



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

July 16, 2019

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



Dear Ms. McLeod-McKay:

**Re: Health Information Privacy and Management Act (HIPMA) Complaint
Your file: HIP18-19I**

Thank you for your June 14, 2019 letter.

With regard to the Consideration Report that your office provided to in relation to HIP18-19I. I am writing to indicate that the Department has accepted both recommendations contained therein.

To that effect, the Department agrees to review current education and training practices to ensure that agents are trained on the requirement to exercise discretion prior to using personal health information in its custody or control.

The Department agrees to advise you on the steps taken above.

Sincerely,



Jennifer Potvin
Chief Information Officer



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

September 13, 2019

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

Dear Ms. McLeod-McKay:

**Re: Health Information Privacy and Management Act (HIPMA) Complaint
Your file: HIP18-19I**

In response to the Consideration Report HIP18-19I provided on June 13, 2019, I am writing to advise you on the steps the Department has taken to meet Recommendation 1.

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

As you know, HSS has recently updated its training materials, and they were provided to your office on December 07, 2018. The requirement to exercise discretion in use of personal health information and specific reference to the application of sections is referenced multiple times throughout the training materials.

All new employees of the Department are required to complete the training as part of their onboarding process. It is the Department's practice to review and update training materials every two years, as well as facilitate employee privacy training across the Department.

Once completing the review of training slides and relevant Department policies, all agents of the Department are required to complete a Pledge of Confidentiality, in which agents acknowledge their understanding and agree to a number of privacy and confidentiality statements including that they "will collect, use, disclose and access only the minimum amount of confidential information as required by [their] role..." In this document the definition of confidential information includes personal health information.

In addition, since the launch of the updated training materials the Department provided 15 in-person privacy training session. Nine of these in-person training sessions were provided directly to the program area referenced in HIP18-19I.

To continue to improve the Department's privacy training, we are in the process of moving the training to the new Yukon Government learning management system, Appendo. This will improve the ability to: mobilize privacy training updates; embed the training in on-boarding packages; and facilitate reminders for staff to re-take updated privacy training.

Sincerely,



Jennifer Potvin
Chief Information Officer

Diane.McLeod-McKay

From: Diane.McLeod-McKay
Sent: Thursday, September 19, 2019 1:07 PM
To: Jennifer.Potvin
Subject: Response to Recommendation in HIP18-19I
Attachments: 2018-11 HSS Privacy Training v7.1.pdf; YG_HSS_IS_PrivacyTraining_Quiz_Draft_7.0.pdf; YG_HSS_IS_PrivacyTraining_EvaluationForm_Draft_7.0.pdf

Jennifer, thank you for your letter of September 13, 2019, setting out the Department of Health and Social Services' response to the recommendation in the HIP18-19I Consideration Report. In your letter you indicate that the exercise of discretion with respect to using personal health information is "referenced multiple times throughout the training materials." I've gone through the materials and do not see that this is the case. To ensure I am working from the right set of training materials, I am appending the materials provided to us in December of 2018.

Can you please confirm that the materials I am working from are the ones referenced in your letter? I would appreciate it if you can respond to me today in regards to this matter.

Thank you.

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

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DELIVERED BY EMAIL

October 7, 2019

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

Re: *Health Information Privacy and Management Act (HIPMA) – Consideration*
Our File No. HIP18-19I

On June 13, 2019, I issued the above noted Consideration Report (Report). There were two recommendations made in the Report. Both were accepted by the Department of Health and Social Services (HSS). They are as follows.

...I recommend that:

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

As you may recall from this consideration, I found HSS violated its obligation to exercise discretion prior to using the complainant's personal health information to provide [REDACTED] with services. As I stated in the Report, "the exercise of discretion under HIPMA must take into account the interests of the individual who is receiving health care in addition to any other reasonable factors." I also stated that "A factor that would be relevant in deciding not to collect, use or disclose personal health information would be if harm could or may come to the individual or another person." It is important to note that the burden of proving that discretion is exercised prior to collecting, using or disclosing personal health information rests with the custodian. Therefore, any process utilized by HSS that involves an exercise of discretion should include a process to document that it occurred.

The 90-day deadline identified in the second recommendation expired on September 12, 2019. The response to the recommendation was received from HSS on September 13, 2019, after I sent an email to remind Ms. Potvin about the deadline. The response provided by Ms. Potvin is attached. As you will note from your review of her letter, she indicates that:

- HSS “trains its agents on the requirement to exercise discretion prior to using personal health information in its custody or control after it determines it has authority for use under sections 55 or 56 and sections 15 and 16 of HIPMA”;
- “HSS recently updated its training materials...The requirement to exercise discretion in use of personal health information and specific reference to the application of sections is referenced multiple times throughout the training materials”;
- “All new employees are required to complete the training as part of their onboarding process”;
- all new employees are required to sign a pledge of confidentiality; and
- the employees involved in the program area referenced in the Report were provided in-person training sessions.

Following my review of the training materials referenced in the letter, I determined there is no reference to the obligations of HSS’s employees to exercise discretion as applicable within the materials or what the process entails. Given this, I followed up with Ms. Potvin by email on September 19, 2019 to clarify whether I have the correct training materials and informed her that in these materials, which I attached to the email, the duty to exercise discretion is not addressed. To date I received no response to my email.

Section 114 of HIPMA provides a right of appeal to a complainant where after deciding to follow a recommendation made by the Information and Privacy Commissioner in a consideration report, a custodian does not follow the recommendation “within a reasonable time.” As indicated, I gave HSS 90 days to provide me with the steps it has taken to implement the first recommendation. The information I received to date from HSS about the implementation suggests it has not yet occurred.

Although it is unclear in HIPMA what constitutes a “reasonable time” to follow a recommendation for the purposes of launching an appeal, it is implied therein that the period must be within six months from the time a custodian receives a consideration report, as this is the maximum allowable time for an appeal to occur. In my view what a “reasonable time” is to follow a recommendation must take into account the nature of the recommendation. In this case, the recommendation is not complex. It merely involves HSS ensuring that its employees are trained on the duty to exercise discretion.

To ensure the complainant is kept apprised of the status of the implementation of recommendation one by HSS, I will be writing to the complainant within the coming weeks to inform [REDACTED] that the recommendation has not yet been implemented and that [REDACTED] has a right to appeal under section 114.

Please feel free to contact me in regards to the foregoing if you have any questions.

Kind regards,

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

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



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DELIVERED BY EMAIL

October 17, 2019

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

Dear Mr. Samis,

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

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

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

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

HIP18-19I

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

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

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

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

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

HIP18-24I

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

1. *I recommend that the Custodian provide the Complainant with access to the 1,201 remaining pages of records (Records) responsive to the Access Request on or before July 29, 2019.*
2. *I recommend that the Custodian provide the Complainant with the Records in reasonable numbers as they become available prior to July 29, 2019.*
3. *I recommend that the Custodian provide the Complainant with sufficient reasons for any refusal of their personal health information in the records requested as required by paragraph 26 (4)(c), inclusive of advising the Complainant of their right to make a complaint to the IPC about such refusal.*
4. *I recommend that within 60 days of receiving the Consideration Report, the Custodian develops a policy that sets out how to handle:*
 - a) *the management of an application for access to personal health information under subsections 25 (1) to (3); and*

- b) its response to a 'complete application' under subsections 26 (1) to (5), inclusive of how to answer the above fourfold questions in respect of paragraph 26 (2)(a).*
- 5. I recommend that the Custodian provides the IPC with a copy of the policy developed under recommendation #4 within 10 days of its development.*
 - 6. I recommend that, within 15 days of developing the policy under recommendation #4, the Custodian:*
 - a) trains its staff responsible for managing and responding to access requests on the policy; and*
 - b) develops a process that ensures these staff are refreshed on the policy on an annual basis.*
 - 7. I recommend that, within 90 days of receiving this Consideration Report, the Custodian evaluates its human, technical and financial resources to determine if they are sufficient to meet the operational demands of processing, within the legislated timelines, the volume of access requests it is receiving. The evaluation must take into account the degree of complexity involved in processing access requests for personal health information.*
 - 8. I recommend that, within 120 days of receiving this Consideration Report, the Custodian provides the IPC with a copy of the evaluation conducted under recommendation #7.*

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

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

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

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

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

Next steps

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

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

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



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

Kind regards,



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

Attachments

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

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



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

October 25, 2019

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

Dear Ms. McLeod-McKay:

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

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

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

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

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

Sincerely,

A large black rectangular redaction box covers the signature area of the letter.

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



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DELIVERED BY SFT

November 1, 2019

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

Dear Mr. Samis:

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

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

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

HIP18-24I

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

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

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

determine if they are sufficient to meet the operational demands of processing, within the legislated time lines, the volume of access requests it is receiving. The evaluation must take into account the degree of complexity involved in processing access requests for personal health information.

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

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

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

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

HIP18-19I

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

...I recommend that:

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

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

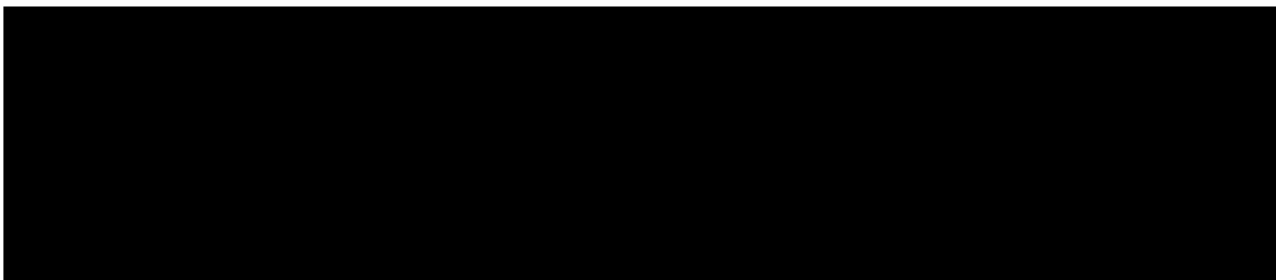
Recommendation 2 in this Consideration Report required the Department to provide me with the steps it has taken to meet recommendation 1. As no steps have been provided by the Department as to how it will meet recommendation 1, I consider this recommendation to not be followed.

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

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

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

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





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

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

Kind regards,



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

Attachments

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



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

November 12, 2019

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

Dear Ms. McLeod-McKay:

Re: Your file HIP18-19I

The Department is in receipt of your letter of November 1, 2019 regarding this matter. I apologize for the delay in responding to your earlier correspondence on this file.

After careful consideration, the department has determined that it does not accept the interpretation that would require the Department to engage in a proactive, case by case, exercise to balance competing factors before using personal health information for the purposes of health care to the individual.

The Department will continue to train staff to follow what it considers as its obligations under the HIPMA.

I further apologize for any confusion that this has caused.

Yours truly,

A solid black rectangular box redacting the signature of Jennifer Potvin.

Jennifer Potvin
Chief Information Officer, Health and Social Services



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DELIVERED BY SFT

January 15, 2020

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

Dear Mr. Samis,

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

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

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

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

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

Kind regards,


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

Cc. HIP18-24i Complainant