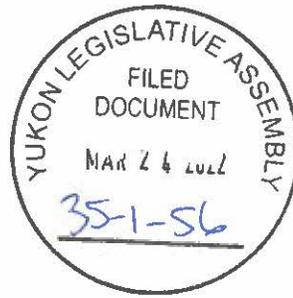




Yukon  
Information  
and Privacy  
Commissioner



3162 Third Avenue, Main Floor  
Whitehorse, Yukon, Y1A 1G3  
T: 867.667.8468  
F: 867.667.8469  
1-800-661-0408 ext. 8468  
[www.yukonombudsman.ca](http://www.yukonombudsman.ca)

**DELIVERED BY SFT**

March 11, 2022

Hon. Sandy Silver  
Premier and Leader of the Yukon Liberal Party  
[sandy.silver@yukon.ca](mailto:sandy.silver@yukon.ca)

Currie Dixon  
Leader of the Yukon Party  
[Currie.Dixon@yla.gov.yk.ca](mailto:Currie.Dixon@yla.gov.yk.ca)

Kate White  
Leader of the New Democratic Party  
[kate.white@yla.gov.yk.ca](mailto:kate.white@yla.gov.yk.ca)

Dear Hon. Member and Members of the Legislative Assembly,

**Re: Comments about Bill No. 11, *Act to Amend the Child and Family Services Act (2022)***

Subsection 92 (a) of the *Health Information Privacy and Management Act (HIPMA)* authorizes the Information and Privacy Commissioner (IPC) to comment on the implications for access to personal health information and personal information under HIPMA of proposed legislative schemes. It is in accordance with this authority that I provide you with the following comments about the amendments proposed in Bill No. 11, *Act to Amend the Child and Family Services Act (2022)* (Bill 11) to section 179 and subsection 180 (1) and (2) of the *Child and Family Services Act (CFSA)*.

**IPC's COMMENTS REGARDING THE AMENDMENTS PROPOSED TO SECTION 179 AND SUBSECTIONS 180 (1) AND (2) in Bill 11.**

In the current version of the CFSA, these provisions state as follows.

**179 Disclosure of director's records**

(1) Subject to sections 71, 140 and 141, no information or document that is kept by a director that deals with the personal history of a child or an adult and has come into existence through any proceedings under this Act or the former Act shall be disclosed to any person other than a person to whom a director has delegated authority under section 176 or a lawyer acting for a director, unless it is disclosed with the consent of the director or under subsection (2).

(2) Subject to sections 71, 140 and 141, no person shall be compelled to disclose any information or document obtained in the course of the performance of duties under this Act except

(a) in the course of proceedings before the court or a judge under this Act; or

(b) in any other case, with the consent of a director or on the order of the court or a judge.

### **180 Application**

For greater certainty, sections ... 179 apply despite any provision of the *Access to Information and Protection of Privacy Act*.

The amendments in Bill 11 to these provisions are as follows.

### **179 Disclosure of director's records**

(1) Subject to sections 71, 140 and 141, information or document that is kept by a director that deals with the personal history of a child or an adult and has come into existence through any proceedings under this Act or the former Act must not be disclosed to any person other than a person to whom a director has delegated authority under section 176 or a lawyer acting for a director, unless it is disclosed with the consent of the director or under subsection (2).

(2) Subject to sections 71, 140 and 141, a person must not be compelled to disclose any information or document obtained in the course of the performance of duties under this Act except

(a) in the course of proceedings before the court or a judge under this Act; or

(b) in any other case, with the consent of a director or on the order of the court or a judge.

### **Scope and application of sections 177 to 179**

180(1) Information referred to in sections ... 179 includes personal information within the meaning of the *Access to Information and Protection of Privacy Act* and personal health information within the meaning of the *Health Information Privacy and Management Act*.

(2) Sections ... 179 apply despite any provision of the *Access to Information and Protection of Privacy Act* and the Health Information Privacy and Management Act.

[My emphasis]

**The amendments to section 180 may have the effect of removing an individual's 'right' to access certain personal health information under HIPMA**

One of the purposes of HIPMA is to "(c) subject to the limited and specific exceptions set out in this Act, to provide individuals with a right of access to their personal health information and a right to request the correction or annotation of their personal health information" [my emphasis].

Subsection 24 (1) of HIPMA states that "an individual has the right to obtain access to their personal health information contained in a record that is in the custody or control of a custodian. The Department is a custodian under HIPMA.

There are limited and specific exceptions to this right of access. They are set out in subsection 27 (1) and include the following, as summarized by me.

A custodian must refuse access to personal health information if:

- there are reasonable grounds to believe that disclosure would cause serious harm to the health or safety of any individual;
- disclosure would identify a third party who supplied personal health information in confidence; or
- disclosing the information would reveal personal information or personal health information about another person and that person has not consented to the disclosure.

A custodian may refuse access to personal health information if the information was collected or prepared by or for a custodian in contemplation of and for a proceeding.

Section 28 gives an individual the right to correct or annotate their personal health information contained in a record in the custody or control of a custodian.

Under HIPMA the definition of personal health information includes 'registration information'. This term is defined in the *Health Information General Regulation* to include, amongst other things, a person's name, gender, date of birth, residential address, telephone number, and email address.

The definition of personal health information together with the mixed record rule in HIPMA means that any personal information in a record that is in the custody or control of the Department, such as any collected under the CFSA, is deemed to be personal health information when it is combined with registration information. Any collection, use or disclosure of personal health information by the Department, as well as the right of access to this information that is in the custody or control of the Department is governed by HIPMA.

The personal history of a child or an adult that has come into existence through any proceedings under the CFSA and that is contained in records in the custody or control of the Department will include registration information and personal information. Therefore, HIPMA applies to this information. As indicated, under HIPMA an individual has the 'right' to access their own personal health information that is in the custody or control of the Department. The Child and Family Services Division, which administers the CFSA, operates within the Department.

Section 11 of HIPMA states "[i]f a provision of this Act conflicts with a provision of another Act..., the provision of this Act prevails to the extent of the conflict unless an Act...expressly provides otherwise".

The amendments to section 180 , as proposed in Bill 11 include that section 179 applies despite any provision of HIPMA.

Under the current CFSA, individuals have the right to access their own personal health information under HIPMA that is in the custody or control of the Department, including any records containing their own personal history that come it existence through any proceedings under the CFSA.<sup>1</sup> In my view, the reason why HIPMA was not added to section 180 in the current CFSA was to preserve this right.

The distinction between the right to access personal health information under HIPMA and the right to access personal information under ATIPPA creates different rights of access. Under ATIPPA, a person has the right to access to any information held by a public body, including the personal information of another person, subject, of course, to exceptions. That said, the privacy and access to information provisions of the ATIPPA do not apply to the personal health information held by the Department, because it is a custodian under HIPMA.<sup>2</sup> As such, this does not create the danger of providing information to a party other than the individual the information is about.

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<sup>1</sup> Or former CFSA.

<sup>2</sup> See subsection 10 (1) and paragraph 38 (1)(l) of the ATIPPA, SY 2018, c.9, as amended.

Considering the information identified in subsection 179 (1), I expect that it would be highly sensitive information about children and their families and would likely include any involvement in child protection proceedings under the CFSA. In context, it makes sense that access to this information by a *third party* would need to be carefully controlled. The method of control in subsections 179 (1) and (2) of the CFSA is via the director, or a court or judge's order.

In Bill 11, subsection 179 (1) prohibits the disclosure of this personal health information unless the director consents to the disclosure.<sup>3</sup> The proposed subsection 180 (2) states that “[s]ections ... 179 apply despite any provision of the [HIPMA]”. Because of the addition of HIPMA to the proposed section 180, an individual's right to access to this personal health information under HIPMA could be eliminated.

Specifically, an individual's right of access to this personal health information could be eliminated if subsection 180 (2) is interpreted such that this provision prevails over the individual's right of access in HIPMA. This would then prohibit the disclosure of the information captured by subsection 179 (1) unless the director provides consent.

If an individual's right of access to this personal health information under HIPMA is lost, then their only recourse would be to seek the consent of the director for such access. This places a significant amount of authority in the hands of the director to decide, what, if any, access to this information would be granted to the individual. The effect of placing the director as gatekeeper creates a barrier to access that is likely to be intimidating to individuals and circumvents the purpose of HIPMA.

In addition, the individual may not have recourse to the IPC for any decision regarding the disclosure of this information because any decision made by the director may be outside HIPMA.

The right of access under HIPMA is an integral part of an individual's ability to exercise control over their own personal health information. The right of access, amongst other things, enables an individual to know what personal health information a custodian holds and is using to make decisions about them. It also allows the individual to request a correction to information that is inaccurate and to annotate records where there is a dispute about accuracy. The latter is largely related to opinions of others about the individual and relies on their ability to access their information. The ability to annotate records is one way in which an individual can provide additional information for the decision maker to consider, which, in turn, promotes fairness.

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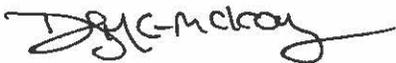
<sup>3</sup> I acknowledge that an individual could obtain a court or judge's order to obtain access to this information under paragraph 179 (2)(b), but that process would be outside of HIPMA.

The individuals who are involved in proceedings under the CFSA are vulnerable. These individuals include children and their families. In my view, the loss of access to information rights in any context is significant. For the reasons noted, the loss of these rights could result in serious consequences for individuals involved in proceedings under the CFSA.

As such, it may be that the proposed amendments will result in the unintended consequences that vulnerable individuals involved in proceedings under the CFSA lose their access to information rights under HIPMA. Accordingly, because a loss of these access to information rights may have significantly serious consequences for these individuals, I strongly encourage the Legislature to:

- a) consider removing the words “and personal health information within the meaning of the *Health Information Privacy and Management Act*” in subsection 180 (1) and the words “and the *Health Information Privacy and Management Act*” in subsection 180 (2) from the amendments to Bill 11; or
- b) modify the amendments to section 179 and 180 in Bill 11 in such a manner that preserves the right of individuals under HIPMA to access their personal history that has come into existence through any proceedings under the CFSA.

Kind regards,



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

Cc. Hon. Tracy-Anne McPhee, Minister of Health and Social Services