



Yukon
Information
and Privacy
Commissioner

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

DELIVERED BY HAND

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Tracy Illerbrun
A/Policy Development Officer
Department of Justice, Yukon Government
P.O. Box 2703 (J-1A)
Whitehorse, Yukon Y1A 2C6

Dear Ms. Illerbrun:

Re: Proposed Missing Persons Legislation Comments

Thank you for inviting my comments on the public consultation currently being undertaken by the Department of Justice in respect of proposed 'missing persons' legislation. My understanding is that the purpose of this legislation¹ is:

- to expand the authority of the RCMP to gather relevant information for a missing persons investigation beyond its current authority under the *Criminal Code* by giving it the ability to collect, use and disclose specific personal information (PI)² and personal health information (PHI),³ as applicable, via a court order or administrative procedure (*i.e.* emergency demand for records) for the purpose of facilitating the timely location of persons identified as missing; and
- to balance this ability against an individual's right to privacy by building into the legislation oversight, accountability mechanisms, safeguards and rules as it pertains to this collection, use and disclosure of PI or PHI.

¹ As informed by the Discussion Document Missing Persons Legislation located at <https://survey.gov.yk.ca/Missing-Persons-Legislation-Discussion-Document.aspx>.

² As defined in the ATIPP Act.

³ As defined in HIPMA.

I note that the public consultation document states the following about the need to equip the RCMP with these additional authorities:

Missing persons legislation allows the police to apply for a court order to fully investigate a missing persons case when the whereabouts of the person are unknown and there is concern for the person's safety or well-being, but there is no evidence of a criminal offense and/or explanation for the person going missing.⁴

Legislation such as this provides oversight and accountability mechanisms as well as safeguards and rules that may be required to release clients' personal information or records.⁵

The public consultation document also highlights that similar legislation in provinces contain the following 'common provisions':

- a definition of missing persons that “could include vulnerable or at-risk persons whose safety and welfare are of concern because of their physical or mental capabilities, personal history or other circumstances;”
- rules about how to make an application to obtain records by court order and about privileged information;
- the ability of law enforcement to obtain a court order to search private property when the missing person case involves a person-at-risk, a vulnerable person or an under-aged minor;
- rules about how to access third party records when the missing persons case involves a vulnerable person, person-at-risk or a minor, including by a court that could limit access to records;
- the ability of law enforcement to make an emergency written demand for a record where it is believed a missing person may be at imminent risk of serious bodily harm or death or there is a concern that pertinent records may be destroyed;
- limits on the use and disclosure of the records obtained;
- the ability of individuals to access the records; and
- offences and penalties for failing to comply with a court order.

⁴ *Ibid* 1., at p.2.

⁵ *Ibid.*

It is without dispute that timely access to information to locate a missing person is essential in some cases to protect those missing from harm. I agree that while access to information is important in these circumstances, the right to privacy is equally important. For the legislation to achieve the proper balance, it will need to include measures that enable the RCMP to obtain access to information, where it is reasonably necessary in the circumstances, for the purpose of locating a missing person.

In Yukon, there are a number of privacy laws that exist to ensure individuals have control over their own PI and PHI. The rights enshrined in these laws are quasi-constitutional rights. It must be recognized that these laws have been carefully crafted to protect the individual's right to privacy while allowing public bodies, custodians and organizations to collect, use and disclose PI or PHI, as applicable, for legitimate public or business purposes.

There are four privacy laws in effect in Yukon. At the federal level, there is the *Personal Information Protection and Electronic Documents Act* (PIPEDA) that applies to private sector organizations in Yukon and the *Privacy Act* that applies to federal government institutions including the RCMP. At the territorial level, there is the *Access to Information and Protection of Privacy Act* (ATIPPA Act) that applies to territorial public bodies including Yukon government departments and the *Health Information Privacy and Management Act* (HIPMA) that applies to custodians including the Yukon Government's Department of Health and Social Services, all hospitals and health facilities, and those organizations run by private health care providers. There are privacy commissioners responsible for monitoring compliance of these privacy laws at the federal and territorial levels. Included in these laws is a codified right for individuals to access their own personal information and the ability to make complaints to the privacy commissioners about violations.

As can be seen, there is already a considerable amount of legislation that imposes rules on public bodies', custodians' and organizations' authority to collect, use and disclose PI or PHI. Adding another set of rules that these bodies must decipher when faced with a request by the RCMP to access PI or PHI, may, in my respectful view, serve to counter the objectives of the proposed law and increase the likelihood of a privacy breach. To avoid placing these bodies in the unenviable position of having to determine which law applies and is paramount when the RCMP asks for records containing PI or PHI to locate a missing person, I recommend the following:

1. examine the existing privacy law landscape to determine where there are gaps that may prevent the RCMP from accessing information where the circumstances are such that access is reasonably necessary to locate a missing person;
2. craft the provisions of the missing persons legislation to fill those gaps; and
3. prior to launching the legislation, develop and distribute outreach material to educate public bodies, custodians and organizations on the RCMP's authority to access PI or PHI for

the purpose of locating missing persons and offer regular training in support of removing any barriers to access caused by poor training or staff turnover.

Prior to analyzing the privacy law landscape and gaps, it is first necessary to determine the circumstances under which the RCMP may be authorized by the proposed missing persons legislation to access PI or PHI to locate a missing person. The public consultation documents indicate the following:

- The purpose and advantage of the legislation is to “[allow] the police to fully investigate a missing persons case when the whereabouts of the person are unknown and there is concern for the person’s safety or well-being.”
- The definition of a missing person in the legislation may include “vulnerable or at-risk persons whose safety and welfare are of concern because of their physical or mental capabilities, personal history or other circumstance.”
- The legislation will contain a process to define “how the RCMP will seek access to third-party records, including any limitation to such records when the missing persons case involves a vulnerable person, person at risk, or a minor”.
- The legislation will allow the RCMP to make emergency demands for records where “there is belief a missing person may be at imminent risk of serious bodily harm or death or concern that patient records may be destroyed.”

From the public consultation document, it is clear that the primary reason the RCMP will be authorized to access PI and PHI to locate a missing person is to prevent the person from suffering harm. It is recognized that key to harm prevention is the ability to locate a missing person in a timely manner. Access to information that provides clues as to the person’s whereabouts must, therefore, also occur in a timely manner.

Yukon’s privacy laws currently permit public bodies to disclose PI or PHI where harm may come to an individual or for the purposes of locating a missing person.

- Subsection 36 (n) of the ATIPP Act authorizes a public body to disclose PI on determining that “compelling circumstances exist that affect anyone’s health or safety and if notice of the disclosure is mailed to the last known address of the individual the information is about.” If the RCMP provides sufficient information to a public body that compelling circumstances exist in which a missing person’s health or safety is affected, then the public body is authorized, without consent, to disclose any PI that is reasonably necessary to locate the missing person. Following disclosure, the individual will receive a notice of the disclosure so they are aware it occurred. This preserves some measure of control, a key tenet of privacy law, over the individual’s disclosed PI.

- Subsection 58 (w) of HIPMA authorizes a custodian to disclose PHI without consent “if the individual is missing or reasonably believed to be missing, to the police for the purpose of assistance in locating the individual, if the [PHI] is limited to
 - (i) registration information of the individual;
 - (ii) the date the custodian’s records show that health care was last provided to the individual, the individual’s general health status at that time and the identity of the person who provided the health care; and
 - (iii) any prescribed information.”

If the RCMP provides sufficient information to support the need for PHI to locate a missing person, then the custodian has authority to without consent disclose the PHI identified in this subsection. This provision squarely addresses the issue of disclosure of PHI to locate missing persons. It is clear that the drafters of HIPMA carefully considered the information that should be accessible to support locating a missing person. Given that this legislation is new and addresses the objective of achieving the balance between access to information for locating missing persons and privacy,⁶ I do not see why it is necessary to create another law to address this issue. Further, HIPMA requires custodians to keep a record of disclosures without consent. This requirement ensures individuals can determine who has their PHI and supports their right to control their own PHI.

Both laws also authorize public bodies and custodians to disclose PI or PHI that is identified in a court order.⁷

Based on the foregoing, the only gap, in my view, between the objects of the proposed missing persons legislation and the current privacy laws governing public bodies and custodians is that disclosure in the foregoing circumstances is discretionary. This means that a public body or custodian can decide not to disclose PI or PHI that is reasonably necessary to locate the missing person. Given this, the gap to fill with the missing persons legislation is a provision that requires the public body or custodian to disclose the PI or PHI after the RCMP meets the thresholds for disclosure under the ATIPP Act and HIPMA, and the public body or custodian determines it has PI or PHI that it may disclose to the RCMP for the purpose of locating a missing person. This provision would expressly need to be identified as being paramount over the ATIPP Act’s and HIPMA’s discretionary authority to disclose PI and PHI.

⁶ The purposes of HIPMA are *inter alia* “(a) to establish strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information; [and] (b) to establish rules for the collection, use and disclosure of, and access to, personal health information that protect its confidentiality, privacy, integrity and security, while facilitating the effective provision of health care.”

⁷ Paragraph 58 (u)(i) of HIPMA and subsection 36 (e) of ATIPP Act.

In terms of the other proposed provisions of the missing persons legislation that deal with the restrictions on use and disclosure of PI or PHI collected by the RCMP for the purposes of locating a missing person, I agree that any use or disclosure beyond the purpose of collection should be strictly prohibited. This would include a use or disclosure “consistent with that purpose.” Any uses and disclosure of PI or PHI collected by RCMP under missing persons legislation should be specified in the law so that individuals know what the RCMP may do with their PI or PHI collected. The legislation should identify a retention period for any PI or PHI collected to ensure its destruction in accordance therewith. The law should also clarify a process for accessing the information collected by the RCMP.

I support developing a procedure for RCMP requests of PI or PHI from a custodian and a public body and the use of a form that identifies the law that is applicable, as well as the specific threshold that must be met by the RCMP in support of the request. Having a form will be useful for training and to clarify for public bodies and custodians at the point of request exactly what the RCMP wants and the authority of all parties to the transaction. Having a clear, well defined process will prevent delays in responding to a request which can occur when a public body or custodian has to take time to verify its authority to disclose. This form can also be used by public bodies and custodians to meet their disclosure without consent obligations by recording on the form the PI or PHI disclosed and retaining a copy for their records.

I trust that you will find my comments to be of assistance as you begin drafting the missing persons bill. Having not seen a draft of this legislation, it is difficult for my comments to be precise. I would appreciate being provided the opportunity to review and comment on the bill once it is drafted.

As my comments provided herein are in response to a public consultation, I will be publishing this letter on my website.

Please contact me if you have any questions about the foregoing.

Kind regards,

ORIGINAL SIGNED BY

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