for access has been authorized by the custodian in accordance with the Regulation. Any access to this information by a person who is not an agent of the custodian would be a security breach.

[57] Despite the Custodian's assertion that the former office manager's administrative tasks did not include access to the PHI, the evidence suggests otherwise.

[58] The evidence provided by the Custodian is that his former office manager had access to the storage unit. Having access to the storage unit also means the former office manager had access to the Records stored therein. The evidence also shows that the 'trustworthy person', whose identity remains unknown, has access to the Records stored in the storage unit because they have a key.

[59] There is also evidence that the former office manager was receiving mail from the Custodian's patients about their Records, which appears to still be occurring given that the Creston, B.C. address provided to his patients in January of 2021 is the mailing address of his former office manager. The former office manager may have also been monitoring the phone messages for the Custodian while his office phone number was operational, although this is unclear.<sup>36</sup>

[60] According to the evidence provided by the Custodian, the former office manager is assisting him in managing the Records.

[61] The Custodian does not reside in Canada and according to his evidence he has been unable to return to Whitehorse because of the border closure issues between Canada and the USA resulting from the COVID-19 pandemic. Given this, it would be impossible for him to facilitate any access to the Records or their transfer without assistance from another person. It may be that the former office manager was performing these tasks on behalf of the Custodian prior to relocating to Creston, B.C. It is unclear who is performing these tasks on behalf of the Custodian at present. Performing any of these functions on behalf of the Custodian would require access to the Records.<sup>37</sup>

[62] The evidence shows that at least two of his patients sought access to their Records. There is no evidence about whether the access was facilitated, noting that a custodian is obligated to provide access to PHI in their custody and control in accordance with sections 24 to 27 of HIPMA. The Custodian could not have facilitated access to these Records without the assistance of a person who is in Whitehorse and who has access to the Records.

[63] The evidence also shows that the Custodian was willing to transfer the Records of his patients at their request. He could only facilitate such a transfer if someone in Whitehorse, who has access to the Records, accessed the Records and undertook the work necessary for the transfer.<sup>38</sup> As indicated above, the process to transfer records is set out in section 60 of HIPMA.

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<sup>36</sup> I note here that the receipt of mail containing PHI may also qualify as a collection of PHI by the Custodian because the former office manager appears to be doing this on his behalf. That would only be authorized if permitted by the Custodian in accordance with HIPMA's requirements.

<sup>37</sup> I note here that performing these functions may also qualify as use or disclosure of PHI by the Custodian because another person appears to be doing this on his behalf. That would only be authorized if permitted by the Custodian in accordance with HIPMA's requirements.

<sup>38</sup> *Ibid.*



[64] The Custodian has not provided any evidence that the former office manager or the 'trustworthy person' are his agents.

[65] The former office manager or the trustworthy person could only be an agent of the Custodian if they are acting on behalf of the Custodian in respect of the PHI in the Records.<sup>39</sup> The meaning of 'agent' is non-exhaustive and includes: (a) an employee of the custodian; (b) a person who performs a service for the custodian under a contract or agency relationship with the custodian; (c) an appointee, volunteer or student; (d) an insurer or liability protection provider; (e) an information manager; (f) if the custodian is a corporation, an officer or director of the corporation; or (g) a prescribed person.<sup>40</sup>

[66] There is no evidence that the former office manager or the trustworthy person is any of the things listed in the definition. However, they would still qualify as an agent if they are or were acting on behalf of the Custodian in respect of the Records.

[67] HIPMA takes into account that most custodians have agents. Subsection 2 (3) clarifies that "a person may be an agent of a custodian whether or not the person has the authority to bind the custodian and whether or not the person is employed by or otherwise receives remuneration from the custodian."

[68] Section 13 states, "[a] person who is a custodian or the agent of a custodian may collect, use, disclose and access personal health information only in accordance with this Act and the regulations." [My emphasis]

[69] Section 19 establishes the rules that a custodian must comply with to protect PHI in its custody or control. Amongst other things, this section requires that any prescribed requirements be met. Subsection 14 (1) of the Regulation requires that for each of the custodian's agents, a custodian must:

- a. determine the PHI that the agent is authorized to access;
- b. ensure that the agent signs a pledge of confidentiality that includes an acknowledgment that the agent is bound by the Act and is aware of the consequences of breaching it;
- c. where appropriate, provide privacy and security orientation and ongoing training; and<sup>41</sup>

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<sup>39</sup> Definition of 'agent' in subsection 2 (1).

<sup>40</sup> There are no persons prescribed as an agent.

<sup>41</sup> See subparagraphs 14 (1)(a)(i) to (iii) of the Regulation.

d. limit physical access to designated areas containing PHI to authorized persons.<sup>42</sup>

[70] Paragraph 20 (1)(c) requires custodians to designate a privacy contact who is responsible, among other things, to “ensure that all agents of the custodian are appropriately informed of their duties under this Act.” A custodian is deemed to be the privacy contact where no such designation occurs.<sup>43</sup>

[71] Section 49 requires custodians to “take reasonable measures to ensure that its agents comply with this Act and the regulations.”

[72] Subsection 50 (1) establishes the rules that custodians must follow as it pertains to their agents. They are as follows.

*50 (1) A custodian may permit its agent to collect, use, disclose, retain, destroy or dispose of personal health information on the custodian's behalf only if*

*(a) the custodian is permitted or required to collect, use, disclose, retain, destroy or dispose of the information, as the case may be;*

*(b) the collection, use, disclosure, retention, destruction or disposition of the information, as the case may be, is in the course of the agent's duties and is not contrary to the limits imposed by the custodian, this Act or any other enactment;*

*(c) the custodian allows the agent to use only that personal health information that the agent needs in order to carry out the purpose for which it was collected or a purpose for which use is authorized under this Act; and*

*(d) the prescribed requirements, if any, are met.<sup>44</sup>*

[My emphasis]

[73] Subsection 50 (2) sets out the rules that agents must follow. It states as follows.

*50 (2) Except as permitted or required by law, an agent of a custodian must not collect, use, disclose, retain, destroy or dispose of personal health information on the custodian's behalf unless the custodian permits the agent to do so in accordance with subsection (1).*

[My emphasis]

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<sup>42</sup> See paragraph 14 (1)(g).

<sup>43</sup> Subsection 20 (3).

<sup>44</sup> There are no prescribed requirements.

[74] Subsection 50 (3) requires an agent to notify the custodian “at the first reasonable opportunity” if a security breach has occurred in relation to any personal health information handled by the agents.”

[75] HIPMA contains mandatory breach notification requirements and deems a breach to have occurred in certain circumstances. ‘Security breach’ is defined in HIPMA as “with respect to personal health information, (a) theft or loss, or (b) disposition or disclosure, or access by a person, contrary to this Act or a regulation.” [My emphasis]

[76] The breach reporting provisions are as follows.

*29 For the purposes of this Division<sup>[45]</sup>*

*a) any event that it is reasonable to believe is a security breach in relation to personal health information in a custodian’s custody or control is deemed to be a security breach in relation to that personal health information; and*

*(b) harm includes identity theft, identity fraud, damage to reputation and personal humiliation or embarrassment.*

*30 (1) If a security breach occurs in relation to an individual’s personal health information in a custodian’s custody or control, and there are reasonable grounds to believe that the individual is at risk of significant harm as a result of the security breach, the custodian must, as soon as reasonably possible after the security breach, notify the individual of the security breach. [My emphasis]*

[77] ‘Risk’ is defined in Black’s Law Dictionary as “[t]he uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; esp., the existence and extent of the possibility of harm.”<sup>46</sup>

[78] If an individual is notified of a security breach that creates a risk of significant harm to an individual, then the custodian must ‘at the same time’ give the IPC a copy of the notice.<sup>47</sup>

[79] The scheme of HIPMA makes it clear that for a person to be an agent of a custodian, they must comply with the rules in HIPMA; specifically, section 49 requires a custodian to take reasonable measures to ensure its agents comply with the Act and Regulations. Subsection 50 (2) makes it clear that an agent is prohibited from collecting, using, disclosing, retaining, destroying or disposing of PHI on behalf of a custodian unless permitted to do so by the

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<sup>45</sup> Division 5 of Part 3.

<sup>46</sup> Black’s Law Dictionary, 10<sup>th</sup> Ed., Garner, B.A., St. Paul, MN, USA.

<sup>47</sup> Paragraph 30 (2)(b).

custodian. A custodian may only permit an agent to undertake those activities on behalf of the custodian if the requirements of subsection 50 (1) are met.

[80] 'Permit' is defined in the online Oxford Dictionary as "officially allow (someone) to do something."<sup>48</sup> In Black's Law Dictionary, 'permit' is defined as "to consent to formally."<sup>49</sup>

[81] Subsection 19 (3) imposes several obligations on a custodian to control who can use PHI and subparagraph 14 (1)(a)(i) of the Regulation requires a custodian to, amongst other things, determine what PHI an agent is authorized to access.

[82] In my view, these provisions, together with the meaning of 'permit', support a reasonable interpretation that any permission given by the custodian to an agent must expressly be in accordance with the terms of permission set out in a formal arrangement, such that it is clear to both the custodian and agent the extent of the permission granted.

[83] Moreover, in order not to violate subsection 50 (2), an agent must be clear about the extent of their authority to act on behalf of a custodian in respect of PHI and to access it. Violation of these provisions is an offence.<sup>50</sup>

[84] The foregoing conclusion is in accordance with HIPMA's scheme, object and intention of Parliament as it ensures that custodians and their agents are positioned to meet their respective obligations under HIPMA and the privacy of individuals' PHI is properly protected.

[85] In the NTPR, I specifically requested that the Custodian provide me with "[a]ll correspondence related to the storage and/or management of the [Records] that are in your custody or control, including but not limited to storage agreements, and information manager agreements." Recall that the Custodian's submissions were that:

*I have no documents to disclose as requested in [NTPR] 2. a and b because the patient records are under my control and the storage is done under a standard storage unit rental agreement with no disclosure of what is stored to the storage company.*<sup>51</sup>

[86] For the reasons above noted, it is clear that the former office manager had or has access to the Records and likely has access to PHI of the Custodian's patients provided by them or their referring physicians in the mail received from them, including, perhaps, voice messages. It is also clear that the trustworthy person has access to the Records. The Custodian has provided no evidence to support that either of these persons are his agents and that the terms of access,

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<sup>48</sup> <https://www.lexico.com/definition/permit>.

<sup>49</sup> Black's Law Dictionary, 10<sup>th</sup> Ed., Garner, B.A., St. Paul, MN, USA.

<sup>50</sup> See paragraph 121 (1)(a).

<sup>51</sup> This part of the NTPR required the Custodian to produce all correspondence related to the storage and/or management of the Records in the Custodian's custody or control.

inclusive of any of their additional responsibilities, are expressly set out in any formal arrangement.

[87] As I have not been provided with the storage rental agreement that the Custodian claims he has with a storage company located in Whitehorse where the Records are stored, I am unable to ascertain whether the storage agreement includes any measures to protect the Records therein.

[88] It is clear from the evidence that the Custodian has not met the requirements of section 19 by applying information practices that include administrative policies, as well as technical and physical safeguards, that ensure the confidentiality, security and integrity of those Records in storage or for other PHI, such as the mail and voice messages, that is in his custody or control. It is also clear that he is not meeting his other obligations set out in paragraphs 14 (1) (b), (f), (h) or subsection (2) of the Regulation.

[89] I will note here that the Custodian need not have 'stand alone' policies and procedures to meet the requirements of these provisions. In the circumstances, it would be sufficient for the Custodian to meet these requirements by embedding his information practices within the written formal arrangement documents with the storage provider and his other agents.

#### **Finding – Issue 1 (b)**

[90] Based on the foregoing, I find, on the balance of probabilities, that:

- a. the Custodian has not met his obligations under section 19, as well as section 14 of the Regulation, to properly secure the Records that are stored in the storage unit;
- b. access to the above Records by the former office manager and the trustworthy person is a security breach; and
- c. any access by the former office manager to PHI received from his patients via mail or voice message is a security breach.

#### **Issue 1 (c)**

**After closing his medical practice in Yukon, did the Custodian fulfil his obligation to make available a public statement in accordance with section 21?**

#### **Custodian's Submission for Issue 1 (c)**

[91] The Custodian asserted the following in his affidavit related to this issue.<sup>52</sup>

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<sup>52</sup> Custodian's affidavit, at 2-4 and 6.

11. *I ... sent a letter to all my patients informing them of the [medical practice] closure to take place on October 1, 2019.*

12.4. *A true copy of my letter to my patients about [my medical practice] closure, marked as Exhibit "D".*

15. *...I advised [my patients] to return to their family physicians who referred them to me in the first place. I also notified the various medical clinics of my closure and asked them to refer their patients to another [medical specialist]. I had a serviced telephone number and a contact person in place for enquiries by patients for another month. Please see Exhibits "C" and "D".*

18. *The [Complainant] contacted me on November 20, 2019, by email, we also had telephone discussion and I wrote her an email dated November 28, 2019, explaining my [medical practice] closure issues and the steps taken to secure patient medical records and access. I clearly stated that patients can direct requests for access or transfer of their records to [my medical practice] address. I arranged for a P.O. Box connected with that address and all mail to that address was transferred to the mailbox which mailbox was monitored by my previous office manager.*

27.1. *A true copy of my email to the [Complainant] dated November 28, 2019, marked as Exhibit "E".*

32. *I took the necessary steps to advise patients of transfer of their medical records to [the Other Medical Practice] by letter dated January 31, 2021.*

36.1 *A true copy of my letter to my patients about transfer of records to [the Other Medical Practice] dated January 31, 2021, marked as Exhibit "G".*

38.3. *Document production request number 3: My information practices followed the HIPMA and HIPMA Regulations' guidelines but was not in a separate written form. I discussed with patients in person what my practices were...*

[92] The Custodian also asserted the following in his submission related to this issue.<sup>53</sup>

3.1 *The [Custodian] sent letters to all [his] patients advising of the [medical practice] closure ... asking them to return to their family doctor for prescriptions and referral to another [medical specialist].*

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<sup>53</sup> Custodian's submission, at 2-3.

3.2 *The [Custodian] sent letters to all medical clinics informing them that patients may follow-up with their family doctors and gave information how he could be contacted.*

3.3 *The [Custodian] in [his] November 28, 2019 email to the Complainant stated that requests for transfer of medical records by patients can be sent to the address of the [Custodian's former medical practice]. [The Custodian] arranged for the forwarding of such mail to a mailbox that was regularly monitored by [the Custodian's] office manager.*

3.8. *All patients have current contact particulars to direct any queries to, i.e., the [Custodian's] secure email address and [the Custodian's] previous office manager's mailing address.*

#### Complainant's Submission for Issue 1 (c)

[93] The Complainant asserted the following in her statutory declaration related to this issue.<sup>54</sup>

5. *[The Complainant has] no reliable information on how many of [the Custodian's] former patients received any notifications from [the Custodian], or which of his other communications were received by other individuals.*

6. *...I was personally contacted in November 2019 by two individuals who identified themselves as former patients that either did not receive any notification from [the Custodian] or were unable to reach [the Custodian] using the contact information given in the notice they did receive.*

7. *...I have been advised by the YMC Coordinator, and believe, that in the weeks immediately following the closure of [the Custodian's medical] practice, she was also contacted at least eight times by former patients who did not receive any notification from [the Custodian] or were unable to reach [the Custodian] using the contact information given in the notice they did receive.*

8. *In mid-November 2019, I made a number of attempts, personally, to contact [the Custodian] by email or by phone, using the email address and phone number that had been made available to some of [the Custodian's] patients. I had no response from the email and the [Custodian's medical practice] phone was not in service.*

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<sup>54</sup> Complainant's statutory declaration, at 1-4.

11. [Having been telephoned by the Custodian using an unfamiliar number],<sup>55</sup> I let [the Custodian] know [during that telephone conversation] that there was no information sign on the [Custodian's medical practice] clinic door and that, in my experience, the [Custodian's medical practice] phone and email were not working. I also told [the Custodian] that the [YMC] and [HSS] were both getting calls from patients seeking guidance on what to do, and how to access their records.

12. [The Custodian] said [he was] surprised at this news, because [he'd] ensured that patients had six months of prescriptions and [the Custodian's] letter let them know that they could go to their [family doctor]. I told [the Custodian] I had been advised that [family doctors] had not been receiving progress notes from [the Custodian]. I also reminded [the Custodian] that the medical record was important for ensuring continuity of care.

13. [The Custodian] promised to follow up with me in a few days on the issues. [The Custodian] did not. A copy of a 26 November 2019 email asking [the Custodian] to meet that commitment is attached to this affidavit as **Exhibit 1**. [Bolding in the original]

19. Contrary to [the Custodian's] assertion, I did not (and do not) have any knowledge of which other Yukon [medical specialists] may or may not have been accepting outpatient referrals at which times.

22. In para. 23 of [the Custodian's affidavit], [the Custodian] asserts that I never communicated to [the Custodian] any information about the [medical] practice identified for transfer of [the Custodian's] patient records, as adverted to in my 16 December 2019 email.

#### Custodian's Reply Submission for Issue 1 (c)

[94] The Custodian reasserted the following in his reply submission.<sup>56</sup>

4. The [Custodian] again confirms the steps [he] took as set out in [his] affidavit filed in response to the complaint and emphasizes the fact that all previous patients have up to date contact information how to reach [him] for access to their records.

10. The [Custodian] submits that the issues that the Complainant asserts about [the Custodian's] patient records focus on patient access to their records. The details of the

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<sup>55</sup> *Ibid.*, statements 9-10, at 2.

<sup>56</sup> Custodian's reply submission, at 2-3.



*issues remain a mystery in ... light of the fact that the Complainant did not provide any credible evidence to support her allegations in this complaint.*

11. *It does not follow logically from the allegations, that because the YMC had problems to contact [the Custodian], that [the Custodian's] patients had the same problems at the relevant time.*

### **Analysis**

[95] Section 21 requires a custodian to create and maintain a statement of their information practices that is available to the public. It states as follows.

*A custodian must make available to the public a written statement that*

- a) provides a general description of the custodian's information practices;*
- b) describes how to contact the custodian's contact individual;*
- c) describes how an individual may obtain access to, or request an annotation for the correction of, a record of their personal health information that is in the custody or control of the custodian;*
- d) describes how to make a complaint to the custodian and how to make a complaint to the commissioner under this Act; and*
- e) meets the prescribed requirements, if any.<sup>57</sup>*

[96] Section 21 is clear. While a custodian is in custody or control of PHI, they must have, as part of their duties and any continuing duties that are applicable in this Consideration, a written statement that is available to the public containing five distinct components.<sup>58</sup>

### **Available to the public**

[97] The term 'public' is not defined in HIPMA. It is defined in the online Oxford dictionary as "[o]f or concerning the people as a whole" which would include the Custodian's patients."<sup>59</sup>

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<sup>57</sup> There are no prescribed requirements.

<sup>58</sup> Each of these paragraphs sets out a different set of requirements. I take this to mean that the Legislature purposely chose to distinguish each from the other given the context and scope of Division 3. As such, it would be hypothetically possible to assert, for example, that the first step in obtaining access or requesting a correction to one's PHI is to contact the custodian or their contact individual. Since 'contact information' is the sole subject of paragraph 21 (b), it cannot constitute a process to access PHI or request a PHI correction. Such contact information, due to its paucity, would not, in my view, be sufficient to meet paragraph 21 (c).

<sup>59</sup> <https://www.lexico.com/definition/public>.

[98] Section 21 does not elaborate on how a custodian is to fulfill this obligation, such as for example, by displaying the statement in such a manner that is accessible by the public or posting the same on a website. Given this, I am of the view that so long as the statement is accessible by any member of the public, at their request or otherwise, this requirement will be met. Where a custodian does not display the statement in a publicly accessible manner, I am of the view that they must provide the written statement if requested by a member of the public as soon as is reasonably possible to allow the member to exercise their rights under HIPMA.

[99] The Custodian stated that he had practiced as a medical specialist in the Yukon for 16 years prior to closing his medical practice on October 1, 2019, and subsequently took steps to 'de-register' as a health care provider in the Yukon sometime after December 1, 2019. HIPMA came into effect on August 31, 2016. As such, the Custodian was bound by HIPMA at that point forward. As such, he was legally required to have in place both information practices, some of which must be in writing,<sup>60</sup> and a publicly available written statement in respect of them, as per section 21.

[100] In stating this, I note that the Custodian asserted that his information practices followed HIPMA and the Regulation. I have, however, no such information practices before me. What I do have is an admission by the Custodian that none of these practices were in written form; rather, the Custodian submitted that he discussed them with his patients in person.<sup>61</sup>

[101] I have in evidence three exhibits of letters from the Custodian to his patients and other medical practitioners. None set out a general description of the Custodian's information practices, as per paragraph 21 (a). They also do not set out how to obtain access to (or request an annotation to make a correction to) their PHI in the custody or control of the Custodian, as per paragraph 21 (c). Moreover, they do not set out how to make a complaint to the Custodian or the IPC, as per paragraph 21 (d).

[102] I accept that sending letters to the Custodian's patients could be one way of communicating a statement about the Custodian's information practices, but this alone is not sufficient, in my view, to meet the requirement that the statement be 'available to the public'. When the Custodian closed his practice, he did not make a written statement of his information practices available to the public.

[103] What he did make available to his patients and other health care providers was information about how to contact him. Despite this, the evidence shows that patients experienced difficulty in contacting him and that he was unable to be reached by telephone for

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<sup>60</sup>Subparagraph 14 (1)(b)(i) of the Regulation requires a custodian to have in writing policies in relation to the collection, use and disclosure of PHI.

<sup>61</sup> *Ibid.*

approximately two weeks when the phone number was out of service, which, as previously indicated, was unbeknownst to him.

[104] The only information that he provided about the security of the Records was in one of the letters he sent to them wherein he stated that the Records are stored “in a secured, climate-controlled facility,” “[t]he facility has limited access and locked storage” and “[t]he facility is in the Yukon.”<sup>62</sup>

[105] The information provided by the Custodian to his patients, as referenced above, is not sufficient in form or content to meet the requirements of section 21.

[106] After closing his medical practice, the Custodian’s section 21 statement about his information practices would need to describe his information practices that are associated with the current circumstances involving the Records, including how the Records are secured in the storage unit and in Plexia, as well as any access to those Records by his agents.

[107] I will emphasize here that when the Custodian closed his practice and left the Yukon without meeting the section 21 requirement, his patients were left without any knowledge of where their PHI was located (other than it is in the Yukon in some storage unit), how to obtain access to it, how it was being secured from unauthorized access, use or disclosure, and how it is being protected. The PHI contained in the Records is highly sensitive given the nature of the Custodian’s practice and any unauthorized access to or disclosure of this information could have serious consequences for his patients, including that it could cause them significant harm.

### **Finding – Issue 1 (c)**

[108] For the foregoing reasons, I find, on the balance of probabilities, that after the Custodian closed his medical practice, he did not meet his obligation to make a written statement about his information practices available to the public as required by section 21.

### **Issue 2**

#### **Did the Custodian fulfil his obligation to enter into an information agreement with Plexia in accordance with subsection 51 (1), as well as section 21 of the Regulation?**

#### **Custodian’s Submission for Issue 2**

[109] The Custodian asserted the following in his affidavit related to this issue.<sup>63</sup>

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<sup>62</sup> Custodian’s affidavit, Appendix F.

<sup>63</sup> Custodian’s affidavit, at 6.

29. *I had a contract with Plexia for electronic management of limited patient information that predated HIPMA. I confirm that I did not enter into an information management agreement with Plexia pursuant to HIPMA.*

*I used Plexia for the management of billing, scheduling, and laboratory information only because I was not convinced that sensitive patient information was secure in the Plexia database and that that deficiency could be cured by any management agreement.*

30. *I contacted Plexia when I became aware that they plan to purge patient information and took steps to secure all patient information in possession of Plexia. I confirm that the information is secure, and that no privacy breach occurred. I could not maintain payments to Plexia due to my clinic's insolvency and my own bankruptcy.*

[110] The Custodian asserted the following in his submission related to this issue.<sup>64</sup>

3.9 *The Plexia records have been secured after the [Custodian] became aware of Plexia's possible purge of the records. I attach a letter from Plexia confirming that the [Custodian] has complete control of and access to the records.*

[111] The letter attached has a Plexia logo on it. It is dated April 28, 2021. In the body of the letter, it states "[t]his letter is to confirm that [the Custodian] has control and complete access to the patient medical charts stored within the Plexia EMR system that is deployed for the [Custodian's former medical practice] in Whitehorse, Yukon" (Plexia Letter).<sup>65</sup>

[112] The Plexia Letter was sent to the office of the IPC on April 28, 2021, after the following events occurred.

- a. On March 15, 2021, an employee of HSS was informed by a representative of Plexia via email that they were aware that the Custodian left the Yukon and they had had trouble contacting the Custodian. In the email, the representative from Plexia requested input on the storage and handling of the Custodian's patient records that he had stored in Plexia. The same day, the employee contacted our office to inform us about the situation. I instructed one of my investigators to contact the Plexia representative and inform them that we were in consideration on the matter and requested that the information be retained. I then instructed my investigator to immediately inform the Custodian about the situation, which they did.

[113] In the NTPR, I requested that the Custodian provide me with "[a]ny agreements entered into with Plexia concerning the Patient Records that are stored electronically therein and any

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<sup>64</sup> Custodian's submission, dated April 29, 2021, at 3.

<sup>65</sup> Attachment to Custodian's submission, at p. 7.

correspondence with Plexia about its transfer or management of the electronic Patient Records.” The only record I received in response to this request was a the Plexia Letter, which we already had.

#### Complainant’s Submission for Issue 2

[114] The Complainant made no submission for Issue 2.

#### Analysis

[115] Subsection 51 (1) states as follows.

*A custodian who proposes to retain the services of an information manager must*

- a) enter into a written agreement with the information manager that provides for the protection of the information that is the subject of the services; and*
- b) comply with the prescribed requirements, if any.*

[116] Section 21 of the Regulation states as follows.

*When entering into a written agreement with an information manager in respect of personal health information under section 51 of the Act, a custodian must*

- a) ensure that the agreement allows the custodian to maintain control of the personal health information; and*
- b) ensure that the agreement contains provisions which*
  - i) identify the objectives of the agreement and the principles that guide the agreement,*
  - ii) describe the types or classes of personal health information (referred to in this section as the “relevant personal health information”) that the information manager may collect, use or disclose under the agreement, the purposes for which it may be collected, used or disclosed and any limitations or conditions on its collection, use or disclosure,*
  - iii) require the information manager*
    - A) to allow the custodian to access or otherwise obtain the relevant personal health information at any time, subject only to necessary operational constraints,*

- B) to forward immediately to the custodian any access or correction request that is made in relation to the relevant personal health information,*
- C) to maintain administrative, technical and physical safeguards that meet or exceed the safeguards required of the custodian under the Act to ensure the confidentiality, security and integrity of the relevant personal health information, and*
- D) to inform the custodian promptly of the information manager's receipt of any requirement issued in a proceeding, including any summons, warrant or order, that relates to the relevant personal health information and that it is reasonable to believe may be enforceable in the jurisdiction in which the information manager operates or in which the relevant personal health information is located,*
- iv) prohibit the information manager from subcontracting, without the custodian's written consent, any of the services to which the agreement relates,*
- v) allow the custodian to monitor and verify compliance with the agreement by the information manager,*
- vi) allow the custodian to terminate the agreement in the event of a breach of the agreement by the information manager, and*
- vii) set out that on termination of the agreement*
  - A) the personal health information to which the agreement applies must be transferred to the custodian, in an electronic format that the custodian can readily use, while*
    - I) ensuring ongoing access to the personal health information by the custodian, and*
    - II) requiring the information manager to cooperate fully with the custodian during the transfer, and*
  - B) following completion of the transfer, the information manager must securely destroy all records of the personal health information to which the agreement applies that remain in its custody.*

[117] The purpose of entering into an information manager agreement with a person who meets the definition of information manager is twofold.

[118] The first is to establish an agency relationship with the information manager that sets out the terms of the relationship. Recall that no person may access, use or disclose PHI in the custody or control of a custodian unless they are an agent of a custodian. Subsection 51 (1) requires a custodian to enter into an information manager agreement when the services of an information manager are retained. An information manager who enters into an information manager agreement with a custodian is their agent. Subsection 51 (2) binds the information manager to the terms of the agreement under force of law and requires that the information manager notify the custodian in the specified circumstances when the agreement is breached.

[119] The second is to ensure that the information manager understands that the custodian controls the PHI that is in the custody of the information manager, sets out the terms of such control, including that they must secure the PHI in their custody in accordance with the custodian's obligations to secure PHI under HIPMA.

[120] To this end, section 21 of the Regulation specifies what, at minimum, must be contained in an information manager agreement.

[121] "Information manager" is defined in subsection 2 (1) of HIPMA as follows.

*"information manager" means a person (other than a person who is prescribed not to be an information manager) who, for or on behalf of a custodian*

*(a) processes, stores, retrieves, archives or disposes of information,*

*(b) strips, encodes or otherwise transforms identifying information to create information that is not identifying information,*

*(c) provides information management or information technology services, or*

*(d) provides a prescribed service.<sup>66</sup>*

[122] What I am able to ascertain from the evidence of the Custodian is as follows.

- a. He *had* a contract with Plexia for the management of "limited patient information that predated HIPMA".
- b. He used Plexia for the management of billing, scheduling, and laboratory information only adding that he "was not convinced that the sensitive patient information was secure in the Plexia database, and that deficiency would be cured by any management agreement."

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<sup>66</sup> There are no prescribed services.

- c. After closing his medical practice and being notified by Plexia that it would purge the information unless it was paid for its services and that after being contacted by the Custodian, Plexia acknowledged in the Plexia Letter that he has “complete control of and access to the records.”

[123] Plexia is a provider of electronic medical record (EMR) solutions to health care providers in Canada.<sup>67</sup> Plexia’s office is in British Columbia.<sup>68</sup> Amongst other things, Plexia’s EMR solution includes applications that allow a health care provider to chart and store PHI, as well as providing a scheduling and billing function. It is unclear if PHI is always stored by Plexia in its British Columbia (BC) location and accessed remotely by health care providers, or if it also offers on-premises services.

[124] There is evidence provided by the Custodian and Plexia that the PHI of the Custodian’s patients is stored in a database operated by Plexia at its B.C. location. The Custodian indicated in his submission that this information is “limited patient information” and information for the management of patient billing, scheduling and laboratory information (E-records). I find that the E-records contain PHI as defined in subsection 2(1) of HIPMA.

[125] Because this information is stored in Plexia’s database, it means that Plexia has physical custody of the E-records and that its employees would have access to the PHI therein by virtue of Plexia being the administrator of the system.

[126] The services offered by Plexia to the Custodian meet the definition of an information manager. Because the E-Records are in the physical custody of Plexia, it was incumbent on the Custodian to have entered into an agreement with Plexia that contained all the terms required by section 21 of the Regulation once he was subject to HIPMA as a custodian. By his own admission, he did not do so, the result of which has numerous consequences for his patients including that their E-Records were almost deleted.

[127] Being caught by the definition of ‘information manager’ in HIPMA does not automatically make Plexia an agent of the Custodian. As indicated above, this requires a formal arrangement which would include an information manager agreement.

[128] The only evidence before me is that Plexia has acknowledged in the Plexia Letter that the Custodian has control over the E-records and can access them. This satisfies the requirement in subsection 21 (a). However, none of the other requirements in respect of information managers, as required by section 51 as well as section 21 of the Regulation, have been met. This evidence supports the fact that the Custodian has gone part of the way to

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<sup>67</sup> <https://www.plexia.ca/company.aspx>

<sup>68</sup> <https://www.plexia.ca/contact.aspx>



establishing Plexia as his agent but, as indicated, not all requirements related to making Plexia an agent have been met. In addition, he has provided no evidence that the E-records are properly secured while in Plexia's custody in accordance with section 19, or that the requirements of section 14 of the Regulation are met.

[129] Based on the foregoing, I find, on the balance of probabilities, that the E-Records in Plexia's custody are not secured in accordance with HIPMA's requirements and that Plexia's access to the E-records is not authorized by HIPMA and is, therefore, a security breach.

[130] I will add here that the Custodian's submission that he was "not convinced that sensitive patient information was secure in the Plexia database and that that deficiency could be cured by any management agreement" is of considerable concern. The Custodian is obligated to protect any PHI in his custody or control in accordance with HIPMA's requirements, including from a security breach no matter how sensitive the PHI is, noting that highly sensitive PHI requires more robust security controls. Once HIPMA came into effect, the Custodian's obligations in respect of the E-records that are in the custody of Plexia crystalized. Any failure to meet those obligations is a violation of HIPMA.

### **Finding – Issue 2**

[131] I find that the Custodian did not enter into an information agreement with Plexia as required by HIPMA and because of that, the E-records are not properly secured in accordance with HIPMA's requirements. As such, access by Plexia to the E-records is a security breach.

## **IX FINDINGS**

[132] As previously indicated, my findings on the issues in this Consideration are as follows.

[133] On Issue 1 (a), I find that the Custodian did not violate HIPMA for not transferring the Records to a successor custodian after closing his medical practice because he was not obligated to do so.

[134] On Issue 1 (b), I find that after the Custodian closed his medical practice:

- a. he did not meet his obligations under section 19, as well as section 14 of the Regulation, to properly secure the Records that are stored in the storage unit;
- b. access to the above Records by the former office manager and the trustworthy person is a security breach; and
- c. any access by the former office manager to PHI received from his patients via mail or voice message is a security breach.

[135] On Issue 1 (c), I find that after the Custodian closed his medical practice, he did not meet his obligation to make a written statement about his information practices available to the public as required by section 21.

[136] On Issue 2, I find that the Custodian did not enter into an information agreement with Plexia as required by HIPMA and because of that, the E-records are not properly secured in accordance with HIPMA's requirements. As such, access by Plexia to the E-records is a security breach.

## **X RECOMMENDATIONS**

[137] As a result of my findings, I make the following recommendations.

[138] On Issue 1 (a), I make no recommendations.

[139] On Issue 1 (b), I recommend that:

- a) within 60 days of receipt of this Consideration Report, the Custodian provide me with:
  - i. the Custodian's current contact information, including his address, telephone number, and email address where he can be reached;
  - ii. a document setting out the location of the Records, including the name of the storage vendor, its address, and the unit number where the Records are stored; and
  - iii. the identity of any persons who have or had access to the Records and their current contact information;
- b. the Custodian take immediate steps to secure the PHI in the storage unit from any further unauthorized access, use or disclosure of the Records and provide me with the steps taken to secure the PHI that demonstrate compliance with HIPMA;
- c. within 60 days of receipt of this Consideration Report, the custodian provide me with copies of the written formal arrangements entered into with any person who has access to the Records in the storage unit or who is otherwise collecting, using or disclosing PHI on behalf of the Custodian, including the storage vendor, his former office manager, and the 'trustworthy person'; and
- b) the Custodian immediately assess whether the security breach has created a risk of significant harm to any or all of his patients whose PHI is stored in the storage unit

and provide me with a report within 60 days of receiving this Consideration Report containing the information set out in paragraphs 31 (1)(a) and (b) of HIPMA.

[140] On Issue 1 (c), I recommend that, within 60 days of receiving this Consideration Report, the Custodian provide me with:

- a. a copy of the written statement containing the requirements of section 21 that relate to the Records that are in his custody and control; and
- b. a description of how he will make this statement available to the public while he is the custodian of the Records.

[141] On Issue 2, I recommend that:

- a. the Custodian take immediate steps to protect the PHI in the physical possession of Plexia;
- b. within 60 days of receiving this Consideration Report, the Custodian provide me with a copy of an information manager agreement that he has entered into with Plexia that demonstrates compliance with section 51, as well as sections 21 and 14 of the Regulation; and
- c. the Custodian:
  - i. immediately assess whether the security breach has created a risk of significant harm to any or all of his patients whose PHI is stored in Plexia; and
  - ii. within 60 days of receiving this Consideration Report, provide me with a report containing the information set out in paragraphs 31 (1)(a) and (b) of HIPMA as it relates to the Plexia Records.

## **Consideration Report**

[142] Subsection 109 (1) requires the IPC, after completing this Consideration, to prepare a report that sets out findings, recommendations and the reasons for them.

[143] Subsection 109 (3) requires the IPC, after completing this Consideration, to give a copy of the Consideration Report to the Complainant and the Custodian. The IPC must also give a copy of the Consideration Report to any person about whom the Report contains any comments or recommendations made by the IPC, unless by doing so the health or safety of any individual would be put at risk.

[144] Subsection 109 (4) enables the IPC to provide a copy of the Consideration Report to

- (a) *a person with statutory responsibility, in Yukon or another province, for the registration, licensing or discipline of, or the regulation of the quality or standards of health care provided by, a custodian about whom the report contains comments or recommendations made by the commissioner; or*
- (b) *any other person, if the commissioner considers that doing so may prevent or lessen a serious and immediate threat to the health or safety of any person.*

[145] Subsection 109 (5) states the following.

*If the commissioner gives a copy of a report under subsection (1) to a person described in ... subsection (4)*

- a) *the commissioner must inform the complainant and the respondent of the person's identity; and*
- b) *where the person is described in paragraph (3)(c) but not in subsection (4), the person*
  - i) *must not disclose any personal information or personal health information contained in the report, except where the law would, if they were a custodian, allow or require them to do so, and*
  - ii) *must securely destroy the personal information or personal health information as soon as the person no longer reasonably requires it.*

## **Custodian's Decision after Consideration**

[146] Subsection 112 (1) requires that within 30 days of 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 its decision to the commissioner.*

[147] Subsection 112 (2) states “[i]f [the Custodian] does not give written notice within the time required by subsection (1), then [the Custodian] is deemed to have decided not to follow any of the recommendations of the [IPC]”.

## Complainant's Right of Appeal

[148] The Complainant's right of appeal is set out in section 114. It states "[w]here 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."

## Publication of the Consideration Report

[149] In accordance with my authority in subsection 109 (6), I will publish this Consideration Report and the Custodian's response to my recommendations on my Office's website.

**ORIGINAL SIGNED**

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

### Distribution List:

- Custodian
- Complainant

## Postscript

[150] I make the following comments.

### Complaint

[151] The Custodian stated, in statement 14 of his affidavit at 3, that "The [Complaint] made as defined in the Notice of Consideration is not correct and all facts are not disclosed." The Custodian did not elaborate so I examined the affidavit and submissions to determine a possible context behind the statement.<sup>69</sup>

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<sup>69</sup> I determined that the Complainant's statutory declaration contained nothing pertinent to the Custodian's assertion in statement 14 above.

[152] The Custodian asserted, in statement 2.2 of his submission at 1, that his “dire [financial] circumstances were caused by actions of the Department of Health and Social Services in retaliation for the Custodian’s [public] whistle blower disclosure of practices...” [concerning a payment dispute between them in respect of invoice information].

[153] The Custodian also asserted, in statements 4 and 5 of his affidavit at 1-2, that, as early as 2016, the Department of Health and Social Services wanted the Custodian to provide full patient medical records with the Custodian’s invoices before it would pay them. When the Custodian refused to comply, citing patient privacy, his financial difficulties allegedly began, ultimately leading to the closure of his medical practice.

[154] The Custodian further stated, in statement 11 of his submission at 4, that “the only live issue to consider [in this Consideration] is how to protect patient health information in the event of retaliatory action against a physician by [the Department of Health and Social Services] having exclusive power to hire and fire, change requirements for eligibility to practice in Yukon and using this power against a whistle blower physician without regard for the interests of the physician’s patients.”

[155] The Custodian then stated, in statement 12 of his submission at 4, that the “absence of whistle blowing protection legislation in Yukon left the [Custodian] hung out to dry without any recourse.”

[156] Given the above, I can only infer that this is what the Custodian meant in statement 14 above but, if correct, then I must clarify that HIPMA does not contemplate what is colloquially called ‘whistle blowing’ about the payment process for medical services under our public health care system in the Yukon since it is concerned exclusively with the protection and management of PHI.

[157] The only Yukon legislation that does embody this ‘whistle blowing’ concept, albeit restricted to Yukon government employees or former employees, is the *Public Interest of Disclosure of Wrongdoing Act* (PIDWA). However, I make no comment about PIDWA except to state that the Custodian’s alleged ‘whistle blower’ issue is not pertinent to the Complaint before me under HIPMA.

### **IPC Authority**

[158] The Custodian made several references in his affidavit and submissions to the IPC. I set them out as follows, in chronological order.

- 1) The Custodian asserted, amongst other things, that he had “identified a retired registered nurse as a willing custodian of my patient records but was informed by the

IPC office that the transfer should be done to [the Other Medical Practice] because several of my previous patients are now patients at this [medical] clinic.”

- 2) In a letter from the Custodian to his patients, dated January 31, 2021, the Custodian stated, amongst other things, that “As per directions of the office of the Privacy Commissioner, I have been directed to provide your full Medical records from my office to the offices of [the Other Medical Practice]. This will occur on March 20, 2021. Unless instructed otherwise the transfer will take place...”
- 3) In an email from the Other Medical Practice to an unknown recipient, dated March 8, 2021, @ 1336 hours, it states, amongst other things, “I have concerns about this entire [Records transfer] process and whether it was appropriately arranged through [HSS] and the [IPC]. Based on the fact that neither of those parties have contacted us leads me to believe they are equally unaware.”
- 4) Sometime following the above email, the Custodian sent a letter to the Other Medical Practice stating, amongst other things, that “I have sent letters to all my patients advising them that I was instructed by the [IPC] to send my records to [the Other Medical Practice]. ... I was not aware that the [IPC] office had not made arrangements with [the Other Medical Practice] or [HSS]. I apologize for the confusion caused by the request from the [IPC’s] office.”

[Emphasis mine]

[159] Recall that I first received the Complaint from the Complainant on October 22, 2020, subsequently assigned an investigator for settlement purposes and was advised on March 15, 2021, that a settlement could not be reached. Also recall that I issued to the Custodian and Complainant an amended NOC on March 25, 2021.

[160] From the underlined language used above by the Custodian in statements 1, 2 and 4, and the Other Medical Practice in statement 3, there is either a misconception or, however inadvertently, a misrepresentation at work.

[161] Under HIPMA, the IPC has no authority to ‘direct, ‘instruct’ or ‘arrange’ anything in respect of a custodian. Moreover, the IPC has no implicit authority through use of the term ‘informed’ to affect a desired result.

[162] All the above statements occurred prior to my NOC issuance to the Custodian and Complainant. They are therefore part of the settlement attempt, as facilitated by my office, and have no bearing on this Consideration and its findings.

[163] The point of a settlement process is to attempt to resolve a complaint without having to proceed to a formal consideration. Resolution efforts employed by my investigators during that process should not be construed by the parties, for whatever reason, as anything other than the opinions of the investigators as it pertains to the interpretation of HIPMA's provisions and their application.

[164] When informal resolution involves a complaint about a procedure that is prescribed for a custodian under HIPMA, as occurred here, it is the custodian who is bound by HIPMA to follow the procedure. Therefore, the role of my investigators is to provide helpful information that will assist a custodian meet their compliance obligations. On receiving the information, it is the custodian who must decide which course to take.

[165] Moreover, custodians are bound by HIPMA. As such, they are expected to understand their obligations and the processes under which they must operate. It is unconstructive and incorrect for custodians or potential custodians to use language that implies the IPC's authority is otherwise than what is set out in HIPMA.