Yukon Information and Privacy Commissioner

CONSIDERATION REPORT

File HIP18-19I

Pursuant to subsection 103 (1) of the

Health Information Privacy and Management Act

Diane McLeod-McKay, B.A., J.D.

Information and Privacy Commissioner (IPC)

Department of Health and Social Services

June 13, 2019

Summary

An individual (Complainant) made a complaint to the IPC alleging the Department of Health and Social Services (Department) used their personal health information contrary to the requirements of the *Health Information Privacy and Management Act* (HIPMA). The Complainant also alleged that the Department did not comply with HIPMA's requirements in regards to the disclosure of their personal health information as well as access to it via an electronic information system and its retention.

The IPC found the Department had authority to use the personal health information but failed to exercise its discretion, as required, for its use. The IPC also found the Department did not disclose the Complainant's personal health information and that no access to the personal health information occurred via its electronic information system. She also found that its retention of this information did not violate HIPMA's requirements.

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Statutes Cited

Access to Information Act, R.S.C. 1985, c. A-1

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Health Information Privacy and Management Act, SY 2013, c 16

Health Information General Regulation, Order-in-Council 2016/159

Yukon Health Information Network Regulation, Order-in-Council 2016/160

Interpretation Act, RSY 2002, c 125

Cases Cited

Yukon

Department of Health and Social Services, Consideration Report HIP16-02I, October 6, 2017 (YT IPC)

Yukon Hospital Corporation, Consideration Report HIP17-08I, March 16, 2018 (YT IPC)

Court

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, [2013] 3 SCR 733, 2013 SCC 62 (CanLII)

Attaran v. *Canada (Foreign Affairs)* 2011 FCA 182

Lurtz v. *Duschesne,* 2003 CanLII 37900 (ON SC)

Ontario (Public Safety and Security) v. *Criminal Lawyers' Association,* 2010 SCC 23

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, 1998 CanLII 837 (SCC)

Thibert v. *Zaw-Tun,* 2006 ABQB 423 (CanLII)

Explanatory Note

[1] All statutory provisions referenced below are to HIPMA unless otherwise stated.

I BACKGROUND

[2] On October 24, 2018, the Complainant made a complaint to the Office of the IPC alleging unauthorized use, disclosure, access and retention by a custodian of the Complainant's personal health information.

[3] The IPC assigned the complaint to an investigator for settlement purposes. Settlement could not be achieved. Upon being notified that settlement failed and prior to issuing a Notice of Consideration, the IPC considered whether any of the circumstances in subsection 101 (1) applied and determined they do not.

[4] A Notice of Consideration dated January 29, 2019, (Notice) was delivered to the Department and the Complainant. The Notice identified a preliminary issue. The preliminary issue was that before considering the complaint, the IPC would first need to determine who the custodian is in respect of the allegation of non-compliance. The custodian was either the Department or a psychiatrist who provided psychiatry services under contract to the Department (Psychiatrist) and who saw the complainant in the Department's Mental Wellness and Substance Use Branch (MWSU). As a result of the preliminary issue, the IPC delivered the Notice to the Psychiatrist and invited the Psychiatrist to make a submission on the preliminary issue.

II CONSIDERATION PROCESS

[5] The IPC received submissions from the Psychiatrist on February 6, 2019, in which the Psychiatrist submitted, *inter alia,* that the Department is the custodian.

[6] The IPC received 'preliminary matter submissions' from the Department on February 7, 2019. The Department submitted that it, and not the Psychiatrist, is the custodian in respect of the allegation of non-compliance. It added that the Psychiatrist was acting in the capacity of an agent of the Department under HIPMA as a result of a contractual relationship between it and the Psychiatrist for the Psychiatrist to provide psychiatric services to patients seen in the MWSU.

[7] On February 28, 2019, the IPC received the Department's initial submission on the issue for Consideration identified in the Notice. The Registrar provided the submission to the Complainant and the Complainant's reply was received on March 6, 2019. Both the

Department and the Complainant made reply submissions. The Department's submission was received on March 15, 2019 and the Complainant's on March 25, 2019.

III JURISDICTION

[8] The definition of 'custodian' in HIPMA includes 'the Department'. 'Department' is defined as "the Department of Health and Social Services." Subsection 7 (1) states that "[e]xcept as provided in subsection (2), this Act applies to (a) the collection, use and disclosure of personal health information by (i) …the Department."

[9] As indicated, the Department acknowledged it is the custodian for the purposes of this Consideration. The parties and the Psychiatrist acknowledge in their respective submissions that the personal health information of the Complainant was used by the Department in providing the Complainant with health care.

IV PRELIMINARY MATTER

[10] The preliminary matter identified in the Notice was "Is the Respondent or the Psychiatrist the custodian for the purposes of the Complaint made by the Complainant?" Based on the evidence and the admission by the Department that it is the custodian in respect of the Complaint made by the Complainant, I accept for the purposes of this Consideration that the Department/Respondent is the custodian (Custodian) and I find the same. This addresses the preliminary matter.

V ISSUES

[11] The issues for consideration identified in the Notice of Consideration are as follows.

1. *Did* [the Psychiatrist] *use the Complainant's personal health information contrary to the requirements of HIPMA?*
2. *Did* the [Custodian] *disclose the Complainant's personal health information to the Psychiatrist contrary to the requirements of HIPMA?*

3. *Was access to* the [Custodian's] *information system by the Psychiatrist authorized for the purposes of providing health care to the Complainant on or about January 2018?*

4. *Did the* [Custodian] *retain the Complainant's personal health information related to care* [the Complainant] *received from* [another psychiatrist] *while he was* [contracted] *by* the [Custodian] *contrary to the requirements of HIPMA?*

VI BURDEN OF PROOF

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

> *106 (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.*

[13] Given that the Complaint is about the Custodian's obligations to comply with HIPMA for the use, disclosure and retention of the Complainant's personal health information and accessibility of this personal health information via one of its information systems, it has the burden of proving that it met these obligations.

VII RECORDS AT ISSUE

[14] There are no records at issue in this Consideration since the issues are about the collection, use and security of records containing personal health information rather than access to these records by the Complainant.

VIII FACTS

[15] There was no agreed upon statement of facts by the parties. The Custodian, however, provided the following information in its submission under the heading "Facts and Submissions."

1. *In making of* [sic] *this submission, the Custodian is relying on all definitions as set out in HIPMA…*

2. *The Department's* [MWSU] *was initiated as a new branch, with a new branch mandate in 2018. Over the course of 2018, a number of process improvements have been made, including those which would help to address issues raised in this Consideration.*

3. *The Custodian submits that* [another psychiatrist] *was, at the relevant time, a HIPMA agent of the Custodian.*

4. *A referral to the consulting psychiatrist(s) can only be made from a counsellor/clinician or a mental health nurse employee of the Department in* [MWSU]. *Either the client or the counsellor/nurse can initiate the discussion about a referral to a psychiatrist but the client must give verbal consent to the referral, and the counsellor/nurse must assess and confirm that the referral request is appropriate.*

5. *Health care was provided to the Complainant by*

    a. *an employee of the Department who works in the* [MWSU] [(Custodian Employee)]; and

    b. *by two agents of the Department,* [the Psychiatrist and another psychiatrist]. *Both of whom were psychiatrists on contract to the Department at the relevant time.*

6. [The Psychiatrist] *provided health care to the Complainant on January 23, 2018.*

7. *The Department granted* [the Psychiatrist] *access to the electronic medical record system in use in the Department's* [MWSU] *(Synapse) after* [the Psychiatrist] *signed a pledge of confidentiality that includes an acknowledgement that she is bound by HIPMA and is aware of the consequences of breaching it. A true copy of this document is attached to the Affidavit of* [the Department's Chief Information Officer (CIO)] *as Exhibit B.*

8. [Another psychiatrist] *has provided health care to the Complainant as an agent of the* [Custodian] *between 2008 and 2013.* [This same psychiatrist] *has since continued to provide health care to the Complainant as a physician and Custodian in his own right, rather than as an agent of the Department. As the custodian, the Department kept the records of it's* [sic] *agent…*[1]

IX DISCUSSION OF THE ISSUES

ISSUE 1: Did* [the Psychiatrist]*, use the Complainant's personal health information contrary to the requirements of HIPMA?

Custodian's Initial Submission for Issue 1

[16] The Custodian's submission for Issue 1 is as follows.

1. *Records indicate that the complainant consented to a consultation with* [the Psychiatrist] *to obtain a clinical opinion on November 7, 2017.*

2. *Records indicate that on January 11, 2018,* [the Custodian Employee] *advised the Complainant that she would consult with* [the Psychiatrist] *prior to the appointment and provide* [the Psychiatrist] *with relevant background information of the Complainant's health care history.*

3. *Records indicate that on January 23, 2018* [the Custodian Employee] *verbally shared the Complainant's personal health information related to historic diagnosis, therapy history and provided some background information to* [the Psychiatrist]. *The transmission of the personal health information between Custodian and* [the Psychiatrist] *was for the purposes of providing health care.*

4. *A true copy of the records referenced above is attached to the Affidavit of* [the CIO] *as Exhibit A.*

5. *Despite having the ability to access the Complainant's file, to our knowledge,* [the Psychiatrist] *did not access the Complainant's file directly. Act* [sic] *attached to the Affidavit of* [the CIO] *as Exhibit C is a copy of an activity log for the synapse system showing no activity by* [the Psychiatrist] *during the relevant time.*

[1] Custodian's Initial Submission, at pp. 2 and 3.

6. *The Complainant's personal health information was <u>used</u> by the Custodian and it's* [sic] *agent* [the Psychiatrist] *pursuant to HIPMA s55(1)*[(a)]...[2] [Emphasis in original]

[17] The Custodian provided an Affidavit sworn by the CIO in support of the submissions with the following exhibits attached:

> Exhibit A – "true copies of records from the Department's Synapse system made on February 28, 2019." The Department indicated that it "redacted information from the records to protect the Complainant's privacy and provided only the evidence necessary to support the Department's initial Submission."
>
> Exhibit B – "a true copy of [the Psychiatrist's] pledge of confidentiality."
>
> Exhibit C – "a true copy of the activity log from the Synapse system made on February 28, 2019 that shows that [the Psychiatrist] did not use her access credentials to use the system during the relevant time."[3]

<u>Complainant's Initial Submission for Issue 1</u>

[18] The Complainant did not address the issues in their submission. Instead, they raised a number of concerns regarding the credibility of the records provided by the Custodian. Specifically, they noted that the dates on some of the records attached as Exhibit A to the Affidavit of the CIO suggest they were created after the Custodian learned about the Inquiry instead of contemporaneously following the care they received. They also noted that a record of their care was missing.

<u>Psychiatrist's Submission relevant to Issue 1</u>

[19] In addition to providing submissions in respect of the preliminary issue, the Psychiatrist provided additional information that is relevant to this Inquiry. This information follows.

> *The MWSU clinic is a community mental health clinic.* [The Psychiatrist] *provides psychiatric consultative services at the MWSU clinic on a contract basis two days per month. Patients connect with the MWSU clinic via referral from their family physician*

[2] *Ibid.,* at pp. 3 and 4.
[3] Affidavit of the CIO, at p. 1.

or psychiatrist. The therapist at the MWSU clinic arranges an appointment with a psychiatrist at the MWSU clinic if needed…

The morning before [the Psychiatrist] *sees a patient through the MWSU, she is provided with information from the MWSU clinic about the patient in a file.* [The Psychiatrist] *reviews this information prior to seeing the patient. After* [the Psychiatrist] *sees a patient through the MWSU clinic, she creates a consultation report.* [The Psychiatrist] *keeps a copy of her consultation report in her own file. However,* [the Psychiatrist's] *own medical file for the complainant is not at issue in this complaint.*

The MWSU clinic has a paper file and an electronic file for each patient. The complainant would have had a paper and electronic file of personal health information kept by the MWSU clinic from the complainant's interactions with [their] *therapist at the MWSU clinic. This is the medical file at issue in this complaint.*

The paper and electronic files at the MWSU clinic are maintained, controlled, and stored by the MWSU clinic. Access is determined by MWSU. Section 60 of HIPMA makes clear that custody or control over personal health information is specific to the personal health information in question, as section 60 contemplates that the custody and control over personal health information can be transferred away from a custodian. Therefore, custodianship over specific personal health information is determined by whether that custodian has custody and control over the specific personal health information. [The Psychiatrist] *does not have custody over the MWSU clinic file for the complainant as they are not stored by her; they are stored at a clinic she only attends twice a month. Further, she does not have control over these records as they are controlled by the MWSU clinic. The MWSU is the custodian relevant to the complaint.*

[The Psychiatrist] *acknowledges that her submissions on this second issue go beyond the preliminary point. However, in order to allow the proper consideration of the preliminary point, it is necessary to understand the necessity of* [the Psychiatrist] *accessing records and information in the possession of the MWSU in order to appropriately provide consultative psychiatric services to patients seen at that location.*

[The Psychiatrist's] *use of personal health information provided to her by MWSU in advance of the consult visit was in accordance with HIPMA. Section 55 (1) of HIPMA provides*

> *55(1) A custodian may use an individual's personal health information that is in its custody or control*
>
> *(a) for the purpose of providing health care to the individual, unless the individual has expressly refused or withdrawn their consent to that use; or*
>
> *(b) for any other lawful purpose, if the individual consents to the use.*
>
> *The complainant did not expressly refuse or withdraw consent to use of* [their] *personal health information for the purpose* [sic] *providing health care, which in this case was performance of the consult.*
>
> *In fact, obtaining an appropriate history, including reviewing all pertinent clinical information, is a necessary part of performing the consult. The Yukon Medical Council's standard of practice for "the Referral Consultation Practice" states that a referral request must include at minimum, "all pertinent clinical information, including, but not limited to, results of clinical investigations." In order to meet the criteria for a psychiatric consultation for billing purposes, an appropriate history must be obtained. The psychiatry adult consultation fee code as published in the Payment Schedule dated April 1, 2018 specifically includes "history" in the criteria for diagnostic examination. As such, it is clear that a physician performing a consult is required to be aware of the patient's past clinical information.*[4]

Custodian's Reply Submission for Issue 1

[20] In its reply, the Custodian responded to the Complainant's observations regarding the creation of the electronic records, indicating that some were created on February 8, 2018, from the Custodian Employee's handwritten notes, which, it suggests, were created contemporaneously with the provision of care by the Custodian Employee to the Complainant. The Custodian submitted an Affidavit of the Custodian Employee along with her handwritten notes affirming her creation of the notes.

Complainant's Reply Submission for Issue 1

[21] In reply, the Complainant submitted that the records are unreliable. The Complainant indicates that five out of six records appear to have been transcribed with more detail from the handwritten notes into the electronic system after the Custodian learned about the Inquiry. In regards to these records, the following is highlighted in the submission.

[4] The Psychiatrist's submissions, at pp. 2 and 3.

1. The handwritten notes dated 'November 7' appear to have been entered into the electronic system on February 8, 2019, as a result of the words "Entered by: [Custodian Employee] 2019-Feb-08" appearing at the bottom. The 'event date', which appears to be the date the Custodian Employee provided care to the Complainant, is '2017-Nov-7'.

2. No handwritten notes were provided for November 16, 2017. Only the electronic record was provided. It indicates that the event date is '17-Nov-16' and the date the electronic record was 'entered by' the Custodian Employee is '2017-Nov-19'.

3. The handwritten notes provided are dated 'Jan 11' and appear to have been "Entered by: [Custodian Employee] 2019-Feb-08." The 'event date' is '2018-Jan-11'.

4. The handwritten notes provided are dated 'Jan 23' and appear to have been "Entered by: [Custodian Employee] 2019-Feb-08." The 'event date' is '2018-Jan-23'.

5. The handwritten notes provided are dated 'Feb 13' and appear to have been "Entered by: [Custodian Employee] 2019-Feb-08." The 'event date' is '2018-Feb-13'.

6. The handwritten notes provided are dated 'Mar 27' and appear to have been "Entered by: [Custodian Employee] 2019-Feb-08." The 'event date' is '2018-Mar-27'.

[22] The Complainant stated the following about the date the electronic records appear to have been created.

> *…How is it that two records one in between dates can match if these entries were entered on Feb 08/19 for* [the CIO's] *ease of reading? This tells me that the Nov 16/17 electronic record was already in the Synapse system and did not require to be altered in any way. How is it that on these dates* [the Custodian Employee] *can be very clear that she informed me in detail she would be sharing information with* [the Psychiatrist] *and that I was fully informed yet can't seem to recall exactly what the information was that she shared with me or* [the Psychiatrist]*? The issue that I brought to her attention on March 27/18 – she would definitely know the information that she shared with* [the Psychiatrist] *because* [the Psychiatrist] *did not get it from my file,* [the Custodian Employee] *was the source and she would know that.*

> *These particular 4 entries (records 4-7)*[5] *are significant to me because they are burned in my mind due to the trauma and pain it has caused me.*
>
> *I know these facts are to be true;*
>
> - *Yes, after repeatedly being asked over several months I finally did agree to a consult with* [the Psychiatrist] *with the understanding that* [the Custodian Employee] *would be attending the meeting with me for support and because she wanted to present her concerns and reasons for the consult. Whenever the suggestion of the consult was put to me I would adamantly emphasize that I did not want to change doctors that I was confident with who I was currently seeing.* [The Custodian Employee] *kept telling me repeatedly that the "purpose of the consult was to get a "fresh set of eyes" only; to see if we were missing something and that she would share my current relevant behavior along with her concerns and reasons for the consult."…*[6]

[23] The Complainant indicated that their understanding about what was being shared with the Psychiatrist was "related to my current experience and have 'fresh eyes' only."[7] The Complainant also added the following.

> *I arrived the morning of the consultation January 23, 2018 and* [the Custodian Employee] *was already there and that was when she informed me she could not stay for the consult because of a last minute meeting she had to attend. She said she would meet with me later and left. It was very brief. During the consult,* [the Psychiatrist] *commented on very personal information from years ago that not only shocked me but threw me off balance The information she referred to had nothing to do with my medical diagnosis, current relevant behavior or clinical presentation (most of the record is whited out) and how she referred to it was incorrect. This information is very, very personal and raw to me. I should have the decision if I want to share that part of information to anyone.*
>
> [The Custodian Employee] *and I met almost 2 months later on March 27, 2018. I was still very very upset and angry not frustrated, there is a huge difference, with* [the Custodian Employee] *and* [the Psychiatrist] *and made myself very clear with* [the Custodian Employee] *why and what I was upset about. I told her how violated I felt*

[5] Records '4-7' have event dates: Jan 11/18 (record 4); Jan 23/18 (record 5); Feb 13/18 (record 6); and Mar 27/18 (record 7).
[6] Complainant's reply submission, at p 1.
[7] *Ibid.,* at p 2.

and I reminded her of what I agreed to when I finally said I would meet with [the Psychiatrist]. *I asked* [the Custodian Employee] *directly these following questions;*

- *How did* [the Psychiatrist] *get that information?*
- *Did* [the Psychiatrist] *have access to my file?*
- *Did you tell* [the Psychiatrist] *that information?*
- *Have you spoken to* [the Psychiatrist] *since the consultation?*

[The Custodian Employee] *was sitting across from me and looked me straight in the eye, shaking her head left to right as she answered*

- ***No**, she did not share any information, she did not know how or who gave* [the Psychiatrist] *the information,*
- ***No**,* [the Psychiatrist] *did not have access to my file that she knew of.*
- ***No**, she had not spoken to* [the Psychiatrist] *since the consultation and was waiting for her report.*
- *She apologized that that had happened to me but had no idea how* [the Psychiatrist] *got the information. There was no misunderstanding about how I felt (I'm very obvious), what I was upset about or why. I was abundantly clear. I can be very articulate and very direct when expressing myself or when looking for answers. I calmed down enough to continue with the session because I wanted to believe* [the Custodian Employee] *was telling me the truth…There was **no mention** of the meeting* [the Custodian Employee] *refers to with* [the Psychiatrist] *on Feb 13, 2018 as stated in her records and I had no answers provided to me or offered in the future.*[8] [Emphasis in original]

[24] The Complainant expressed their feelings associated with the information conveyed to the Psychiatrist and how it had a significantly negative impact on their life. In this regard, the Complainant stated "had I known just how the consultation was going to play the way it did **I NEVER would have said yes**" and added that:

[8] *Ibid.,* at pp 3 and 4.

- "I DO NOT WANT THIS TO HAPPEN TO ANOTHER PERSON. [The Custodian] has to recognize that when a client says no – no means no and not to repeatedly make a request..."
- Vulnerable clients "don't fully understand what is being asked for or what it fully means to say "yes" in terms of sharing what kind of information."
- "Maybe consider not only verbally fully explaining in detail what information will be shared so the client may have a say or at least not be side-blinded [sic] – put it in writing so the client can see exactly what they are agreeing to sharing (in layman's terms)."[9] [Emphasis in original]

Analysis

[25] The provisions relevant to this Consideration are set out below.

[26] Section 13 of HIPMA states that "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."

[27] Sections 15 and 16 of HIPMA establish limits on the collection, use or disclosure of personal health information by a custodian. These sections state as follows.

> *15 A person who is a custodian or the agent of a custodian must not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure.*
>
> *16 The collection, use and disclosure of personal health information by a custodian or their agent must be limited to the minimum amount of personal health information that is reasonably necessary to achieve the purpose for which it is collected, used or disclosed.*

[28] A custodian's authority to use personal health information is set out in Division 3 of Part 5 of HIPMA. Sections 55 and 56 authorize a custodian to use personal information in certain circumstances with or without consent of the individual who the personal health information is about.

[9] *Ibid.,* at p 4.

[29] In this case, the Custodian is relying on paragraph 55 (1)(a) for its use of the Complainant's personal health information. This paragraph states as follows.

> *55(1) A custodian may use an individual's personal health information that is in its custody or control*
>
> *(a) for the purpose of providing health care to the individual, unless the individual has expressly refused or withdrawn their consent to that use;*

[30] For the Custodian to rely on this provision for the use of the Complainant's personal health information, it needs to establish that:

1. it used the Complainant's personal health information for the purpose of providing the Complainant health care;
2. the personal health information used was in the Custodian's custody or control; and
3. the Complainant had not expressly refused or withdrawn their consent to that use.

[31] The ability of the Custodian to use the Complainant's personal health information under paragraph 55 (1)(a) is discretionary. As such, it will need to establish it exercised its discretion prior to using the information.

[32] In accordance with the requirements of sections 15 and 16, it must also establish that:

1. no information other than personal health information would suffice to provide the health care; or
2. the personal health information used to provide the health care was limited to the amount of personal health information that is reasonably necessary to provide the health care.

[33] The following definitions in HIPMA are relevant to this Consideration.

[34] 'Personal health information' is defined as:

> *(a) health information of an individual,*

[35] 'Health information' of an individual is defined as:

> *…identifying information of the individual, in unrecorded or recorded form, that*
>
> *(a) relates to the individual's health or the provision of health care to the individual,*

[36] 'Health care' is defined as:

> *…any activity (other than an activity that is prescribed not to be health care) that is or includes*
>
> *(a) any service (including any observation, examination, assessment, care, or procedure) that is provided (i) to diagnose, treat or maintain an individual's physical or mental condition,*

[37] 'Use' of personal health information includes:

> *(a) handling or dealing with the personal health information in any manner whatever, other than by collecting or disclosing it, and*
>
> *(b) the transmission of the personal health information between a custodian and an agent of that custodian;*

[38] The definition of 'agent' is also relevant to this Inquiry. 'Agent' is defined as:

> *…a person (other than a person who is prescribed not to be an agent of the custodian) who acts for or on behalf of the custodian in respect of personal health information, including for greater certainty such a person who is*
>
> *(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,*

[39] There are two aspects of use relevant to Issue 1. The first is the use of the Complainant's personal health information by the Custodian Employee in transmitting the information to the Psychiatrist for the purposes of providing the consultation. The second is the use of this information by the Psychiatrist to provide the consultation. Both are 'uses' under HIPMA. The Custodian Employee and the Psychiatrist are agents of the Custodian under HIPMA and are obligated, when acting on its behalf, to comply with HIPMA for the use of personal health information.

Did the Custodian use the Complainant's personal health information for the purpose of providing the Complainant with health care?

[40] I am satisfied for the following reasons that the Custodian used the Complainant's personal health information for providing the Complainant with health care.

1. The Custodian's submissions indicate that the Custodian Employee "verbally shared the Complainant's personal health information related to historic diagnoses, therapy history" and "some background information" with the Psychiatrist.[10]

2. Two records submitted by the Custodian, the Synapse record with the event date of January 23, 2018, and the handwritten notes authored by the Custodian Employee on the same date, indicate that personal health information of the Complainant was transmitted from the Custodian Employee to the Psychiatrist.

3. These two records state the following about the information that the Custodian Employee transmitted to the Psychiatrist:

    i. "I shared information related to historic diagnosis, therapy history and provided some background information…"[11]

    ii. "- consult [Psychiatrist]
    - [Complainant] to see [Psychiatrist]
    - brief consult pre apt
    - provided clinical HX[12]
    - clinical presentation."[13]

4. This information qualifies as the Complainant's personal health information.

5. This personal health information was transmitted to the Psychiatrist by the Custodian Employee for the purpose of providing the Complainant with consultative psychiatric services (Consult). This type of service qualifies as health care under subsection (a)(i) of the definition of 'health care.'

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[10] Custodian's Initial Submission, at p. 3.
[11] Affidavit of the CIO, Exhibit A: Client Records, Synapse Report, event date January 23, 2018, entered by [Custodian Employee] February 8, 2019.
[12] I understand the abbreviation 'HX' to mean history.
[13] Affidavit of the Custodian Employee, handwritten notes authored by Custodian Employee, dated January 23 [no year indicated].

6. The submissions of the Psychiatrist confirm she used the Complainant's personal health information received from the Custodian Employee to provide the Consult to the Complainant.

Was the personal health information used in the Custodian's custody or control?

[41] The Custodian did not make any submissions about whether it had custody or control over the personal health information used. Subsection 55 (1) makes it clear that a custodian is only authorized to use personal health information that is within its custody or control for the purposes specified in paragraphs 55 (1)(a) and (b).

[42] I am satisfied based on the evidence that the Complainant's personal health information both in the handwritten notes and the Synapse records are in the custody and control of the Custodian. I am further satisfied that the Complainant's personal health information, which was transmitted to the Psychiatrist by the Custodian Employee and subsequently used by the Psychiatrist, was based wholly or partly on the contents of these records.

Did the Complainant expressly refuse or withdraw consent to the use of the personal health information?

[43] Subsection 55 (1) together with its paragraph (a) authorizes the Custodian to use the Complainant's personal health information to provide the Consult without their consent unless the Complainant withdraws their consent or expressly refuses consent for the use.

<u>Withdrawal of Consent</u>

[44] Consent can only be withdrawn if the Complainant gave valid[14] consent to the use of their personal health information and then withdrew consent afterward. Consent can only be 'withdrawn' if the requirements in section 42 are met.

> *42(1) An individual may withdraw their consent to a custodian's collection, use or disclosure of the individual's personal health information by notifying the custodian who has the custody or control of the personal health information.*
>
> *(2) An individual's withdrawal of consent under subsection (1), (a) must meet the prescribed requirements, if any;*

[14] 'Valid' in this context means consent obtained in accordance with the requirements in Part 4.

[45] There is no evidence before me that the Complainant gave consent to the use of their personal health information for the Consult and then withdrew it in accordance with section 42 and I find this did not occur.

Refusal of Consent

[46] In Consideration Report HIP17-08I,[15] I examined the meaning of 'expressly refuses consent' in the context of interpreting subsection 58 (a). That provision authorizes a custodian to disclose personal health information about an individual unless the individual withdraws their consent or expressly refuses consent.

[47] The facts in HIP17-08I were that a new mother had not been informed by hospital personnel that certain of her and her child's medical records would be disclosed by the hospital to a community health centre for post-partum health care, although she did not plan on receiving this type of care from the community health centre. She made a complaint to the Office of the IPC alleging that the hospital did not have authority to disclose this information. I found that consent for the disclosure was not required and that she had not withdrawn her consent. I also found that she had not expressly refused consent. In making this determination, I stated the following about how to interpret 'expressly refuses consent' in HIPMA.

> *Subsection 58 (a) requires that an individual's refusal to consent be express. The meaning of express consent is set out in section 35. It states as follows.*
>
> > *35(1) Express consent need not be in writing, but where express consent is required under this Act and has been given, the custodian who receives it must record it.*
> >
> > *(2) Express consent and a record of express consent must satisfy the prescribed requirements, if any.*[16]
>
> *Subsection 35 (1) clarifies that an express refusal to consent may be made orally or in writing. Given this, for the Complainant to have met the express refusal of consent requirement in subsection 58 (a), she would have had to express orally or in writing that she refused consent to the Custodian disclosing the Records to the Health Centre.*

[15] Yukon Hospital Corporation, Consideration Report HIP17-08I, March 16, 2018 (YT IPC).
[16] I noted in that Consideration Report that "The *Health Information General Regulation* does not prescribe any requirements for express consent."

> *The ability to refuse consent is part of an individual's rights under HIPMA to control their own personal health information. There is no temporal application associated with the right to refuse consent identified in HIPMA. This fact together with the legislative scheme and purposes of HIPMA described above support that in order for an individual to fully exercise control over their personal health information under HIPMA, the right to refuse consent for any collection, use and disclosure of personal health information by a custodian must include the ability to refuse consent both reactively upon being asked for consent and proactively upon learning in some other way about the custodian's intent on collecting, using or disclosing personal health information with which the individual does not agree.*
>
> *Based on the evidence of the Complainant, it is clear that she was unaware that her and her child's personal health information would or may be disclosed to the Health Centre for the purposes of receiving at-home, follow-up health care. This conclusion is supported by the evidence of the Custodian's agents who indicate in their respective Affidavits that the Complainant was simply told she would be contacted by a public health nurse or that a public health nurse will visit her at home following her discharge.*
>
> *Had the Complainant been made aware by the Custodian's agents that the Records would be disclosed, she could have expressed her desire to the contrary by proactively refusing her consent for their disclosure. She could not do so because she was never informed that the Records would be disclosed and that she had the ability to refuse.*[17]

[48] There is no evidence before me that the Complainant was asked to give valid consent for the Custodian Employee to transmit their personal health information to the Psychiatrist in order for the Complainant to receive the health care and that consent was refused. Given this, I find that the Complainant did not *reactively* refuse to provide consent.

[49] This does not end the analysis, given that I found in HIP17-08I that an individual has the right to both reactively and proactively refuse consent as part of their ability to exercise control over their own personal information under HIPMA. Proactive express refusal to consent provides the Complainant with the ability to refuse consent to the use of this information even when consent for the use was not sought by the Custodian.

[17] At paras. 84 to 89.

[50] It is clear from the submissions of the Complainant that they were under the impression that a limited amount of their personal health information, more specifically 'current' medical information, would be transmitted to the Psychiatrist for the purposes of the Consult. It was also clear from the submissions that the Complainant did not expect that some very specific historical medical information would be transmitted. In this regard, the Complainant stated the following.

> …[the Custodian Employee] *kept telling me repeatedly that…she would only share my current relevant behaviour along with her concerns and reasons for the consult.*[18]
>
> *My full consent to* [the Custodian Employee] *has always been with the agreement of consulting with* [the other psychiatrist] *only… My consent this time was totally different situation with limited consent with* [the Custodian Employee] *because I trusted her when she kept telling me repeatedly "the purpose of the consult is to get another clinical opinion related to my* ***current*** *experience and have 'fresh eyes" only.*[19]
>
> *…During the consult* [the Psychiatrist] *commented on very personal information from years ago that not only shocked me but threw me off balance. The information she referred to had nothing to do with my medical diagnosis, current relevant behaviour or clinical presentation…and how she referred to it was incorrect. This information is very very personal and raw to me…*[20]

[51] The Complainant's submissions indicate that, following their appointment with the Psychiatrist, they questioned the Custodian Employee about how the Psychiatrist gained knowledge of what was referred to in the submissions as "very personal information."

[52] The Custodian's submissions in respect of the Complainant's personal health information, inclusive of the 'very personal information' that was transmitted to the Psychiatrist, are as follows.

1. The Complainant consented to the Consult with the Psychiatrist.

2. The Complainant was advised that the Custodian Employee would provide the Psychiatrist with "relevant background information of the Complainant's health care history."

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[18] *Ibid.,* at p 1 and 2.
[19] *Ibid.,* at p 2.
[20] *Ibid.*

3. The Custodian Employee verbally shared the Complainant's personal health information inclusive of "historic diagnosis, therapy history" and "some relevant background information" to the Psychiatrist.[21]

[53] Records provided by the Custodian support that the Complainant was informed that their personal health information would be provided to the Psychiatrist for the Consult. In the Synapse record with an event date of January 11, 2018, it states that the Custodian Employee "shared" with the Complainant that "I would bring [the Psychiatrist] up to date with respect to [the Complainant's] current struggle as well as the reason for the consult and some of the *relevant background information*" [my emphasis]. The handwritten notes of the Custodian Employee state that the she informed the Complainant that she would provide the Psychiatrist with information including "HX etc."

[54] It is clear from this evidence that the Complainant was not provided any specifics about what background information or 'HX, etc.' would be provided to the Psychiatrist, including that the 'very personal information' would be provided.

[55] The submissions of the Complainant make it clear that, had the Complainant been aware of this use of their personal health information and their rights under HIPMA, they would either have: (a) refused the Consult; or (b) at minimum, expressly refused consent for the use of the 'very personal information' for the Consult.

[56] It is also clear from the evidence that the Complainant did not have the opportunity to exercise their right to refuse consent as a result of the following:

1. the failure of the Custodian Employee to clarify what she meant by providing the Psychiatrist with the Complainant's 'relevant background information' or 'HX etc.' or that this information would include the Complainant's 'very personal information;' and

2. the failure of the Custodian Employee to inform the Complainant that they had the right to refuse consent to the use of this personal health information.

[57] Based on the foregoing, I find that the Complainant did not expressly refuse consent to the transmission of their personal health information to the Psychiatrist for the Consult.

[21] Department's initial submissions at p.3.

[58] Upon learning from the Psychiatrist during the Consult that she had knowledge of the historical medical information about the Complainant, including the 'very personal information', the Complainant could have, at that time, exercised their right to expressly refuse consent for the Psychiatrist's use of the personal health information for the purposes of providing the Consult. There is no evidence that this occurred and I find it did not.

[59] My finding on paragraph 55 (1)(a) is that the Custodian was authorized to use the Complainant's personal health information for the purposes of the Consult because the Complainant did not withdraw or expressly refuse their consent to the use.

Did the Custodian meet the requirements of sections 15 and 16 in respect of the use of the Complainant's personal information?

Section 15

[60] Sections 15 prohibits the Custodian from using personal health information for the purposes of the Consult if other information will suffice.

> *15 A person who is a custodian or the agent of a custodian must not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure.*

[61] I am satisfied that the Consult could not have been provided without the use of at least some of the Complainant's personal health information.

Section 16

[62] Section 16 requires that the Custodian use the minimum amount of the Complainant's personal health information that is reasonably necessary to provide the Consult.

> *16 The collection, use and disclosure of personal health information by a custodian or their agent must be limited to the minimum amount of personal health information that is reasonably necessary to achieve the purpose for which it is collected, used or disclosed.*

[63] It is clear, based on the submissions of the Complainant, that the Complainant is of the view that more of their personal health information was used for the purposes of the Consult than was needed to conduct the Consult. The Complainant indicated in their submissions that they were prepared to proceed with the Consult on the understanding that only current medical information would be provided to the Psychiatrist for the Consult. The Complainant's primary concern appears to be that the 'very personal information' was used and that this

information, in their view, had no bearing on the purposes of the Consult, which the Complainant understood to be about addressing their current medical issues.

[64] The Custodian, on the other hand, contends that the personal health information provided to the Psychiatrist by the Custodian Employee was required to conduct the Consult and used for the same.

[65] In order to meet the requirements of section 16, the Custodian is required to establish that it used the minimum amount of the Complainant's personal health information that was 'reasonably necessary' to provide the Consult.

Reasonably necessary

[66] The meaning of the words 'reasonably necessary' in section 16 have not yet been interpreted. As such, I will conduct a purposive analysis to determine their meaning.

[67] The modern approach to statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.[22]

[68] In Yukon's *Interpretation Act*, it states that [e]very enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.[23]

[69] The purposes of HIPMA are set out in section 1. The purposes relevant to this analysis follow.

> *1 The purposes of this Act are*
>
> *(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;*
>
> *(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;*
>
> *(c) …*

[22] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC).
[23] *Interpretation Act*, RSY 2002, c125, at section 10.

(d) …

(e) to provide for an independent source of advice and recommendations in respect of personal health information practices, and for the resolution of complaints in respect of the operation of this Act; and

(f) to provide effective remedies for contraventions of this Act.

[70] In HIP16-02I,[24] I stated the following about how HIPMA's provisions are to be interpreted.

> *The protection of personal information privacy has been recognized by our highest court to be quasi-constitutional in nature. The SCC in Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 stated that "[t]he importance of protection of privacy in a vibrant democracy cannot be overstated."[25] Personal health information goes to the biographical core of individuals. Therefore, it is the most sensitive personal information that exists. Health information laws were developed to facilitate the flow of personal health information to provide individuals with healthcare and to effectively manage Canada's public health system while taking into account that the information collected, used and disclosed by custodians for these purposes is the most sensitive type that, if breached, could result in significant harm to individuals.*
>
> *HIPMA is no exception. It is clear from the purposes in HIPMA that the drafters recognized that to facilitate the flow of personal health information for health care and health system management, strong controls and accountability mechanisms are necessary to maximize privacy and security and minimize the risk of harm. One of these mechanisms is the right to have complaints about non-compliance addressed independently by the IPC.*

[71] Health information privacy laws in Canada, like HIPMA, were designed to maximize an individual's control over their own personal health information while allowing the flow of personal health information to facilitate patient care. This is the object of HIPMA. HIPMA's scheme facilitates control by establishing rights of individuals in regards to their personal health information and by imposing duties on custodians in respect of the collection, use,

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[24] Department of Health and Social Services, Consideration Report HIP16-02I, October 6, 2017 (YT IPC).
[25] [2013] 3 SCR 733, 2013 SCC 62 (CanLII), at paras 20 to 22.

disclosure and management of personal health information. HIPMA also provides for independent oversight and has offences for knowing non-compliance.

[72] Consent is the primary vehicle of control in HIPMA. However, in recognition of the highly sensitive nature of personal health information, HIPMA requires custodians to limit the amount of personal health information they collect, use or disclose for authorized purposes including for providing health care even with consent.

[73] There are a number of provisions in HIPMA that are relevant to determining what 'reasonably necessary' means in section 16.

[74] Several provisions in HIPMA authorize an individual to refuse to provide consent for the collection, use and disclosure of their personal health information for the provision of health care, and to withdraw consent once given.

[75] Section 36 requires a custodian to comply with a refusal, withdrawal or modification to consent "except to the extent that the individual purports to prohibit or restrict any collection, use or disclosure of personal health information that is required by law or established standards of professional practice." In subsection 43 (2), a custodian can refuse to comply with a consent restriction where there is a reasonable belief that compliance is likely to endanger the individual's health or safety.

[76] Section 79, together with section 6 of the *Yukon Health Information Network Regulation*,[26] allows an individual to mask personal health information accessible via the 'Yukon Health Information Network'.

[77] These provisions suggest that health care providers may not always be able to use all of an individual's personal health information in its custody or control for the purposes of providing health care, given an individual's ability to refuse, withdraw or modify consent to the use. They also suggest that, in order to provide health care, a custodian must, at minimum, be able to collect, use or disclose enough personal health information to meet their legal obligations and any professional standards associated with documentation and record keeping.

[78] How much information is needed to meet these obligations must be determined on a case-by-case basis. Where a custodian is unable to meet these obligations, they will need to determine whether care can be provided or must be refused. Section 48, together with its subsections (a) and (b), recognizes the right of custodians to refuse to accept an individual as

[26] Order-in-Council 2016/160.

a patient or client for the purposes of health care and to refuse to provide an individual with health care.

[79] The definitions of 'necessary' and 'reasonably' are not defined in HIPMA. Their definitions in Oxford Dictionary[27] are as follows:

1. 'necessary' is defined as "requisite" or "essential;" and
2. 'reasonably' is defined as "having sound judgement" and "in accordance with reason" and "within the limits of reason; fair, moderate."

[80] Taking into account the foregoing, together with HIPMA's object and scheme and the intent of the Legislature, the term 'reasonably necessary' in section 16 , in my view, means that a custodian may collect, use or disclose the amount of personal health information that is requisite or essential for the provision of health care as determined by the custodian using sound judgement. The amount of personal health information that is reasonably necessary to collect, use or disclose for this purpose will in all cases include, as an absolute minimum, the amount of personal health information required by a custodian to meet any legal obligations and professional standards associated with documentation and record keeping. Any personal health information collected, used or disclosed beyond the absolute minimum must be personal health information that is requisite or essential to provide health care as determined by the custodian using sound judgement.

[81] The Psychiatrist submitted that she needed the Complainant's 'pertinent clinical information' and enough personal health information to obtain an 'appropriate history'. She pointed to the Yukon Medical Council's standard of practice for 'the Referral Consultation Practice', which states that a referral request must include at minimum, "all pertinent clinical information, including, but not limited to, results of clinical investigations." She also indicated that, in order to meet her billing requirements for the Consult, she is required by the Payment Schedule dated April 1, 2018, to provide a history and, to do so, she would need to be aware of the Complainant's past clinical information.

[82] The Yukon Medical Council's standard of practice for 'the Referral Consultation Practice' requires that a referral request ***from a physician*** to a consulting physician contain certain personal health information, including "all pertinent clinical information including, but not limited to, results of clinical investigations." This standard of practice applies to physicians who are licensed to practice medicine in Yukon. It does not apply to the Custodian

[27] Canadian Oxford Dictionary, Second Edition, edited by Katherine Barber, Don Mills Ontario, 2004.

Employee who is not a physician and who referred the Complainant to the Psychiatrist for the Consult. Therefore, this requirement does not apply to the facts of this case.

[83] Number 22 (f) in the Referral Consultation Practice standard, however, requires a consultant to prepare a report which must include "information considered, including, *history*, physical findings, and investigations" [my emphasis]. To meet this requirement, the Psychiatrist required enough of the Complainant's personal health information in order to document the Complainant's history in the report.

[84] There have been several cases before the courts in which they examined the duty to take a history by physicians and the duty of the physician to ensure they have adequate information to provide a proper diagnosis.

[85] In *Thibert v. Zaw-Tun*,[28] Justice J. Rooke of the Alberta Court of Queen's Bench stated the following about these duties in the context of determining whether a physician was negligent in providing health care to her patient.

> *…just as the duty to diagnose incorporates a duty to take a thorough history, so too does the duty to refer necessarily require proper charting. For a subsequent physician to be able to provide appropriate care, he or she must be made acquainted with all the salient facts of the case. Thus, Picard and Robertson comment as follows at p. 249:*
>
> > *Referring doctors have a duty to take reasonable steps to ensure that all significant information in their possession, including their own findings, opinion and diagnosis (if any), is brought to the attention of the other doctor or facility. The referring doctor plays a vital role in ensuring that there is no breakdown in the chain of communication.*
>
> *Here, I find that no history being charted restricted the ability of the subsequent physician(s) to provide proper follow-up care, which was not provided on a timely basis.*[29]

[28] 2006 ABQB 423 (CanLII).
[29] *Ibid.*, at para. 116.

[86] In *Lurtz v. Duschesne,*[30] Justice J. Lalonde of the Ontario Superior Court of Justice stated the following about the information a referring doctor must provide to a specialist doctor.

> *…blind referrals are not sufficient. The specialist needs to have as much information from the referring doctor before a finding, that the latter has met the appropriate standard of care, can be made. The referring doctor needs to provide the specialist with information respecting the patient's history, condition and current care.*[31]

[87] In response to the arguments of the defendants that a patient has a corresponding duty to "disclos[e] to his doctor all relevant and pertinent information of which he is aware in order to permit his doctor to make a proper diagnosis,"[32] Justice Lalonde stated the following.

> *The defendants are right in their argument that a physician cannot operate in a vacuum and needs as much information as possible. As the court stated in Symaniw v. Zajac (1996), 12 O.T.C. 275 (Ont. Gen. Div.), doctors are not clairvoyants and cannot surmise a patient's problems without actually having some information to rely upon. However, it is not enough for the referring doctor simply to hope or expect that the patient will present an exhaustive analysis of his/her current predicaments or treatment to the specialist. In other words, a physician cannot transfer all liability onto his or her patient.*[33]

[88] From these cases, two things are clear. One, a physician has a duty to satisfy themselves that they have all the pertinent medical information about a patient, including their medical history, to provide them with health care. Two, it is incumbent on those involved in the provision of health care to ensure that pertinent medical information is relayed between health care providers in support of this objective. Although these cases are about physicians, the duty, in my view, extends to any person involved in the provision of health care and would, in this case, extend to the Custodian Employee.

[89] Given the foregoing, I am satisfied that it was reasonably necessary for the Custodian Employee to provide the Psychiatrist with all the Complainant's personal health information she had gathered during the course of providing the Complainant with treatment and any prior records created on which she relied to provide the Complainant with care. In this case, the Psychiatrist had a duty to ensure she had enough knowledge about the Complainant's

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[30] 2003 CanLII 37900 (ON SC).
[31] *Ibid.*, at para 156.
[32] *Ibid.,* at para 157.
[33] *Ibid.,* at para 158.

health care history and presenting conditions to make a diagnosis. The Custodian Employee had a corresponding duty to ensure the Psychiatrist received this information. The Psychiatrist, in my view, is in the best position to determine the information she needs to make a diagnosis. In this case, the evidence shows that the Complainant's personal health information, including the 'very sensitive personal information', was in fact used by the Psychiatrist during the Consult. This suggests it was relevant to the health care provided by the Psychiatrist to the Complainant.

[90] As indicated previously, the Complainant did not withdraw, refuse or modify their consent to use their personal health information for the Consult. Therefore, it was incumbent on the Custodian Employee, in accordance with the standard of care, to provide all available information relevant to the Complainant's care to the Psychiatrist for her use in conducting the Consult.

[91] I note here that, had the Complainant withdrawn or refused their consent to the use of certain of their personal health information, the Custodian Employee would have been unable to provide the restricted information to the Psychiatrist. I determined there was no restriction placed on the use of the information. Had it been, it would have, in my view, been incumbent on the Custodian Employee to inform the Psychiatrist of this fact to ensure she was aware and could discuss the same with the Complainant. The decision of the Complainant to restrict the use of their personal health information would then require the Psychiatrist to decide whether to proceed with the Consult.

[92] The Psychiatrist indicated that she had to collect certain personal health information for billing purposes. It is unclear on the evidence whether she bills the Custodian under the terms of her contract or must go through Insured Health and Hearing Services. Therefore, I have not considered this fact in my analysis. Given the foregoing, nothing turns on this.

[93] My finding in regards to section 16 is that the Custodian met the requirements of this section for its use of the Complainant's personal health information.

Did the Custodian exercise its discretion under paragraph 55 (1)(a) prior to using the Complainant's personal health information for the Consult?

[94] The exercise of discretion has been considered by our courts in the context of exercising discretion in relation to access to information requests under the various access to information laws in Canada.

[95] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[34] Chief Justice McLachlin and Justice J. Abella, writing for the Supreme Court of Canada (SCC), provided the following about how discretion is to be exercised by a public body under Ontario's *Freedom of Information and Protection of Privacy Act* (ON FIPPA) when the head of a public body applies a discretionary exception to the right of access under that Act.

1. For any discretionary exemption, the "discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case.[35]
2. There are two steps.
    i. The head must first determine whether the exemption applies.
    ii. If it does, the head must then "go on to ask whether, having regards to all the relevant interests, including the public interest in disclosure, disclosure should be made."[36]

[96] They then set out the responsibility of the reviewing Commissioner as follows.

1. There are two steps.
    i. The commissioner must first determine whether the exception was properly claimed.
    ii. If so, the commissioner must then determine whether the head's exercise of discretion was reasonable.[37]

[97] They also cited a prior decision of the Ontario Information and Privacy Commissioner (ON IPC) who indicated the following about the commissioner's duty.

> *In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head I can and, in the*

[34] 2010 SCC 23.
[35] *Ibid.*, at para 66.
[36] *Ibid.*
[37] *Ibid.*, at para 68.

> *appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly*. [38] [Emphasis in original]

[98] In the case before the SCC, it determined that the ON IPC failed to review the exercise of the head's discretion in respect of the law enforcement provisions of ON FIPPA and it remitted the matter back to the ON IPC for reconsideration.[39]

[99] While the exercise of discretion in public access to information laws is set in a different context and requires the balancing of different interests, the information provided by the SCC above is informative as to how discretion should be exercised by a custodian under HIPMA and the role of the IPC in considering the exercise of discretion by a custodian.

[100] How the exercise of discretion is to occur in HIPMA must be considered within its specific purposes and scheme and the intent of the Legislature. As I stated above, "HIPMA is designed to maximize an individual's control over their own personal health information while allowing the flow of personal health information to facilitate patient care." I also stated that "HIPMA's scheme facilitates control by establishing rights of individuals in regards to their personal health information and by imposing duties on custodians in respect of the collection, use, disclosure and management of personal health information."

[101] One of the duties imposed on custodians is to exercise discretion about whether to collect, use or disclose personal health information. All the provisions in HIPMA authorizing the collection, use and disclosure of personal health information for the provision of health care or other related purposes, specifically sections 53 to 58, are discretionary.[40] The discretionary nature of HIPMA's collection, use and disclosure provisions together with requirements in sections 15 and 16 creates a series of steps a custodian must undertake before deciding to collect, use or disclose personal health information. They are as follows.

1. A custodian must first determine whether, for a specific purpose, that personal health information is necessary (section 15).

2. Upon deciding it is necessary, it must then determine whether it has authority to collect, use or disclose personal health information (sections 53 to 58).

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[38] *Ibid.*, at para 69.
[39] *Ibid.,* at para 74.
[40] I note here that there are certain provisions in HIPMA that establish mandatory requirements in regards to the collection of personal health information to facilitate the Yukon Health Information Network.

3. Upon determining it has authority, it must then limit the amount of personal health information to collect, use or disclose to the amount reasonably necessary for the specific purpose (section 16).

4. After determining the minimal amount, it must determine whether there are any restrictions on its collection, use or disclosure such as withdrawals, refusals or modifications of consent.

5. After all the limitations and restrictions are applied, the custodian will have determined the personal health information that it 'may' collect, use or disclose.

6. At this point, it must still decide whether there is any reason ***not*** to collect, use or the personal health information by exercising its discretion.

Exercise of discretion under HIPMA

[102] The interests at stake in the exercise of discretion are different under health information laws than under public access to information laws, given that health information laws are designed to facilitate the flow of personal health information for patient care while maximizing an individual's control over their personal health information. In this context, the interests of individuals are at the centre of any decision-making when it comes to the collection, use and disclosure of their personal health information for receiving health care. Given this, when providing health care to an individual, the exercise of discretion must take into account the interests of the individual who is receiving health care in addition to any other reasonable factors. 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.

IPC's role in considering the exercise of discretion

[103] I have already determined that the Custodian was authorized by paragraph 55 (1)(a) and section 16 to use the Complainant's personal health information to provide the Consult. I must now determine if the Custodian's agents exercised discretion not to use some or all of the Complainant's personal health information for the purposes of the Consult, despite having the authority to do so.

[104] The burden of proving that the exercise of discretion occurred rests with the Custodian. The Custodian did not provide any direct evidence to support that it exercised its discretion as required under subsection 55 (1).

[105] In *Attaran v. Canada (Foreign Affairs)*,[41] Justice J.A. Dawson, writing for the Federal Court of Appeal (FCA), stated the following about a similar situation faced during an appeal before the FCA concerning the Department of Foreign Affairs and International Trade's application of section 15[42] of the Federal *Access to Information Act*.

> *In the present case, there is nothing in the public or the ex parte record before the Court, including the affidavits filed on behalf of the respondent, which expressly demonstrates that the decision-maker considered the existence of her discretion. However, the absence of such evidence is not determinative of the issue. The same situation existed in Telezone where the Court examined the record before it, including internal departmental documents, in order to be satisfied that the decision-maker understood that there was a discretion to disclose documents.*
>
> *Conversely, just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. In every case involving the discretionary aspect of section 15 of the Act, the reviewing court must examine the totality of the evidence to determine whether it is satisfied, on a balance of probabilities, that the decision-maker understood that there was a discretion to disclose and then exercised that discretion. This may well require the reviewing court to infer from the content of the record that the decision-maker recognized the discretion and then balanced the competing interests for and against disclosure, as discussed by the Court in Telezone at paragraph 116.*[43]

[106] Based on the foregoing, I am satisfied that the fact the Custodian did not make submissions on the exercise of discretion required by subsection 55 (1) is not determinative of the issue. However, having reviewed the evidence, and based on its totality, I am unable to infer that the Custodian exercised its discretion about the use of the Complainant's personal health information for the purposes of the Consult prior to its use.

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[41] 2011 FCA 182.
[42] Section 15 of the *Access to Information Act* is a discretionary exception to the right of access to information under that Act.
[43] *Ibid.,* at paras 35 and 36.

[107] As indicated above, there is evidence to support that the Custodian determined that it was reasonably necessary to use the Complainant's personal health information for the Consult, which was a precondition for determining it had authority to use the information. This evidence does not, however, support that the Custodian, through its agents, recognized it had a duty to exercise its discretion about the use and that the exercise of discretion occurred prior to its use. Perhaps had the Custodian exercised its discretion as required, it would have decided not to use the Complainant's 'very personal information' for the purposes of the Consult, after taking into account their interests and evaluating whether they may suffer harm from its use.

[108] Given the foregoing, I am unable to find the Custodian met its burden of proving that it exercised its discretion prior to using the Complainant's personal health information for the Consult as required by subsection 55 (1).

Finding – Issue 1

[109] My findings on Issue 1 are as follows:

1. The Custodian was authorized by paragraph 55 (1)(a) to use the Complainant's personal health information for the purposes of providing them with health care and that the requirements of sections 15 and 16 were met.

2. The Custodian did not exercise its discretion prior to its use of the Complainant's personal health information, as required by subsection 55 (1).

ISSUE 2: Did the Custodian disclose the Complainant's personal health information to the Psychiatrist contrary to the requirements of HIPMA?

[110] The definition of 'disclose of personal health information in HIPMA is as follows.

> "*disclose*"*, in relation to information in the custody or control of a person, means making the information available or releasing it to another person, but includes neither using the information nor its transmission between a custodian and an agent of that custodian;*

[111] Both submissions of the Custodian and Psychiatrist indicate that no disclosure occurred because the Psychiatrist was an agent of the Custodian when the Complainant received health care. The Complainant did not provide any submissions specific to this issue.

Analysis

[112] I have already determined that the Psychiatrist was acting as an agent of the Custodian when the Complainant's personal health information was transmitted to her for the purposes of providing the Complainant with health care. These facts support that the Complainant's personal health information never left the Custodian's custody and control and, therefore, that disclosure of their personal health information did not occur.

Finding – Issue 2

[113] My finding on Issue 2 is that the Custodian did not disclose the Complainant's personal health information.

ISSUE 3: Was access to the Custodian's information system by the Psychiatrist authorized for the purposes of providing health care to the Complainant on or about January 2018?

[114] The Custodian's submissions on this issue are as follows.

1. *Although the Department granted* [the Psychiatrist] *access to the electronic medical record system in use in the* [MWSU] *(Synapse) after* [the Psychiatrist] *signed a pledge of confidentiality, the synapse activity log associated with* [the Psychiatrist's] *account shows no activity. To our knowledge,* [the Psychiatrist] *did not access synapse.*

2. *Personal health information about the Complainant was transmitted verbally from the* [Custodian Employee] *to* [the Psychiatrist].

3. *As an agent of the custodian who has undertaken the requisite privacy training,* [the Psychiatrist] *could have accessed and used the Complainant's personal health information contained within Synapse for the purpose of providing health care to the Complainant in accordance with HIPMA.*[44]

[115] Included with the Custodian's submissions is an audit report of the Synapse system. The parameters of the report are from November 1, 2017, to January 31, 2018. The 'staff name' selected for search is the Psychiatrist and the 'client' is the Complainant. The 'enrollment' selected is 'all'. Below that is a list of services within which clients can be enrolled. The list shows the Complainant enrolled in one. The report, based on these

[44] Custodian's Initial Submission, at p. 4.

parameters, shows that the Psychiatrist did not access the Synapse system between November 1, 2017, and January 31, 2018.

[116] Also included is a copy of a 'Pledge of Confidentiality Health and Social Services' form signed by the Psychiatrist. The date of signature is April 25, 2017.

[117] The Psychiatrist's submissions relevant to this issue are as follows.

> *The morning before* [the Psychiatrist] *sees a patient through the MWSU, she is provided with information from the MWSU clinic about the patient in a file.* [The Psychiatrist] *reviews this information prior to seeing the patient…*
>
> *The MWSU clinic has a paper file and an electronic file for each patient. The complainant would have had a paper and electronic file of personal health information kept by the MWSU clinic from the complainant's interactions with* [their] *therapist at the MWSU clinic. This is the medical file at issue in this complaint.*
>
> *The paper and electronic files at the MWSU clinic are maintained, controlled, and stored by the MWSU clinic. Access is determined by MWSU…*[45]

[118] The Complainant did not provide any specific submissions in relation to the accessibility by the Psychiatrist to the Synapse system. It is clear from the submissions, however, that Issue 3 arose as a result of their understanding that the Custodian Employee did not relay the 'very personal information' to the Psychiatrist, which led the Complainant to surmise that the Psychiatrist must have accessed it from the Synapse system.

Analysis

[119] The issue here is whether the access to the Synapse system by the Psychiatrist was authorized for the purpose of providing the Complainant with health care in January of 2018. The evidence demonstrates that no access occurred.

[120] A separate issue is whether the personal health information in the system, including that of the Complainant's, should be accessible to the Psychiatrist when she is not providing care to the clients whose records she has access to. This issue is not before me and I make no finding in this regard, but I am of the view that it is an issue the Custodian should carefully evaluate.

[45] Psychiatrist's submission, at p. 2.

[121] The evidence shows that prior to January of 2018, the Psychiatrist had not provided health care to the Complainant. It is questionable, therefore, why she had access to the Complainant's personal health information via the Synapse system prior to a care relationship being established. As indicated above, the Custodian searched the Synapse system for the Psychiatrist's access to the Complainant's personal health information therein from November 1, 2017, to January, 31 2018.

[122] The Psychiatrist's 'Pledge of Confidentiality' form was signed on April 25, 2017. The Custodian's submission indicates that the Psychiatrist was given access to the Synapse system after signing this form. The Psychiatrist, therefore, had access to the Synapse system and the Complainant's personal health information dating back to April of 2017, a full nine months before she provided any health care to the Complainant. This fact, however, is not certain. The audit log parameters searched were from between November 1, 2017, and January 31, 2018. Why November 1, 2017, was chosen is unclear.

[123] The Custodian is obligated by a number of provisions in HIPMA to restrict access to personal health information to ensure agents can only access the information when it is necessary to do so for the purpose of carrying out their duties. While having agents sign a confidentiality pledge is a positive step, it is only one way of mitigating the risk of its agents accessing personal health information for an unauthorized purpose.

[124] Section 13 states that "[a] person who is a custodian or the agent of a custodian may…access personal health information only in accordance with this Act and the regulations." Paragraph 19 (1)(e) requires a custodian, as part of its duties to protect personal health information, to "minimize the risk of unauthorized access to…personal health information." Subparagraph 14 (1)(a)(i) requires a custodian "for each of the custodian's agents" to "determine the personal health information the agent is authorized to access."

[125] The best way to mitigate the risk of unauthorized access to personal health information by its agents is to restrict access on a 'need-to-know' basis. Given this, the Custodian may wish to consider if it can further restrict access in the Synapse system as a measure of preventing access to personal health information for an unauthorized purpose to those who need to know the personal health information of a client for the provision of health care.

Finding – Issue 3

[126] My finding on Issue 3 is that the Psychiatrist did not access the Complainant's personal health information in the Synapse system for the purpose of providing the Complainant with health care in January of 2018.

Issue 4: Did the* [Custodian] *retain the Complainant's personal health information related to care* [the Complainant] *received from* [another psychiatrist] *while he was* [contracted] *by the* [Custodian] *contrary to the requirements of HIPMA?

Analysis

[127] This issue stems from the Complainant's view that the Psychiatrist accessed their personal health information in Synapse that contained records created by the Complainant's prior psychiatrist, who was also contracted by the Custodian and provided health care to the Complainant.

[128] In the Custodian's submissions, it confirmed that the Complainant's prior psychiatrist contracted with the Custodian and provided care to the Complainant as an agent of the Custodian between 2008 and 2013. It also confirmed that it did retain the Complainant's personal health information generated by their former psychiatrist during the period he provided the Complainant with health care as an agent of the Custodian. Specifically, it stated that:

1. "[a]s the custodian, the Department kept the records of its agent [the former psychiatrist];"[46] and
2. "…The Department continues to provide healthcare to the Complainant and the records are maintained in accordance with HIPMA."[47]

[129] Retention and destruction of records containing personal health information are important aspects of protecting personal health information. Paragraph 19 (1)(e) requires the Custodian to "provide for the secure storage, disposal and destruction of records to minimize

[46] Custodian's Initial Submission, at p. 3.
[47] *Ibid.,* at p. 5.

the risk of unauthorized access to or disclosure of the personal health information." Paragraph 19 (1)(f) requires the custodian to "develop policies which provide that personal health information is retained in accordance with the prescribed requirements." No requirements are prescribed.

[130] The notice requirements for implied consent in the *Health Information General Regulation*[48] require a custodian to "generally describe the custodian's record retention schedule." This implies that the Custodian, which uses this form of consent from time to time, must have a retention schedule that applies to records containing personal health information, given that it must describe the same in its notice.

[131] The Custodian did not provide a retention schedule showing the retention period for the Complainant's personal health information recorded in paper and in the Synapse system. It would have been useful to have this information for this Issue. Despite this, because the Custodian has been providing care to the Complainant from 2008 to present, I am satisfied that it would be appropriate to retain all the records containing the Complainant's personal health information created for the purposes of providing the Complainant with ongoing care.

Finding – Issue 4

[132] My finding on Issue 4 is that the Custodian did retain the Complainant's personal health information in records created by their former psychiatrist for the provision of the Complainant's ongoing care by the Custodian and that this retention is not contrary to HIPMA's requirements.

[48] Order-in-Council 2016/159.

X FINDINGS

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

[134] On Issue 1, I find that:

1. the Custodian was authorized by paragraph 55 (1)(a) to use the Complainant's personal health information for the purposes of providing them with health care and that the requirements of sections 15 and 16 were met; and

2. the Custodian did not exercise its discretion prior to its use of the Complainant's personal health information, as required by subsection 55 (1).

[135] On Issue 2, I find that the Custodian did not disclose the Complainant's personal health information.

[136] On Issue 3, I find that the Psychiatrist did not access the Complainant's personal health information in the Synapse system for the purpose of providing the Complainant with health care in January of 2018.

[137] On Issue 4, I find that the Custodian did retain the Complainant's personal health information in records created by their former psychiatrist for the provision of their ongoing care by the Custodian and that this retention is not contrary to HIPMA's requirements.

XI RECOMMENDATIONS

[138] As a result of my finding that the Custodian failed to exercise its discretion prior to its use of the Complainant's personal health information under subsection 55 (1), 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.

Custodian's Decision after Consideration

[139] 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.*

[140] Subsection 112 (2) states that "[i]f [the Custodian] does not give written notice within the time required by subsection (1), [the Custodian] is deemed to have decided not to follow any of the recommendations of the commissioner."

Complainant's Right of Appeal

[141] The Complainant's right of appeal is set out in section 114. It states as follows.

> *114 Where 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.*

ORIGINAL SIGNED

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

Distribution List:

- Complainant
- Custodian
- Psychiatrist

Post Script

It was clear from the evidence put forward by the Complainant that they were distraught about the use of their 'very personal information' by the Custodian. Although I found the Custodian had authority under paragraph 55 (1)(a) together with sections 15 and 16 to use the Complainant's personal health information, it should consider adopting, as a 'best practice', providing individuals with more detailed information about the use of their personal information, particularly when it is highly sensitive, to avoid causing individuals harm when it is used contrary to their wishes, as occurred here.

In this case, as indicated, it is likely that had the Complainant been informed about the use of their 'very personal information' for the Consult, they would have refused the Consult or refused to consent to its use for the Consult. Unfortunately, no one informed the Complainant about the use and the information was used contrary to their wishes. The Complainant highlighted the following in their submissions that the Custodian may wish to consider in developing its best practice.

- Vulnerable clients "don't fully understand what is being asked for or what it fully means to say 'yes' in terms of sharing what kind of information."
- "Maybe consider not only verbally fully explaining in detail what information will be shared so the client may have a say or at least not be side-blinded [sic] – put it in writing so the client can see exactly what they are agreeing to sharing (in layman's terms)."

I would also suggest that the Custodian ensure that personal health information of a highly sensitive nature, such as that collected in the course of providing psychiatric services, be secured at the highest level, inclusive of strong access controls for personal health information stored in paper and electronic information systems. It was evident that the Psychiatrist had access to the Complainant's personal health information in Synapse long before she provided the Complainant with any health care. As I indicated in the body of this Consideration Report, the Custodian should evaluate its access controls in the Synapse system and, if possible, limit access only to those who require access in order to provide care to a client.