

NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 19-HIA12

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OVERVIEW

A Complainant made a request to the Office of the Information and Privacy Commissioner (OIPC) for a review under the NWT *Health Information Act* (HIA) regarding possible risks to privacy related to services provided to him at his local medical clinic. The Complainant felt there was a gross misalignment of the position and qualifications of the individual providing the service with the intricacies of the health service being provided and that this was unethical. He also alleged that the medical clinic had breached his privacy as a result. The Complainant also maintained that the degree of sensitivity of the matter compounded the need for a licensed provider to be assigned to the task, but the employee assigned to the task was not a licensed medical practitioner. The Information and Privacy Commissioner identified several issues within the submitted complaint, but focused largely on two major questions that arose:

- a) were the necessary conditions of consent pursuant to section 14 and 15 of the HIA complied with?
- b) were measures for protection of the client's personal health information pursuant to section 85 of the Act applied in this case?

The review concluded that, based on the available evidence, the *Health Information Act* was complied with and privacy was not breached in this instance. However, the Information and Privacy Commissioner did find that there were areas in which the custodian could improve its policies and procedures so as to achieve a more privacy protective approach, including ensuring optimal safeguards were in place in this context. Five recommendations have been made.

BACKGROUND

In the winter of 2018, the Complainant attended an appointment at the primary care clinic that would require the taking of photographs of a skin condition for the purposes of obtaining a consult from a southern specialist. The Complainant had previously participated in the same process but in prior appointments an MD or RN had taken the photos. At this appointment, the person taking the photos confirmed to the Complainant that she was not a nurse. Rather, the person taking the photos was a clinic assistant (CA). The Complainant is familiar with the usual job responsibilities of the CA because the Complainant is also an employee working in the NWT health system. According to the Complainant, when concern was expressed about the CA's credentials and qualifications to be doing clinical work (i.e. taking photos) the CA "asked if I wanted a nurse to come and take the photos". The Complainant declined due to time constraints and frustration with possible further delays in the process of obtaining diagnosis/ treatment for his medical complaint that this would cause. The CA then, with permission, proceeded to take the photos and, as reported by the Authority, afterwards the client informed the CA and a licensed practical nurse (LPN) they would be filing a complaint about the practice.

The Complainant submitted a formal request for review of the photographing incident under the HIA, on March 29th, 2018. In his complaint he alleges that the CA does not have sufficient knowledge or training to be taking medical photographs, and argues that such photos should only be taken by an MD or an RN, as they have the necessary clinical expertise by way of their licensing to carry out this task. The Complainant felt that this was "unethical, unprofessional, a breach of confidentiality..., and is just plain wrong!" The Complainant argued that privacy would be afforded if a person with more medical training and professional licensing were the one taking the photos. The Complainant also expressed discomfort with having to risk exposure of sensitive areas of his body for the purposes of taking the photos. The situation was exacerbated in that the Complainant works for the same organization as the person who was taking the photos.

The Complainant took the matter to the HRHSSA management representative who followed up with the business area responsible for taking the photos. The management representative reported that the scenario of the CA taking the medical photographs was standard practice and had been the standard of service for several years. The Authority further reported that the reason the CA has been assigned and trained in use of the camera is because of high turnover and non-permanent staff rotation of MDs and RNs. The Authority asserted that there is no clinical requirement for an RN or MD to be the person taking the photos, that the CA was working under the direction of the referring practitioner, and that this task reflects the job description of the CAs, which otherwise was described as a "medical assistant".

The OIPC undertook a review to identify whether, in fact, privacy had been breached or conditions of the HIA not complied with by HRHSSA in this matter.

APPLICATION OF THE *HEALTH INFORMATION ACT*

The *Health Information Act* (HIA) applies to this complaint pursuant to several sections of the Act including clearly defining the HRHSSA as a "health information custodian" and its employees as "agents" under the Act. (Section 9(1)). Service and health records relating to primary care services qualify under the definition of "personal health information". Also relevant is subsection 10 of the Act as follows:

- 10(1) An agent shall comply with this Act and the regulations in the collection, use and disclosure of personal health information and in the exercise of other powers of a health information custodian and the performance of other duties and functions of a health information custodian.
- 10(2) A health information custodian shall take reasonable measures to ensure that its agents comply with this Act and the regulations.

Section 85 of the HIA applies in this case, in that it stipulates "a health information custodian shall take reasonable measures to maintain administrative, technical, and physical safeguards for the protection of personal health information". Further, section 85(a),(b) and (c) are applicable in this case with respect to the appropriateness of the individual who took the photos which were being collected for the purposes of consult with a southern specialist.

Part 3 of the HIA relates to implied consent. Section 16(1) of the HIA states that "Subject to this Act, a consent to the collection, use or disclosure of personal health information about an individual may be express or implied." Implied consent is not given unless it is knowledgeable, pursuant to section 14:

14. For the purposes of sections 15, 17 and 18, a consent to the collection, use or disclosure of personal health information about an individual is knowledgeable if it is reasonable in the circumstances for the health information custodian to assume that the individual knows
 - (a) the purposes of the collection, use or disclosure; and (b) that the individual may provide or withhold consent.

Although not the focus of the Complainant's concerns, this case also calls into play section 5, 63, and sections 91, 94 and 99 and the HIA Regulations Section 13. The process followed in providing services to the Complainant has impacts on client privacy, relies on the knowledge and training of the agent in both handling the camera device and in handling the information captured to the device appropriately so as to ensure they are protected from unauthorized use or disclosure. Therefore these sections which pertain to secure collection, transference, storage and destruction of the information and address access issues as well as storage into/from an electronic information system, also have relevance in context to this case.

ISSUES

The key questions in the complaint could be summarized as:

- a) Were the necessary conditions of consent complied with?
- b) Were adequate measures for protection of the client's personal health information applied?

In assessing these issues, I considered a number of matters which may have contributed, in one way or another, to the Complaint as follows:

1. **Requirements for Professional Designation:** The Complainant has stated that he feels it is not appropriate -- it is in fact unethical -- for someone who is not a medical professional to have been assigned to take the photos. He maintains that the photos should be taken by an RN (nurse) or MD (doctor). The question then is whether or not there is a requirement for the photo taker to have a professional designation to take such photos or not and, if so, whether the lack of a professional designation being held by the picture taker constitutes a breach of confidentiality.
2. **Other Duties as Assigned:** The Complainant argued that the employees taking medical photos should understand the intricacies of the task, and should be trained to ensure they have sufficient knowledge and skills to take such and that it is not right for this task to be assigned to someone not trained in use of the camera. Has the CA been trained to use the camera, and in privacy awareness? Was the client's privacy breached by the CA being assigned to provide this service? Would assigning another staff member, licensed or not, who is trained in use of the camera, and who has a more clinical background, make the photo taking process more "privacy safe"?
3. **Consent:** I gave weight to the fact that the HRHSSA had set a precedent for knowledgeable consent in this case that may have been invalidated when new factors were entered into the equation. The first three times that the Authority offered this same

service to the client, an RN or MD took the photos, and thus the client can have reasonably assumed that the next time they had photos taken for the same condition it would be an RN or MD who would undertake that task. Because the client previously consented to the process in that configuration, the consent to the process might be valid only in those circumstances, and not applicable to this new scenario. Given the Complainant's objections to the substitution in staff both before and after the photos were taken, one might conclude that the previously established "implied consent" no longer existed and, as a result, the Complainant had NOT consented to the provision of the service or the sharing of their information. Rather, the ordinary person might conclude that there was no consent as required by the HIA to the collection of PHI in this fashion.

4. Communication to Clients about Services - Administrative Safeguards:

When the Complainant made the appointment to have pictures taken, he had an expectation that the photos were going to be taken by an RN or an MD. In fact, in this instance, unbeknownst to the Complainant, the appointment was made with a CA. Were there potential privacy risks to be avoided by informing clients about what to expect when medical photos are taken? Could clients exercising options ahead of time give greater protection to their privacy in this case? Are there privacy best practices that could have been applied in this case?

5. Covering Up - Physical Safeguards: The Complainant declared he was "not happy" that it was necessary to reveal some parts of his anatomy that he would not otherwise disclose in public in order for the photos to be taken and commented that he felt they "were hardly covered" during the process. The fact that he would have preferred an MD or RN take the photos, exacerbated his feeling of being exposed. Did the Authority protect the client's privacy when providing this service? Did it meet its responsibilities under HIA?

6. Privacy in the Digital Age - Technical Safeguards: Aspects of this case have the clear potential to impact privacy, especially in light of the fact rather sensitive

personal health information that was being collected on a mobile device and with intention to transfer the photos, presumably electronically, to a third party in another jurisdiction. The Authority has a responsibility to ensure appropriate provisions are made to allow future access to the same photos and to protect the information at rest and in transit. As the Complainant had concerns about the knowledge, skills and abilities of the individual taking the photos, it is relevant to explore if HRHSSA had considered, and had in place, adequate safeguards to protect personal health information and privacy with respect to the camera and photos captured on the camera.

ANALYSIS

Requirements for Professional Designation to Provide Services

The Complainant feels that the person who takes the photos should be a medical professional -- that the photos should be taken by an RN or MD. In previous sessions where photos were taken for medical reasons the camera was operated by an RN or an MD. In the last session the CA took the pictures. This new situation was incongruent with the client's expectations as to what services would be provided and by whom, and was also different in service provision to the previous appointments.

The client presumably did not take issue with the RN and the MD taking the photos because he assumed that because the persons taking the photos are licensed health care workers, they must have been trained and know how to operate the camera and take pictures of medical conditions. In contrast, the Complainant took issue with the CA taking the photos as he perceived that the CA lacked the knowledge, skills, and abilities to take medical photographs because they were not medically trained.

Evidence brought forth by the HRHSSA challenges these assumptions. The Authority maintains that while RNs and MDs do provide this service, it is equally as likely that the CA might be the position tasked with taking such photos. HRHSSA indicated that "it is common practice for the CA to take medical photographs for the clinic" and that this

has been established practice for over seven (7) years. The HRHSSA also maintains that the task is within the job responsibilities of the CA, and that the CAs have been trained to perform this specific task. Furthermore, the CAs have been trained to ensure the required level of quality of the image is assured as this is necessary for the specialist to interpret the photos, thus indicating not just anyone can take the photos but that they have to be trained to use the camera and in composition of the photo.

While the CA is not a medically trained professional, the requirements for operating the camera and taking such photos does not require either a medical professional license or extensive medical background according to the Authority. Furthermore, there is no evidence that all RNs and MDs working for the Authority have been trained in the use of the camera. In fact the Authority provided evidence that would indicate otherwise - the Authority maintains there is a high rate of turnover in staff, and there are non-permanent staff. It may therefore not be an efficient use of resources to have all RNs and MDs trained to take the photos using the HRHSSA equipment if they are simply going to leave in a short while. With limited and rotating resources, it seems prudent to have a staff person who is more readily available throughout the year trained to provide this important service.

While it can be expected that such qualifications might be advantageous in this regard, it is not medically necessary. The Authority maintains that the CA is capable and knowledgeable in the performance of this task. Furthermore, in performing these duties the CA is acting under the direction of the ordering provider (assumed to be a doctor or nurse practitioner) so is in a similar position as a lay dispenser of medications or a physiotherapist aid. They are interacting with the client and performing activities within the narrow scope of those directions. There is no indication that a formal qualification is a requirement, though educational options and certifications might be available. In terms of operational efficiencies this situation represents an effective and efficient use of human resources.

But does it comply with HIA? Is it "good for" privacy? There is nothing specific in the Act that addresses when tasks must be performed by a medical professional. If there were such restrictions, those would appear in the legislation governing physicians and nurses and other medical professionals. All things considered in this specific case, there is no evidence of a breach of confidentiality associated with the individual's professional training (or lack thereof). Certainly, the Authority might have done better in terms of client awareness about the service, but there was no inherent breach of privacy because the CA took the pictures.

Other Duties as Assigned

Broadly, there is nothing under the HIA that indicates that an agent of a custodian in performance of a task assigned to them by the custodian which is clearly within their responsibility and the purview of their job responsibilities and for which they have been trained is at odds with the letter of the legislation. The custodian has the authority to assign resources as required and reasonable to fulfil expected service requirements.

While not in contravention of the HIA, the question arising from the Complainant's objection to the CA providing the service is, in these circumstances, whether the in-house training they receive sufficient to meet HIA and privacy requirements? Provided that the staff person is adequately trained in the privacy and security of personal health information and the use of a mobile device, this training should meet privacy requirements for the service to be provided. Based on the information at hand, privacy was not breached by the fact that the CA was locally trained to provide the service and did so as a result of being tasked with taking medical photographs by the health information custodian. However, we were not provided with any direct evidence that the CA in this case had completed privacy training. That said, she did demonstrate privacy awareness when responding to the Complainant's request.

In addition, the job description of the CA does not specifically state that CAs are tasked with taking medical photos. The job description does provide that a CA must have

proven knowledge of medical terminology, and is required to provide "as and when" required services to any and all of the various clinics managed by HRHSSA, including primary and acute care, and allied health services. They can be assigned various tasks, including taking vital signs, processing urine dips, and they can be called in to assist a physician with a client in the exam room. The job description clearly states they are expected to provide client centered care, ensure client safety, and comply with all policies and procedures of HRHSSA. From the job description is it clear their job is not strictly non-clinical/administrative. There is a clear expectation and demonstrated need for the position holder to understand clinical concepts and they are expected to provide limited hands-on services directly to clients and to handle biological materials. From this it is not unreasonable to expect that taking medical photos might be tasked to this position given the need to be trained on and familiar with the equipment, and that this might be needed in a variety of clinics managed by HRHSSA.

Consent for the Taking of Photos

In light of the details of this case, I questioned whether the conditions of implied consent pursuant to section 14 of the Act were breached. Section 14 states:

For the purposes of sections 15, 17 and 18, a consent to the collection, use or disclosure of personal health information about an individual is knowledgeable if it is reasonable in the circumstances for the health information custodian to assume that the individual knows

- (a) the purposes of the collection, use or disclosure; and
- (b) that the individual may provide or withhold consent.

Furthermore, section 15 states that consent:

- (a) must be a consent of the individual;
- (b) must relate to the information;
- (c) must be knowledgeable; and

(d) must not be obtained through deception or coercion.

The Complainant knew that he was going to the medial clinic to have photos taken and by all accounts the process that was followed was the same as the last time the Complainant went to have photos taken with the exception of who took the photos. The Complainant was aware of the parts of his body that photos would be taken of so could anticipate the areas that would have to be revealed for the photos. The Complainant had previous experience with this process, so one would expect he was aware of what was involved. However, I gave weight to the fact that the HRHSSA had set a precedent the first three times they offered the service to this client, where an RN or MD took the photos, and thus the Complainant's previous consent to the process might be valid only in those cases and given those circumstances, and not applicable to this new scenario. Based on the Complainant's objection to the substitution of staff both before and after the photos were taken one might conclude that he did not consent to the change and the HIA was not complied with.

The Complainant states in correspondence to this office that because of his experience as a health care provider himself, he was familiar with and knowledgeable about the *Health Information Act* and how it applies to client's information rights. In this case, as described by both the HRHSSA and the Complainant, the Complainant raised the issue with the CA prior to the taking of the photos when it became clear that the CA, and not an RN or MD, would be taking the photos. This indicates his knowledge that he could withhold or provide consent. In compliance with the HIA section 14(b), the CA "did the right thing" in this situation by offering another staff member to take the photos, thereby respecting the client's concerns and rights under the Act. The Complainant chose not to exercise this right. According to the Complainant's statements, he did so for reasons relating to the commitment of time and being already frustrated with the process, and in his estimation to hopefully hasten the anticipated resolution of the medical condition without further delay.

In declining the offer for an RN or MD to take the photos, having stated according to the HRHSSA for the CA to "go ahead and take the photos", the client clearly consented, pursuant to section 14 and 15 of the HIA, to the photos being taken by the CA. Furthermore, and for clarity, there is nothing in the evidence provided by the HRHSSA or by the Complainant to suggest that the conditions of section 15(1)(d) were contravened in this matter. The client was not coerced or deceived by the custodian, or its agents. I recognize that the time and apparent repeated effort of the Complainant in trying to find resolution to his medical situation may have caused frustration and that this frustration may be a contributing factor in the Complainant's decision. It was not, however, a decision made as a result of some failure of the Authority such that it constrained the Complainant's ability to exercise his rights under the Act. The Complainant chose to have the photos taken by the CA and, while doing so in no way waived his right to privacy, it did demonstrate an autonomous decision to share his private information with the service provider that was present.

Communication to Clients about Services:

Though HRHSSA did not breach the HIA or the Complainant's privacy rights, the HRHSSA failed to meet the Complainant's expectations, particularly in the areas of ethics and privacy. Could the Authority better inform clients about what to expect when medical photos are taken - that sometimes the CA or MD or RN will take the photos - and could assurances be made that all of these individuals have been trained in this process so that clients can exercise options ahead of time? Would this have been better in terms of minimizing potential for privacy risk and risk to meeting consent conditions? The obvious answer to both of these questions is "yes". There will always be ways to improve services to clients, one of the easiest (though perhaps somewhat time consuming) ways to do this is to communicate better with clients.

Certainly, the provision of more detailed information to clients ahead of time seems to be warranted in such a case as this, so that clients are not put in a situation where they are so inconvenienced they consent to something they would rather not consent to.

Consent should be meaningful. A custodian should not be able to use implied consent for a broad range of applications for the convenience of the custodian. Clients should have assurances that health care service providers are qualified to do the job, are competent in use of the medical devices they are exposing clients to, are applying ethical decision making, and that the Authority has policies and procedures to ensure client safety and privacy best practices are applied. Proactive communication with clients allows them to make decisions about their health and privacy before they are put into a situation where they are questioning whether their privacy is being impacted, and to avoid situations in which the client has to make an on-the-spot-decision and be compelled to trade their privacy for clinical care.

Physical Privacy Safeguards

Could the Authority have done more to make the client feel more comfortable about their privacy in the taking of the photos given the location on the body of the photos needed to be taken? Were there efforts to protect personal health information, and to only allow the collection of information necessary for the provision of service? As reported, it seemed necessary that the Complainant had to reveal some parts of his anatomy that he would not usually display in public in order for the photos to be taken. Though the Complainant declared he was "not happy" with the entire situation and it is possible the HRHSSA could have made additional efforts in this regard, I find that there was no breach of privacy when the photos were taken.

There are clear statements and indications by the Authority and Complainant that sensitive areas were covered, but "barely covered" was the description later given by the Complainant in expanding on his original complaint. This gives a sense that the HRHSSA met the minimum requirements for privacy under HIA Regulations section 13(2) and HIA section 85, but it might have done more to optimize privacy in this situation. By way of example, in certain circumstances where there are added sensitivities, such as exposure of parts of body parts not normally exposed in public spaces, this might trigger an alternative step in the decision making process that would

allow for the removal of the standard resources (CA), and the insertion of another resource (MD or RN).

There is enough evidence in the facts of this case (not just in the covering of areas not needing to be photographed) that suggests the presence of more than one potential risk to privacy which the HRHSSA might want to review internally to determine if there are weaknesses and gaps in the current processes that warrant additional safeguards. While legislated requirements have been met, the process and procedures should always reflect not just minimal requirements but best practices in privacy in a health and social services setting.

Privacy in the Digital Age

In consideration of the factors in this case, the Complainant's focus was on the issue of the status of the non-professionally trained staff member taking the medical photos. The privacy concerns of the Complainant related mostly to his perception that the staff member was not qualified to provide the service. However, after ruling out a possible breach of consent conditions, there is no evidence there was a breach of client privacy or the HIA to do with the CA taking the photos.

This does not mean there are no privacy concerns. The review of the complaint raised additional considerations which have the clear potential to impact privacy, specifically to do with staff training in privacy, the handling of the mobile device used to take the photos, the handling and safeguarding of information captured on the device, and the transference of the photos to what, by all accounts, appears to be a third party. While these are not the subject of the complaint, I felt it appropriate to take this opportunity to bring attention to these aspects of the information being handled to allow the Authority to consider appropriate safeguards in order to prevent a possible breach in the future.

In brief, the Authority is responsible to ensure staff have acquired an appropriate level of awareness and understanding of privacy and the HIA and in the use of equipment

that captures, processes or stores personal health information so that privacy is appropriately protected. Devices used for capturing medical images must also have safeguards applied to them while in use and at rest. Not just anyone should be allowed to access and use the camera. Use should be tracked and images captured should be necessarily removed once they are captured and transferred to the EMR or other client record. Pictures should not be left on the camera unnecessarily or without safeguards applied. Images captured on the device have to be stored and transmitted in a secure manner. Health information custodians are subject to HSS policy and procedures and to NWT legislation and are required to ensure that the same policies, protections and procedures also apply to third party contracted service providers and part time, or locum service providers.

In addition, if the photos are transmitted to a third party, appropriate safeguards such as information sharing agreements, and confidentiality agreements pursuant to section 61(1)(2) must be in place. Information transmitted electronically must be afforded electronic protections such as, but not limited to encryption, use of passwords to access accounts and documents, and the use of secure information sharing applications. In addition, the client's right to their own health information has to be honoured by ensuring that the client can access those photos at any time, pursuant to section 5 and sections 91, 94 and 99. Further, the photos are subject to section 63 of the Act, which requires capture and storage of the information within an electronic health information system, where access is subject to protections through electronic safeguards such as RBAC and auditing.

CONCLUSION

Privacy is a social construct based in values that include freedom and a condition of not being subject to surveillance or otherwise knowingly intruded upon by others. Ethics is considered integral to privacy. Ethical decision making is required to demonstrate respect of an individual's right to privacy.

The finding that the Authority complied with the Act and that the privacy of the client was not breached does not mean the HRHSSA could not have done better and does not mean they should not learn from this case and strive to make improvements. In fact, the opposite is true. There is always something that can be taken away from any complaint so that improvements can be made in privacy practices.

It is certain that the HRHSSA could have been pro-active and provided better awareness for the client about the services they were receiving. They could have considered the sensitivity the matter and the fact that the CA was a co-worker of the Complainant, which made the situation more uncomfortable for the client than it already was. It would possibly have been better for the Complainant if the client's existing practitioner had been the one taking the photos, instead of them having to share this rather sensitive information with yet another person.

To recap and summarize, we were asked to determine if the requirements under the Act pertaining to consent had been met by the custodian. I found that the custodian had complied with the Act, and specifically in terms of the specific facts of this case, had met key requirements pursuant to section 14(a)(b) and 15(c)(d), being that the consent was "knowledgeable" and the client had demonstrated knowledge that they had the right to provide, or withhold consent. I determined that "implied consent" was a requirement for the information to be collected, and that the conditions of implied consent pursuant to the Act had been met by the custodian. The Complainant actively exercised his right to consent by identifying his preference and, when presented with alternatives that would meet that expressed preference, the Complainant autonomously declined the alternatives and verbally provided express consent for the original option presented.

Amongst other issues and key to this matter, I needed to determine if access to the Complainant's information by the specific individual in question, or by the nature of their position, or in the provision of the service that day, could be deemed inappropriate collection of and access to information and confirm that measures were or were not in

place to ensure protection of information pursuant to section 85 of the Act. Based on this review, which included consideration of the business context, there was no evidence of a contravention of the Act or breach of privacy associated with the assignment of the task to the individual in question, to the position, or in the performance of that task on that day. Although the individual works in the same facility as the Complainant, so do all the other potential staff who might be assigned to provide the same service. Further, there is no evidence that the individual is familial or otherwise closely associated positively or negatively with the client. Unless expressly instructed, the Authority could not have reasonably known that the client did not want to share information with that specific person or persons in that specific position.

Furthermore, the job responsibilities of the individual in question allows for the inclusion of this task, and the actions taken by the custodian to ensure the individual is knowledgeable in the delivery of that service. In addition, the decisions made by the individual when they provided services to the Complainant that day indicated an awareness of the client's rights and demonstrated application of privacy safeguards.

As a closing comment, I would like to take this opportunity to remind everyone, from staff and management within the health sector to patients dealing with day to day medical issues, that privacy is your right. While custodians and agents have a responsibility to ensure clients are aware of their right to provide, withhold or withdraw consent, control of that right is, ultimately, the patient's. If those rights are waived, if consent to a situation is given begrudgingly, or if no action is taken on the part of the person the information is about, the right is lost. Once your information is lawfully disclosed, or your privacy is breached, there is little opportunity to go back in time and apply protections to it. If, as citizens, we don't exercise our right to privacy, that right will grow stagnant and that is the point at which we risk losing our right to privacy and with it the right to make autonomous decisions about who we want to share our personal information with. It is your personal health information, it is your privacy, and it is your right.

RECOMMENDATIONS

I would like to take this opportunity to give due credit to the CA in this case for respecting the client's concerns and offering an alternative to better meet the client's expectations and protect his dignity and privacy.

I make the following recommendations relating to this case with the goal, as always, of improving privacy protections in the future.

1. I recommend that all staff be required to take mandatory appropriate training in the custodian's obligations under the *Health Information Act* and that a record for all such training be kept by the custodian so that the training of each employee can be easily referenced.

If in compliance with this recommendation the health information custodian will always be able to point to the specific privacy training given to each staff member so as to be able to assure patients that their privacy is being considered and respected. This recommendation is particularly important with respect to those staff members who are not medically trained. Medical education always carries with it constant references to patient confidentiality and, in most cases, ethics training that will include aspects of confidentiality. It is part of the educational process in all medical professions to impart sensitivity about the privacy of patients. This same background and training is rarely something that non-medically trained staff will have.

2. I recommend that more emphasis be placed on the training of staff and management in not only the handling of personal health information, but also on front-line interaction with clients, to optimally and pro-actively protect their privacy and ensure within these interactions that clients are made aware of their rights to privacy and their rights under the HIA.

The staff person who took the photos in this case protected the client's privacy and respected their rights because of her direct interaction with the complainant and the offer to do things differently. There is, however, weak evidence that this was something that was part of the normal practice rather than simply a good employee trying to do the right thing without necessarily having been given that direction. Given the reported high frequency of staff moving in and out of the Authority, regular privacy training should be a normal course of the business of the Authority in order to meet legislated and policy requirements for staff privacy training.

3. I recommend that the HRHSSA ensure that all employees are aware of and compliant with Ministerial Directive MD-2017-3, otherwise known as the Electronically Stored and Transferred Information Policy issued by the Minister of Health as of May 8th, 2017. Further, I recommend that HRHSSA review that Directive with a view to ensuring that the requirements of that directive are applied to devices used by the authority for purposes such as the one outlined in this case.

To be clear, there is nothing in the facts of this case that confirm that the pictures taken in this instance were not appropriately handled by the Authority, and the Authority advises that training for and use of the device meets expectations. However, there is no reference by the Authority to the HSS policy or other policy instrument to affirm that privacy issues of this case extend to the management of the device itself. The facts of this case present the opportunity to identify and address potential risks to privacy when using digital devices to collect personal health information. I therefore take this opportunity to make this recommendation. Health information custodians should be continually reviewing policies on the use of mobile devices because the kinds of devices used and the ways in which they are used in the health system changes almost daily. These policies should explicitly include and be applied to the use of cameras in taking medical photos. There is no evidence that the HRHSSA has a standard protocol in place for use of the camera or the taking of clinical pictures. The purpose of this recommendation is to ensure all safeguards are in place, end to end, with regard to

access to and use of the camera itself, and including storage and transference of photos, as well as disclosure of the same to third parties, in compliance with the Act.

The 2017 HSS Electronically Stored and Transferred Information Policy applies generally to mobile devices but is not specific to the use of cameras, and only covers storage and transfer, not consent, collection and use of the information captured and stored on those devices. Comprehensive and consent-driven policies, specifically regarding capturing images of clients are commonplace in many health facilities across the country. We submit the publication "Photography, Audio-visual Recording and Assignment of Rights of Patients", St. Joseph's Healthcare, Hamilton, Ontario, as a model on which the Authority should consider developing and implementing their own policy to reflect privacy best practices including obtaining express consent for photos of client's and ensuring storage meets requirements clients' access rights to their own information, pursuant to the HIA.

4. I recommend that the custodian ensure, through process, policies and procedure, that staff and clients have appropriate and viable options to resolve privacy issues that don't fit the standard process when clients express discomfort with the way in which their personal health information is being collected, used or disclosed.

The authority should ensure that the client's right to privacy is met not only as a minimum standard. Some clients are going to be far more concerned about their privacy than others and the needs of those clients have to be met, even when "standard policies" meet the basic privacy obligations of custodians under the Act. The Authority should be a privacy advocate for its clients. There should be a visible culture of privacy in all aspects of its business. The outcome of the interaction with the health system for this client, in terms of privacy best practices, could have been better. I recommend reviewing current practices and ensuring governance is in place to facilitate, to enhance, and to optimize privacy rights of clients, including as this pertains to clients who will be put into a somewhat compromising position and it is reasonable to believe

that added efforts would be appropriate in order to limit risks to privacy and ensure client s privacy is respected and dignity maintained.

5. I recommend that the Authority review the sections of the Act pertaining to consent and consider circumstances where consent may be extinguished by way of a significant change related to the provision of the service that was not previously identified so as to ensure client privacy rights and rights with regards to consent are being appropriately respected in the day to day operations of the Authority. This should include identifying and implementing measures to ensure consent is valid, such as though policy and procedures.

There is little comfort provided in the Authority's submissions that they have a full or clear understanding of when and how consent to the collection, use and disclosure of personal health information can be obtained and when the conditions change such that consent no long exists. In their defense, the HIA does not assist greatly in clearing this up. The consent provisions are complicated and hard to follow. This said, the fact that the authority had not informed the client that the CA might be taking the photos, the fact there was a precedent set by the Authority during the previous appointments, and the fact that this was a rather substantial change in who would have access to their information, and the fact that the patient in this case was also an employee should have triggered questions by the custodian and its employees about the effectiveness of the previous implied consent. In this case, the CA saved the situation by stopping and asking the client if he would like another option after concerns were raised. Given this, it behooves the Authority to circle back, review and identify weaknesses, and find and implement solutions that better ensure client's right to consent (or not) to sharing of their information, is exercised with greater intentionality.

Elaine Keenan Bengts
Information and Privacy Commissioner