

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 20-HIA 22**

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BACKGROUND

On December 14th, 2018, our office received notice that a resident of Fort Simpson (hereinafter referred to as A.B. for ease of reference) had allegedly found a banker's box full of files in the salvage area of the Fort Simpson dump. The files contained dated mental health and addictions information about a large number of people. A.B. shared his find with a CBC North reporter and gave the reporter access to the records. The reporter, in turn, contacted the Northwest Territories Health and Social Services Authority (NTHSSA) about the found documents to inquire as to NTHSSA's knowledge of them. NTHSSA took immediate steps to contact A.B. to recover the files, but A.B. refused to give the files to anyone with NTHSSA or the Department unless he was granted a meeting with the Minister of Health.

This office immediately opened a breach investigation file and, pursuant to section 137(1) of the *Health Information Act* initiated a review of the incident. As a first step in that process, my office delivered a letter to A.B. demanding that he produce and deliver to the RCMP in Fort Simpson all of the records he had in his possession so that they could, in turn be delivered to the Office of the Information and Privacy Commissioner. The R.C.M.P. in Fort Simpson attended at A.B.'s home on the evening of December 14th at the request of the Information and Privacy Commissioner and took possession of a box of files from A.B.. The box was subsequently delivered to the Office of the Information and Privacy Commissioner in Yellowknife, where it has remained since.

Beginning on December 17th, officials of the NTHSSA were given supervised access to the records to allow them to identify affected individuals for the purpose of notifying

them of the breach as required by section 87 of the *Health Information Act*. Supervised access was also given to the investigators hired by NTHSSA to investigate this incident. A copy of the investigator's report was provided to this office pursuant to the NTHSSA Privacy Breach Policy on May 29th, 2019. This investigation report has assisted this office's review and provided necessary and important historical and factual context.

THE RECORDS FOUND

The box received by the Office of the Information and Privacy Commissioner was a "bankers' box" intended for file storage. The box itself was in bad condition and had clearly been stored in damp, if not wet, conditions. A hand written label on the outside of the box read "LKFN Fresh Start". Inside the box was a green plastic garbage bag (also in poor condition) and inside the bag were 124 file folders, red or blue in colour, with names on each file. Some files included the personal information of several people from one family. The files were mostly in alphabetical order, with surnames starting with the letters "A" through "S". It is to be noted that the pictures taken by CBC North and published in their news reports do not show a box - only the plastic bag with the files in it. There is some question, therefore, as to whether the box received by the Office of the Information and Privacy Commissioner is the same box in which the records were allegedly found.

The content of the files related mostly to addictions counseling services, including both referrals to programs and discharge papers from various residential addiction programs including Poundmakers, Nats'ejee Keh Treatment Center and Action North Recovery Centre. In addition to first and last names and contact information of individuals, the files contained other personal information including such things as:

- date of birth
- social insurance, treaty and health care numbers
- personal history, including family, legal, health, addictions and treatment history.

It appears that the records had been created between November of 1988 and January, 2005. The majority of the papers, however, appear to have been created in the mid 1990's. The records appear to have been created by a number of different organizations including the "Alcohol and Drug Program for the Hay River Reserve", the "Sharing Lodge Healing Program" and the GNWT as is evidenced by letterheads and logos on the paperwork.

Considering the age of the records, the papers were in relatively good shape. There was no evidence of water stains, running ink or crinkling that would suggest water damage, though they were damp and musty smelling.

HISTORICAL CONTEXT

It was not immediately obvious what the origin of these records was. The file folders did not appear to be similar to those used by any current program of the Department of Health and Social Services or the Northwest Territories Health and Social Services Authority (NTHSSA). Because the contents of the files included records from a number of organizations, it was not possible to ascertain where the records originated. The first order of business, therefore, was to attempt to identify where these records might have come from. In order to attempt to do this, it was helpful to create, to the extent possible, a historical time line. Much of this information was gathered and provided by the investigators, though they noted that there were clearly many gaps in the available information. Some of the relevant findings of the investigators were the following:

- In 1984, the Hay River Reserve started to operate the Sharing Lodge Healing Program at the Hay River Reserve, and it appears to have run from 1984 until sometime in the 2000s although under various names, including the "Hay River Reserve Alcohol and Drug Program" and the "Sharing Lodge Healing Program".

- Until 1988 responsibility for the provision of health services in the Northwest Territories lay with the federal government. This responsibility was transferred to the GNWT in 1988. Regional boards/authorities were also established at that time.
- Throughout the 1990's, and into the early 2000's, there was a focus on community-based programming for addictions and mental health counseling and there were a number of programs financed by the GNWT but operated and managed by Non-Governmental Organizations (NGOs) (often band offices) to meet these needs. The investigators were able to identify a number of these community based programs and found some contracts and contribution agreements for the provision of various addiction counseling and treatment programs. One of those community-based projects was the Fresh Start Program run by the Liidlii Kue First Nations (LKFN).
- In about 1990, the (LKFN) began a program in Fort Simpson called "Fresh Start", with funding from the Government of the Northwest Territories. This program included intakes for programming and referrals to residential treatment programs, including the Nats'ejee K'eh Treatment Centre on the Hay River Reserve. This program continued until at least the early 2000s.
- As the 1990's progressed, there was growing dissatisfaction about the quality of alcohol and drug services in the Northwest Territories.
- In 1994, the cabinet approved consolidation of the Department of Health and the Department of Social Services, and in 1997, these departments were amalgamated. At this time responsibility for direct service delivery was divested to regional Health and Social Services Boards or Authorities, including the Dehcho Health and Social Services Authority (DHSSA).

- In 1997, the *Access to Information and Protection of Privacy Act* came into effect, requiring public bodies, including health authorities, to maintain privacy standards and protect against unauthorized collection, use and disclosure of personal information.
- Between 2002 and 2005, the GNWT moved toward an Integrated Service Delivery Model. The GNWT began to take over responsibility for addictions counseling and Alcohol and Drug Workers, who were previously employed by NGOs offering these services under contract, were brought in-house as existing contribution agreements expired.
- In 2007, responsibility for mental health and addictions services on the Hay River Reserve was transferred to the GNWT and programs continued to be provided on the Hay River Reserve, but under the management and control of the GNWT.
- In approximately 2010, Dehcho Health and Social Services Authority (DHSSA) moved the offices of social services and mental health into the Stanley Isaiah Seniors Home (SISH) building in Fort Simpson. The facility has been on lease to the GNWT since approximately 2008, always for health and social services programming in the Dehcho region. Before being leased to the GNWT, the facility appears to have been used by the LKFN as a care facility.
- In 2013 the Nats'ejee K'eh Treatment Centre on the Hay River Reserve was closed down. Treatment files were moved from that facility to the basement of Centre Square Mall and ultimately to the warehouse in Yellowknife.
- In 2015, the position of Alcohol Addiction Counselor at the Hay River Reserve was terminated. The Department sent employees to the Hay River Reserve to collect files. Files were transferred first to Fort Providence and then, apparently,

to the SISH building in Fort Simpson. There does not appear to have been any inventory or other cataloguing of the records when they were transferred.

- On October 1, 2015, the *Health Information Act* came into effect.
- On August 1, 2016, the NTHSSA was established and amalgamated six health authorities throughout the Northwest Territories, including the DHSSA.

This history is relevant in that it confirms that during the time period in which these found records were created, addictions and counseling services in the Dehcho region were provided by NGOs under funding agreements/contracts with either the federal government or the GNWT.

It is to be noted that each time there was a change in the structure of the health system in the Northwest Territories (with responsibility moving from the federal government to the Department of Health to the Department of Health and Social Services and the regional health authorities, to the NWT Health and Social Services authority), it is presumed that ownership of and responsibility for all records and other assets was also transferred accordingly.

OWNERSHIP OF THE RECORDS

As noted above, it is impossible from the records themselves to verify with any certainty where they originated. From the above historical context, and the content of the files, however, it appears likely that these files were originally created by one or more NGOs in the Dehcho Region, providing addictions and counseling services to residents in the region. This included addictions programs offered on the Hay River Reserve. These programs all appear to have been operated under a contractual arrangement with either the Federal Government (before 1988) or with the Government of the Northwest

Territories, specifically the Department of Health, the Department of Health and Social Services or with the Dehcho Health and Social Services Authority.

This suggests ownership rests or has rested with the Department of Health, the Department of Health and Social Services, the Dehcho Health and Social Services Authority and the Northwest Territories Health and Social Services Authority successively since they were create. It is not, however, determinative.

All of the contracts and contribution agreements discovered by the investigators contained some provisions with respect to ownership of records. For example, a contract between the Government of the Northwest Territories and LKFN signed in 1996 for the administration of the SISH facility contains the following paragraph:

When this agreement is terminated the Recipient shall, within five working days, deliver to the Department all correspondence, files, documents, papers and property which may have come into the Recipient's possession for the purpose of carrying out the project.

In another contract between the Deh Cho Health and Social Services Authority and LKFN for the administration of the "Fresh Start" program in 2001, the following paragraphs are included:

When this Agreements terminated the recipient shall, within five working days, deliver to the Board all correspondence, files, documents, papers and property which may have come into the Recipient's possession for their purpose of carrying out the project." [as written]

The Recipient agrees that information it obtains from the CEO about the program or clients of the program will be kept confidential. Unless the

CEO agrees in writing, in advance, the Recipient will not release, allow media coverage or publish any information about the program or clients either past or present. This duty shall survive any termination of this Agreement.

Yet another contract between the Dehcho Health and Social Services Authority and the LKFN for alcohol and drug programming in 2002 contains the following paragraphs:

All documents, files, records (paper or electronic) generated and maintained by the Contractor pursuant to this Contract become and remain the property of the Government of the Northwest Territories. Upon termination of this Contract the Contractor will deliver to the DCHSSB all papers and property belonging to the Government of the Northwest Territories at the Contractor's expense....

The Contractor agrees that the information it obtains while providing services under this Contract are confidential. Unless the DCHSSB gives written approval in advance, the Contractor shall not release, allow media coverage or publish any information it obtains under this Contract. This includes information on past or present clients of the program. This duty shall survive any termination of this contract.

There is no evidence that any addictions counseling or treatment programs were offered or delivered by NGOs between 1988 and 2005 without funding from either the Department, the Dehcho Health and Social Services Authority or the Government of the Northwest Territories under contract. It is safe to assume, therefore, that all such services provided in the Dehcho during this time frame were provided either directly by the GNWT or by NGOs under contract to the GNWT. It is also reasonable to conclude that all of these contracts contained standard provisions like the ones noted above

which provided that all documents, files, and records generated and maintained by the contractor would become and remain the property of the Government of the Northwest Territories when the contract came to an end. For the purposes of this review, therefore, I find that the records in question were owned by the Government of the Northwest Territories, and specifically by the NWTSSA, when they were recovered by a private citizen in Fort Simpson in late 2018.

HOW DID THESE RECORDS END UP IN FORT SIMPSON

The content of the files suggests strongly that these records were created as part of programming on the Hay River Reserve. While the individuals named in the records appear to be from a number of Dehcho region communities, by far the largest number appear to have been residents of Hay River or the Hay River Reserve when the records were created. Furthermore, there were a number of addictions and counselling services available on the Hay River Reserve between 1988 and 2005.

How, then, did they find their way to Fort Simpson? Because we are not able to identify with any certainty where the documents originated, we are equally challenged to answer this question. A number of potentially conflicting clues were unearthed by the investigators.

It appears that the LKFN ran a “Fresh Start” program in Fort Simpson from approximately 1990 until about 2003 and that part of this program included making referrals for clients to residential treatment centers, including the Nats’ejee K’eh (NJK) Treatment Centre on the Hay River Reserve. It is possible, therefore, that the files discovered were created and kept in Fort Simpson as part of the “Fresh Start” program and had remained there since they were originally created.

One witness recalled that the Dehcho Health and Social Services Authority took over the work of addictions counseling from the local NGOs in approximately 2004, which included services provided on the Hay River Reserve. This witness recalls that when the treatment centre on the Hay River Reserve shut down in approximately 2015 “there were concerns with leaving documentation at the ‘Health Cabin’” and “arrangements were made to have all client files removed and taken to Fort Simpson to the basement of SISH”. This witness specifically recalled that there were a number of boxes of files going back to the 1990s that were transported. According to the witness, the boxes were put in locked cages in the basement of SISH. She recalled that the boxes contained “health information, band information, mental health records, and LKFN files from previous, similar programming”. This witness recalled that the file folders were blue and red and had old addictions related counseling notes.

Another witness recalled being told that when the office on the Hay River Reserve (where counseling had been provided) was closed there were still files in the building. This witness was instructed to retrieve the files and take them back to Fort Providence to secure. The witness recalled boxing up the files, which were in different coloured folders, in alphabetical order. She recalled boxing “old” files in brand new file boxes (four or five boxes in total). When she got back to Fort Providence with the files, there was not enough room in the filing cabinets, so they were put in the basement in “a secure area for old files”. There is some indication in the witness’s statements that these files were at some point transferred from Fort Providence to Fort Simpson.

Other witnesses provided information revolving around the closure of the Nats’ejee K’eh (NJK) Treatment Centre on the Hay River Reserve in 2013. At that time, NJK was being run by the Dehcho Health and Social Services Authority. Several witnesses, backed up by email records, describe the steps taken to transfer records from the Hay River Reserve to Yellowknife. An employee from the Department of Health and Social Services, Territorial Social Programs in Yellowknife traveled to the Hay River Reserve

to supervise the transfer of the records. Another employee met the transport truck at the a storage facility in Yellowknife to supervise the delivery. These records were sorted and prepared for archiving and 64 boxes were eventually moved to the Infrastructure Warehouse in Yellowknife as archival records.

It is to be noted that NJK Treatment Centre was a completely separate program from the counseling programs offered on the Hay River Reserve.

Yet another witness indicated that since early 2018, staff from NTHSSA - Dehcho Region, had been providing counseling services on the Hay River Reserve with staff from Fort Providence traveling to the Reserve to provide counseling services. At some point, someone took notice of a locked filing cabinet in the health centre on the Reserve that did not have a key. The supervisor of mental health in the Dehcho region was instructed to have the Fort Providence supervisor move the files in the cabinet to Fort Simpson, which was apparently done.

Based on these recollections, it is not possible to determine how the box of files in question ended up in Fort Simpson. These records might have originated in that community, or they could have been moved there from the Hay River Reserve or Fort Providence at some point. It is likely, however, that at some point, the files in question, whatever their origin, found their way to the basement storage area of the SISH building in Fort Simpson. This building has been on lease to the Dehcho Health and Social Services Authority and subsequently to the Northwest Territories Health and Social Services Authority since 2008.

THE DISCOVERY OF THE FILES

Once again, the facts are not entirely clear in terms of where the records were found or when. A.B. has maintained that he found the box of files in the local dump and retrieved

them from there. There are, however, other plausible and perhaps more probable explanations as to how he came to be in possession of the files.

A.B. said that he found the files at the dump while scavenging sometime in October. He also told investigators that what he had turned over to the Information and Privacy Commissioner was only “a small, little amount” of what he had, which amounted to over 1000 files. He told both investigators and my office that he only retrieved some of the records he had found and that the files at the dump were “two or three feet” deep, “trucks” deep, and “ten feet to fifteen feet deep in diameter”. He stated that there were still “thousands and thousands” more files at the dump with boxes broken open and piles on the ground when he left. He told investigators that when he found the records, he threw them into a “plastic thing” and threw it (clearly indicating only one item) into the back of his pick-up truck, where it apparently remained for some months.

At some point, A.B. decided to bring his concerns to his MLA and visited his office and told him about the records. A.B. confirmed that the MLA had advised him to bring the box of files to him but he did not want to do that or to give the files to NTHSSA.

To ensure that all of the files in A.B.’s possession had been received, my office obtained written confirmation from A.B. that he had handed over to the Information and Privacy Commissioner all of the files and all the paper he had recovered from the dump related to this matter and that he had not made any copies of any of the content of the files.

A.B.’s MLA confirmed that he had had a meeting with A.B. on November 14th, 2018 and during the course of the conversation, A.B. indicated that he had “a box” (indicating only one box) of health files. In a later email to the Minister of Health and Social Services, the MLA indicated that A.B. had told them they were “addictions” files. The MLA stated that he had asked A.B. if he wanted to give the box of files to him or to the Minister and that A.B. responded, “no” and that he wanted a meeting with the Minister. The MLA

advised A.B. that he would have to tell the COO of the NTHSSA - Dehcho Region about their conversation.

The MLA states that on the same day or the following day he met with the COO in the COO's office to discuss the matter. The COO expressed at the time that he was confident that there was no way that A.B. could have had NTHSSA's files because of their security.

The MLA met with A.B. a second time two days later and advised him that A.B. needed to see the COO and A.B. responded "yup", indicating that he would follow up. The MLA did no further follow up with either A.B. or with the COO after this meeting.

The MLA confessed that he wondered at the time whether A.B. really had any files.

After the CBC news report came out, the MLA advised that a number of his constituents approached him indicating that they knew "the truth", but they did not want to get involved or have their names shared. He indicated that these constituents had told him that A.B. was talking about having these files as early as July or September, 2018 and some had seen "a box" of files in the back of his truck. These constituents were consistent in stating that A.B. was telling them that he found the files at the dump. Some constituents also indicated that A.B. had been sharing the contents of the files with them.

There are a number of inconsistencies, as well, with the information provided by the COO. Initially, the COO of NTHSSA - Dehcho Region advised the investigators that the first he had heard of the records in question was when he received a call from head office about it on December 13th. After being asked if he had ever discussed the possibility of missing or lost files with the local MLA earlier than that, he denied any such discussion until presented with an email from the MLA to him dated November 16th. After being presented with this evidence, the COO belatedly recalled that the MLA

had come to his office and told him that A.B. had found some records. The COO said that this discussion left him with the perception that the files might not exist. He told investigators that it was his understanding that the MLA was going to ask A.B. to bring the files to the COO's office. A.B. did not do that and the COO did nothing further about the matter. The COO indicated that he was "waiting for more information" from the MLA. When no further information was forthcoming from A.B., the COO apparently forgot about it or decided it was not worth pursuing further.

THE STORAGE FACILITY

While we cannot be absolutely certain, it appears most likely that the found files had been stored in the basement storage area of the SISH building in Fort Simpson. This is a building that has been used to provide health and social services in Fort Simpson for many years. It is a public building, which means that it is accessible by the general public. The public also has full access to the basement of the building, where there is a public laundry area next to the storage room. There is, therefore an "active invitation" for members of the public to go to the basement of the building.

The storage room itself is a large area with various sized cages fashioned out of metal mesh material. There is a door into the room where the cages are located but evidence from several sources suggests that this door is most often unlocked and is often open so that anyone walking by can see the cages inside or even walk into the area. It would not be difficult for anyone to get into the room with the cages and, in fact, there was an incident not too long ago when some teenagers got into the room and into some of the unlocked cages and destroyed supplies kept in some of these cages. Most of the cages have locks, though witnesses indicated that there were some cages containing supplies such as diapers that did not have locks. As noted below, there is very little control over keys which allow entry into the room and the cages, which are, for the most part, kept in a key box on the main floor of the building.

It appears that each of the cages is dedicated to a specific group (for example: social services, LKFN, medical, mental health etc). While many witnesses referred variously to there being medical records, death records, dental records, counselling and social services records, mental health records, probation files, and LKFN financial records, no one appears to have any real idea of what is (or was) contained in the cages with the possible exception of one cage, which contains a number of boxes related to deceased persons, which have been sorted and formally labeled under the GNWT records management system, referred to as DIIMS.

Interestingly, and of considerable concern, the COO for NTHSSA, Dehcho Region advised the investigators that, while he was aware of files stored in the SISH building, he had never been in the basement of the SISH until this event. He stated that until the incident in question, he did not know for sure whether there were mental health and social services files in the basement, but that he "knew files were in the building and secure". How he knew this if he had never been in the basement is unclear. He suggested the possibility that a "disgruntled employee" had taken the box of files and given it to A.B. as he was sure (never having visited the basement storage area) that the files in storage were secure. He also indicated to the investigators that, when he visited the storage area in the wake of the breach being reported by CBC in December, 2018, he thought the storage cages "looked organized and sorted". This is in stark contrast to the perception of the investigators who visited the area two months later, and expressed concerns about the lack of any apparent organization in the storage cages.

EVENTS IN MONTHS LEADING UP TO THE BREACH

There were three events that happened in the summer and fall of 2018 which may have contributed to the loss of these files. The investigators hired by NTHSSA to look into this breach suggest that it is very possible that the files were not found in the dump as is alleged by A.B. but were taken from the SISH during one of these three events.

1. The July Clean Up

The first of these events occurred on July 10th, 2018. At this time the Executive Director of Clinical Integration/Executive Director of Mentoring for the NTHSSA directed that the storage space in the basement of the SISH be “cleared out”. A work crew, which included both housekeeping and custodial staff, went through all of the cages and cleared and tidied them out. It was noted at that time that at least one of the cages did not have a key and some of the materials in that cage looked like boxes pertaining to and belonging to the LKFN. Most indicated that these files appeared to be financial records of the LKFN. There was some discrepancy between the various witnesses about what was to be done with these records - some thought that one employee had been given direction to contact the LKFN to arrange to deliver them or have them picked up. Several recalled that direction had been received from LKFN that these records should be taken to the dump if they were more than 7 years old. Officials with LKFN denied that there had been any discussion with anyone from NTHSSA, Dehcho Region about the transfer of these files back to the LKFN. It is unclear whether these records remain stored in the SISH building, but it is likely that they remain in the cages today.

At least two witnesses involved in this clean up indicated that during the clean up, some boxes were taken up to the main floor desks and tables and some were put in the porch. The witnesses recalled that a lot of things were taken from the cages during this clean up and put in the entrance way, then loaded on the truck and taken to the dump. The recollections, however, were that there were no boxes of “files” in the pile which was designated to go to the dump. Another witness involved in the clean-up was also clear that no files had been taken to the dump, either during that clean-up or before.

There is evidence that during this clean-up, some boxes were taken to a boardroom upstairs to be sorted. It does not appear that this sorting was immediately done and

“quite a few” boxes remained on the table in the boardroom for several months at least. It is unclear whether this room was kept locked.

Another witness who was involved in the clean-up stated that there was a lot of old equipment, old bed rails, stereos and other household items that needed to be discarded. There were also some boxes discarded during the cleanup, but not bankers’ boxes and no boxes of paper. He recalled items were brought up from the basement of the SISH and put in the foyer, including old cooking supplies that the head cook looked at before anything was taken to the dump.

Another witness also described the summer clean-up of the cages. This witness said that “everything” was taken out of the cages and the cages were cleaned and materials put back. This witness recalled that a few cages had health centre information. There was also one cage full of belongings of a youth who had previously been in care, whose name was clearly known. This witness also indicated that there was also a cage full of kitchen stuff, including pots, pans, coolers and old dishes that were brought up for someone from the LKFN to get. The witness also recalled that one cage had no key and they had to get a lock cutter to get into the cage and that this cage had social services material that were to have been reviewed by appropriate personnel.

2. The October Flood

There was also a flood in the basement of SISH in mid-October of 2018 during which boxes in the storage cage closest to the public laundry had to be moved to protect them from water damage. Nothing appears to have been removed from the basement at this time but there is some evidence that some boxes may have been moved from one cage to another.

3. The Boardroom Conversion

The third event was the conversion of the boardroom into office space between September 7 and September 24th, 2018. There were, reportedly, a lot of boxes on the boardroom table before this conversion took place. Some of these appear to have been put there during the July clean-up, to be reviewed by appropriate staff. There is evidence that some of the boxes were labeled “LKFN”. One witness indicated that the boardroom had become a “junk pile of stuff” and a summer student had been tasked with cleaning the room and getting rid of the “junk”. Another witness remembered that there were a lot of boxes in the boardroom that had to be moved. This witness does not recall moving any bankers’ boxes or boxes with paper.

Another witness recalled that everything in the boardroom had to be cleaned out to make a new office, but there had been no particular person assigned to pack things up. This witness did remember a counsellor indicating that he would go through some of the materials. Further, this witness recalled that a summer student was assigned to go through the office. “Stuff” left on the table after the clean-up was “garbage” and was put out in the front foyer before being loaded on a truck. The witness recalled that there were some social services materials in the boardroom but that social services staff went through these boxes and they were taken back down to the cages.

One employee recalled that there had been “boxes and boxes” in the boardroom and he had started to go through those records, but did not get far. The witness recalled seeing literature and academic journals, plans for the Dehcho region, financial statements and outdated mental health textbooks and participant manuals. While he did not go through all of the boxes, he said he did not see any client files.

Having reviewed the witness’s recollections, once again we are left with uncertainty. It is, however, unlikely that the flood in October created any opportunity for boxes to be

taken or inappropriately disposed of. By all accounts, no boxes or files left the basement storage area during this event, though some boxes may have been transferred from one cage to another.

The other two events, however, left a lot of room for this box of records to have been either taken by an unauthorized third party or to have been accidentally included in those items brought to the dump. During the July clean-up, boxes were clearly transferred from the basement to other parts of the building. No effort was made to keep track of what was moved or what was discarded. Boxes were left for periods of time in the foyer or the porch and this would have provided the opportunity for any member of the public to take a box.

The conversion of the board room to an office space also appears to have left opportunity for a box of files to have been accidentally sent to the dump or for an unauthorized individual to gain access to a box of records. This project appears to have been rather haphazardly organized, with many employees having access to the items in the boardroom. The room had, apparently, been used pretty much as a catch-all for boxes and miscellaneous items that no-one knew what to do with. It is possible that the box of files in issue in this case was brought up to the boardroom to be reviewed during the July clean up and was left there until the room was needed for an office and was then simply discarded without any real review of what was in the box. It may, therefore, have ended up at the dump in the process of cleaning up the boardroom.

DOES THE *HEALTH INFORMATION ACT* APPLY TO THESE RECORDS

The *Health Information Act* came into effect on October 1st, 2015. Section 2 of the Act outlines its purposes as follows:

to govern the collection, use, disclosure and protection of personal health information in a manner that recognizes both the right of individuals to access and protect their personal health information and the need of health information custodians to collect, use and disclose personal health information to support, manage and provide healthcare.

Section 4 of the Act provides that the Act applies to all records containing personal health information that are in the custody or under the control of a health information custodian, except for a list of specific kinds of files, none of which are relevant to this review.

“Health Information Custodian” is defined in section 1 of the Act as:

- (a) the Department,
- (b) a medical practitioner, other than a medical practitioner acting as an agent of a health information custodian...
- (d) a prescribed person, class of persons or organization responsible for the management, control and operation of one or more health facilities, as defined in section 1 of the *Hospital Insurance and Health and Social Services Administration Act*, ...

The Department of Health and Social Services is, therefore, a health information custodian under the Act, as is the Northwest Territories Health and Social Services Authority. The Dehcho Health and Social Services Authority was also a health information custodian under the Act prior to the amalgamation of most regional authorities in 2016.

The *Health Information Act* applies to all records “in the custody or under the control of” a health information custodian. Do the records in question fall within that category such that the *Health Information Act* applies to them? We have already determined that the

records were owned by NTHSSA by virtue of the contractual arrangements between service providers and the Department or a health authority. We have also found that the Dehcho Health and Social Services Authority, the NTHSSA and Department of Health and Social Services were or are all health information custodians as defined in the Act.

The HIA does not require custody **and** control of the records. It requires only custody **or** control. Ownership denotes at least a degree of control and that, in my opinion, is sufficient to conclude that the records in question are subject to the HIA. Furthermore, it is conceded by the NTHSSA that the records were almost certainly in storage in the basement of the SISH building in Fort Simpson prior to being in the possession of A.B.. This would give the NTHSSA ownership, custody and control of the records immediately before they were allegedly found by A.B.

All of the found records, however, were created prior to the *Health Information Act* coming into effect on October 1st, 2015. Does this change matters? Section 196 of the HIA provides as follows:

196. This Act applies to the use or disclosure of personal health information on or after the day this section comes into force, by
- (a) a health information custodian, even if the custodian collected the information before that day; or
 - (b) a person other than a health information custodian and to whom a custodian disclosed the information, even if the person collected the information before that day.

On this basis, I find that the HIA does apply to the use and/or disclosure of personal health information, even if it was collected before October 1, 2015.

Also of relevance in this case is the concept of “agents” working for or on behalf of a health information custodian. Section 9 of the HIA provides that the following individuals are deemed to be agents for the purpose of the powers, duties and functions of a health information custodian with respect to the collection, use and disclosure of personal health information:

- a) employees of the custodian
- b) a person who performs a service for the custodian as an appointee, volunteer, student or under a contract or agency relationship

Section 10(1) requires agents to comply with the Act and the regulations in relation to the collection, use and disclosure of personal health information and 10(2) requires health information custodians to “take reasonable measures to ensure that its agents comply with this Act and the regulations”.

The *Health Information Act* applies to “personal health information” as defined in Section 1 of the Act. The definition lists a number of specific kinds of information as personal health information, including:

the following information in any form that identifies an individual, or in respect of which it is reasonably foreseeable in the circumstances that the information could be used, either alone or with other information, to identify an individual:

- (a) information about the health and healthcare history of an individual,
- (b) information respecting health services provided to an individual,
- (c) information about eligibility or registration of an individual for a health service or related product or benefit,...
- (e) information collected in the course of providing a health service to an individual or information that is collected incidentally to the

- provision of a health service to an individual, including the individual's name and contact information,
- (f) a personal health number, other identifying number, symbol, or other particular assigned to an individual in respect of health services or health information....
 - (i) information prescribed as personal health information.

This is a very broad definition and I find that it is clearly broad enough to include mental health and addictions counseling information. In fact, the Regulation 2 under the *Health Information Act* makes this very clear:

- 2. The following are health services for the purposes of the definition of “health service” in subsection 1(1) of the Act;
 - a) addiction services including addiction treatment, counseling and detoxification;...
 - c) mental health counseling

I therefore find that the records in question contained personal health information as defined in the *Health Information Act*.

In summary, I find that

- a) the *Health Information Act* applies to this situation
- b) the records in question were subject to the HIA notwithstanding that they were created prior to the coming into force of the Act
- c) the Dehcho Health and Social Services Authority and, subsequently the amalgamated Northwest Territories Health and Social Services Authority owned the records in question as a result of contractual provisions in the contribution agreements between the GNWT and NGOs delivering addictions counseling services in the Dehcho region prior to

2015, and that they also had both custody and control of the records in question.

THE ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT

The *Access to Information and Protection of Privacy Act* (ATIPPA) is also of relevance to this case. This legislation came into effect on December 31st, 1996. One of the stated purposes of ATIPPA is to “prevent the unauthorized collection, use or disclosure of personal information by public bodies”.

The ATIPP Act applies only to public bodies as defined in the Act. This includes departments and agencies of the GNWT, including health and social services boards and authorities. Unless provided for in contracts between a public body and a non-governmental agency, it does not apply to organizations such as indigenous governments or agencies, private sector service providers or private sector businesses.

As noted above, it appears that all addictions services were provided by non-governmental organizations, but under contract to the Department of Health or a Health Authority until approximately the early 2010s. Also as noted above, it appears that all of these contracts contained standard provisions which provided that records created during the course of the provision of services were and remained the property of the GNWT and were to be physically handed over to the GNWT upon termination of the contract.

Further, section 3(1) also provides that the Act applies to “all records in the custody or under the control of a public body” with a number of limited exceptions. One of those exceptions is in relation to personal health information as defined in the HIA which is contained in a record that is in the custody or under the control of a public body that is also a health information custodian (such as the Department of Health and Social

Services and/or the NTHSSA). This exception means that, to the extent that the HIA applies to these records, the ATIPP Act does not. The ATIPP Act does, however, have residual application to the extent that any of the records involved are not subject to HIA. Section 3 does not differentiate between records created before the coming into force of the ATIPP Act and records created after that date. I find, therefore, that to the extent that the ATIPP Act applies, it applies to the records in question even if they were created before ATIPP came into force on December 31, 1996.

WHAT DOES APPLICATION OF THE HIA MEAN IN TERMS OF THE RECORDS IN QUESTION

Having established that the HIA applies to the records found in Fort Simpson, what does this mean in terms of the custodian's responsibilities to protect the records? Quite simply, it means that the health information custodian having custody and control of the records has certain positive obligations with respect to the records.

Section 38

We start with section 38 of the HIA which prohibits a health information custodian from disclosing personal health information about an individual unless:

- a) the custodian has the express consent of the individual and the disclosure is for a lawful purpose; or
- b) the disclosure is permitted or required by the HIA or by another Act, or by a regulation of Canada

The concept of consent for the collection, use and disclosure of personal health information under the *Health Information Act* is complicated. The Act requires health information custodians to obtain consent, either express or implied, from the individual

for the collection, use or disclosure of that person's personal health information. Section 18 of the HIA provides that health information custodians can assume that the patient/client has provided implied consent to the collection of their personal health information where the collection is for the purposes of providing or assisting in the provision of a health service to the individual and can similarly assume that the patient/client consents to the disclosure of that information to another health service provider for the purpose of the individual's health care. However, this is qualified by subsection 18(2)(b) which requires consent to be "knowledgeable". As I have indicated in previous reports under the HIA, I have serious doubts that custodians are meeting the prescribed requirements of consent, especially in meeting the requirement that consent be "knowledgeable". In this case, the issue is not whether there was consent to the collection of the information, or for the use of the information for the purposes of providing addictions counselling to the individuals involved. Rather, the issue here is whether there was consent to the disclosure of the information contained in the files to unknown individuals who had no role in the provision of health services. I think we can safely conclude that there was no such consent.

The only other circumstance under which a health information custodian can disclose personal health information is where the disclosure is permitted or required by the HIA or by another Act, or by a regulation of Canada. There is, however, no suggestion that this was the case.

Based on this, I find that the disclosure resulting from the mishandling of these files was an unauthorized disclosure and contrary to section 38 of the *Health Information Act*.

Section 8

Section 8 of the HIA requires health information custodians to "establish or adopt standards, policies and procedures to implement the requirements" of the Act and the

regulations, "including the requirements under sections 85 to 88"

Section 8 is a general provision requiring health information custodians to develop or adopt and implement policies and procedures to ensure compliance with the HIA. It is clear from the investigation into this matter that there were/are few such policies or procedures in place with respect to the movement, storage and management of closed or historical records. Such policies or procedures that do exist were outdated and largely unknown to employees. The investigators spoke to at least 23 employees or former employees of the NTHSSA (or its predecessor), mostly in the Dehcho Region. With a very few exceptions, the employees interviewed were largely unaware of or were unfamiliar with any specific written policies or procedures in relation to records management, records storage and/or retention and destruction policies. Most were of the opinion that no medical files were ever to be destroyed but they could not say why that was or how they knew that. Several suggested that the retention of older files had something to do with litigation arising out of the residential schools review. One employee indicated that he knew that maintenance and cleaning staff were not allowed in the "records room" and indicated that this was just "understood". Another said "you just know". One said that he did not know about any policies but recalled at some point being told that files would have to be "destroyed, not thrown out" and was vaguely aware that there was some sort of "destroying policy". Another staff member said that staff "know" they don't destroy anything and that this was just something that you "learned over time" working for the Authority. One employee thought that the NTHSSA followed the Alberta College of Physicians and Surgeon's retention schedules and believed that it was 10 - 20 years. Another thought there was an obligation to hold on to files for 7 years. One suggested that social services (as opposed to health) records had to be locked and secured for 99 years.

Several senior employees confirmed that there were no ORCS (Operational Records Classification System) or ARCS (Administrative Records Classification System) in place

within the NTHSSA or any of its regions (with the possible exception of the Stanton Hospital, but even this was not clear).

Two employees referred to a program entitled the Community Counselling Program (CCP), in place since approximately 2016, which provides standards with respect to such things as records management, confidentiality, records retention, consent and other such issues in relation to counselling records. This program is apparently currently operational and expected to be followed by all counsellors in the Northwest Territories. It contains a section on “Records Management” and “Records Security” which includes the following guidance:

2. In instances where there is no permanent counsellor in the community the following should be considered when deciding if files should be kept in the community:
 - * ownership of the building (i.e. HSSA, health centre)?
 - * Are there other agencies/departments located in the building?
 - * How often a counsellor visits the community?
 - * The size of the community and how many active files there are?
3. In instances where there are fly in services only, counsellors should not be traveling with files.
4. Keep all client records in a secure storage which adheres to the following secure storage measures
 - a) All files must be locked filed cabinet/storage inside of a locked room (double-locked).
 - b) Client information, case notes or other documentation should not be stored on the computer
9. Any additional hand written notes taken during sessions or otherwise, must be included in the file.

Mention is also made of Records Retention which states, in part:

1. Retain all client files in the Health and Social Services Authority office until a records schedule is approved.
2. Do not destroy any files

One of the witnesses indicated that a schedule was to have been developed by each of the then eight health authorities (this program was put in place prior to amalgamation) but, with the possible exception of the Stanton Hospital none of the authorities had established one. Nor does it appear that there has been such a schedule established since the amalgamation of six of the 8 former health authorities in 2016.

This directive does not appear to be a policy of NTHSSA but is more like an ethical guideline provided by a professional organization. In any event, it is clear that it is applicable only to counselling records and it appears to contemplate almost exclusively the handling of current records, not dated or closed records.

I was referred to a policy, apparently issued by the Dehcho Health and Social Services Authority which indicates a “Last Review” date of October, 2010 and a “Next Review” date of October, 2012, with respect to “Storage of Records”. (ADM 462). This policy provides that DHSSA records are “confidential documents recording the course of an individual’s health and/or social services and provide a means of communication amongst health and social services professionals enabling high quality and continuous Client well-being”. The procedures outlined in the policy include a statement that DHSSA records are the property of DHSSA and that records are not to be removed from the facility except when the records are under subpoena or when requested by the Coordinator of Risk/Planning. With respect to storage, the policy provides:

- a) All Health and Social Services records are to be kept in a lockable room/cabinet with access only to authorized persons.
- b) The room must be free of the following:

- i. Rodents
- ii. Water Damage
- iii. Mold
- c) The building that houses the files must have a fire system in place.
- d) The room that houses the files must be secure.
- e) File boxes are to be kept off the floor.
- f) Aged files are to be stored in boxes and labeled accordingly and placed on shelves provided at the Stanley Isaiah Wellness Centre (now known as the Stanley Isaiah Seniors Housing building or SISH)

To the extent that this policy remains in place, it is clearly not currently being followed. As no records retention ORCS or ARCS exists, the records are to be retained by the Authority until such a time as these do exist, and so cannot be disposed of. Records apparently are being retained long term but are clearly not being managed efficiently as discovered by the investigators when they personally observed the contents of the cages in the SISH building and as evidenced by A.B. coming into possession of the records.

I also reviewed another policy, issued by the Dehcho Health and Social Services Authority dated March 23, 2009 with respect to “Retention and Destruction of Health and Social Services Records” (ADM 410). This policy recognizes the intention to ensure that “records are managed efficiently” and suggests that DHSSA “will classify, maintain in an easy-to-locate manner, and disposal of records when they are no longer required” in accordance with the GNWT ORCS and ARCS. This policy notes that ARCS will identify when records ready for final disposition can be destroyed or must be transferred to the NWT Archives for archival selection/permanent retention. While the policy exists, no ORCS or ARCS schedules have been set. This policy is, therefore, also not being complied with.

The NTHSSA Risk Manager also referred to the existing Mandatory Training Policy which is applicable system wide and which requires “immediate supervisors” to ensure that all employees, contractors and volunteers complete the appropriate level of **mandatory** training within three months of the employee’s start date and annually thereafter. The level of training required depends on the job responsibilities of each employee and ranges from one basic module (General Privacy and Confidentiality) to nine modules. It was acknowledged by the Risk Manager that NTHSSA has not achieved full compliance with this policy. While the investigators did not ask each employee interviewed whether or not they had received privacy training under this policy, based on the responses they received to other questions, it is my guess that few of the employees in the Dehcho Region interviewed have completed even the basic level of training, and this includes the Chief Operating Officer.

In relation to the transfer of records, several of the individuals interviewed by the investigators described how records were transferred from Hay River to the Government Warehouse in Yellowknife in 2013 when the NJK Treatment Centre in Hay River closed. One individual was responsible for arranging the move of boxes, including their security and loading. This employee witnessed the arrival of 64 boxes of records in Yellowknife where they were stored in a “secure holding area” in a local downtown building so that they could be sorted, reviewed and prepared for ultimate storage with the Department of Public Works and Services in the “Government Warehouse”. This suggests that there is a formal “process” for the secure transfer, processing and ultimate storage of sensitive records. I was not, however, referred to any such policy. It may be that this organized and secure transfer of files from the Hay River Reserve to Yellowknife was solely the result of the hard work of several conscientious employees who took it upon themselves to ensure that these records were securely transferred and stored.

Other witnesses indicated that in June or July of 2017, an employee was tasked with cataloguing and boxing up some files regarding deceased persons which were being stored in the basement of the SISH building. This was done and DIIMS (Digital Integrated Information Management System - an electronic file management system used by the GNWT) labels were created for and applied to those boxes. It appears, however, that these boxes were not moved from the basement of the SISH building and remain there even today. Again, this suggests that there is, at some level, an established process for dealing with closed or dated records. That being said, the process is clearly not being applied consistently.

As outlined under the discussion above with respect to how the found records ended up in Fort Simpson, if there was a process or procedure in place, it was clearly not followed when closing down many of the addictions counselling and referral programs in the early 2000s. With the exception of the transfer of records from the NJK Treatment Centre to Yellowknife in 2013, the only record of the transfer of responsibility for or physical possession of any records from any of the NGOs to the GNWT is contained in the memories of long time and former employees of the Department and/or the Dehcho Health and Social Services Authority (as it then was). Though there are inconsistencies between witness statements, and we can expect that because of the passage of time many recollections are vague, it is reasonable to conclude that no inventory was completed and no effort was made to identify the records for archiving or future handling. We don't know what was transferred, how it was transferred, where the records were transferred to or, for that matter, where they were transferred from. We don't know how many files or how many boxes were transferred. The one box of found records involved in this case is clearly not the sum total of all records created by all of the NGOs which provided addiction counselling services or referrals prior to the transfer of this function to the GNWT. This reasonably begs the question of where, then, are the rest of the records that surely must still exist.

In fact, with the exception of the transfer of the files from the NJK Treatment Centre to Yellowknife, there is no record of counselling or referral files being transferred to or taken over by the Department or the Dehcho Health and Social Services Authority in any organized or documented way, despite the existence of standard provisions in the funding contracts between the NGOs and the GNWT or its delegated health authorities at the time which confirmed that ownership of these records remained with the GNWT and were to be returned to the GNWT at the end of the contracts. Further, it is clear from the investigator's report that, even in the aftermath of this breach, there is no one who knows exactly what records remain in the basement of the SISH, and no one has taken the initiative to catalogue what remains in the many, many boxes that are still stored in this facility.

All of this points to the general absence of appropriate and necessary policies and procedures in relation to the handling of closed and/or dated records and the transfer of records. Clearly, the *Health Information Act* came into effect only long after the creation of the records in question and, in fact, long after the transfer of addictions counselling and referral records from NGOs to the Department and/or the Dehcho Health and Social Services Authority. The *Access to Information and Protection of Privacy Act* has, however, applied to all records in the custody or control of public bodies since December 31, 1996. Furthermore, as indicated above, the *Health Information Act* applies to all records in the custody and control of a public body, regardless of when they were created or when they came to be in the possession of the Department or the Dehcho Health and Social Services Authority or the Northwest Territories Health and Social Services Authority. Upon the coming into effect of the *Health Information Act* on October 1st, 2015, the Dehcho Health and Social Services Authority, and thereafter the NTHSSA, were required to have policies and procedures in place and in effect to manage, secure and protect all of the records containing personal health information in their custody or control. Clearly, at the time of this breach, no real thought had been

given to the management of these or any other dated records in storage and how they should be handled. Nor, it appears, has this breach changed that situation significantly.

I find that the Dehcho Health and Social Services Authority and, subsequently, the Northwest Territories Health and Social Services Authority, have failed to comply with section 8 of the HIA.

Section 85

Both section 85 and 86 of the Act set out clear obligations which health information custodians must meet.

Dealing first with Section 85, this provision requires health information custodians to “take reasonable measures” to protect personal health information:

- 85.(1) A health information custodian shall take reasonable measures to maintain administrative, technical and physical safeguards for the protection of personal health information, including for protection
- (a) of the confidentiality of personal health information and the privacy of individuals the information is about....
 - (c) against unauthorized access to or unauthorized use, disclosure or alteration of personal health information;
 - (d) against loss or unauthorized destruction or other disposal of personal health information; and
 - (e) against theft or any other reasonably anticipated threat or hazard to the security or integrity of personal health information.

Section 13(1) of the Regulations under the HIA give more definition in terms of the safeguards required under section 85 of the Act, some of the more relevant being as follows:

- 13.(1) The administrative, technical and physical safeguards required under section 85 of the Act must include...
- (f) measures to protect personal health information stored and transported on removable media;
 - (g) a requirement that personal health information be maintained in a designated area subject to appropriate security safeguards;
 - (h) a requirement that access to personal health information be monitored on an ongoing basis for the purpose of ensuring that only authorized access is occurring;

For the purpose of this report, I include paper records in the definition of “removable media”.

Regulation 13(2) goes on to provide that the measures to maintain safeguards must be proportionate to any threat to the security, confidentiality or integrity of the personal health information. Regulation 13(3) requires health information custodians to “review its compliance with and effectiveness of its administrative, technical and physical safeguards on an annual basis”.

To determine whether NTHSSA maintained sufficient safeguards in relation to these records, we have to consider what the investigators found in relation to the storage of records in the basement of the SISH building in Fort Simpson, which is where the files were most likely stored before being found by a local resident.

The following is a description of the storage facility from the report of the investigators hired by NTHSSA to conduct an investigation into this breach.

The reception room of the SISH building is off to the side of the entrance and you cannot easily see the entrance from the reception room. There is a key box on the wall of reception area, and it was unlocked and open on the day investigators attended the building. Investigators also attended the basement of SISH, where a storage room full of cages is located. A number of general comments need to be made about the cages:

- The storage room door was unlocked and open when investigators attended the facility.
- The cages themselves are made of metal netting and it is easy to see the materials in the cages. The room is immediately off a public laundry room.
- There are no shelving units in the cages. Boxes were stored on the basement floor.
- The storage room has a sprinkler system.
- The records in the cages were in a variety of boxes, ranging from banker's boxes, to packing boxes, to large egg boxes. The boxes were stacked on top of each other, with most being compressed by weight.
- A number of boxes had obvious water damage.
- Some boxes had handwritten labels, and some had labels where the writing had been crossed-out or written over. Some labels were written on torn pieces of paper and numerous boxes did not contain the records reflected on the labels.
- Some boxes had labels that stated "LKFN Fresh Start", though they were not banker's boxes (such as the one that is the subject of this investigation). Those boxes contained yellow or green file folders, labelled with a client's name. Some of the file labels also stated "Fresh Start."

- One cage contained a few boxes that appeared to have been sorted and stored using the GNWT Digital Integrated Information Management System (DIIMS) label system
- Only a few boxes looked at by investigators had an inventory sheet attached to them, indicating contents of the boxes.

Descriptions of the facility indicate that there is no monitoring of persons entering or leaving the building or going down the stairs to the basement, where the storage cages are located. Security of the area is made more challenging by the fact that a public laundry area is also located in the basement, adjacent to the storage cages, so the public often visits the basement.

Evidence given by a number of witnesses interviewed suggested that the keys for these storage cages were kept in a key box located in a public reception area. The key box is not monitored and is not within eye sight of any NTHSSA employee. Further, the evidence provided by many witnesses and by the investigators is that the wall mounted key box is often left unlocked, making the keys available to anyone walking into the building. There was evidence that, at least in one instance, the key for a cage had been lost and it was necessary to cut the lock off the door in order to gain entry. Some of the cages had no locks at all although it appears that these cages did not contain paper records, but supplies. There is no indication that anyone (other than the COO by virtue of his position) was designated as being responsible for the storage area or for controlling access to the storage area or for the contents of the storage area. As noted above, this is concerning in light of the fact that the COO advised that he had never set foot in the storage area prior to the breach, so there was not even an acknowledgment of executive responsibility, let alone demonstrated management of this business area.

The lack of compliance with the NTHSSA's mandatory training policy also indicates a failure to ensure appropriate administrative safeguards. Employee knowledge and

understanding of policy protective practices is an important safeguard and lack of that knowledge clearly contributed to the loss of sensitive records in this case.

I find that the Authority was not in compliance with section 85 of the HIA, either at the time of the breach or at the time of the investigation. I find that there were virtually no administrative, technical or physical safeguards in place for the protection of the records being stored in the basement of the SISH building at the time the records went missing. What safeguards there were (locks) were so easily bypassed that they were absent or not in any way effective. Furthermore, based on the report of the investigators, it does not appear that this incident led anyone in an executive or management position within the Dehcho Region or NTHSSA headquarters to take immediate steps to properly safeguard the remaining records, as required by the HIA.

Section 86

Section 86 of the HIA requires health information custodians to take reasonable measures to protect the security and confidentiality of records.

- 86.(1) A health information custodian shall take reasonable measures to protect the security and confidentiality of records that contain personal health information, including measures to ensure that the records
- (a) are maintained in a secure manner;
 - (b) are, if applicable, transferred in a secure manner; and
 - (c) are, on destruction or other disposal, disposed of in a secure manner
- (3) A health information custodian shall take reasonable measures to maintain records in an orderly manner and to maintain an

organized system of record-keeping, to ensure ease of access to the records when personal health information is required.

- (4) A health information custodian shall comply with requirements set out in the regulations in respect of the retention, transfer, and destruction or other disposal of records containing personal health information

We have already discussed under section 85 the lack of reasonable measures in place to protect the records in storage at the SISH. We have also discussed the lack of any formal or controlled process for the transfer of old or closed files.

It is important to note that when the first indication was given by A.B. to the MLA, and then by the MLA to the COO, that there may have been a breach, the COO took no steps to investigate the matter and ensure that the records that were under his custody and control, including the ones in the cages, were secure and accounted for, as required by the HSS policy created as part of HIA implementation. He also did not initiate a breach response under the policy or follow up with A.B. about the allegations.

It is clear that NTHSSA is not in compliance with section 86(1) of the HIA.

It is also clear that NTHSSA is not in compliance with section 86(3) which requires a health information custodian to take “reasonable measures to maintain records in an orderly manner and to maintain an organized system of record-keeping”. The investigators who visited the storage facility at SISH made it clear that what they found was not a well-organized storage area. They found no shelving units, with boxes stored on the basement floor. The boxes ranged from banker’s boxes to packing boxes to large egg boxes, stacked on top on one another, most compressed by the weight of the boxes on top of them. Some boxes had handwritten labels and some had labels where

the writing had been crossed out or written over. Some labels were written on torn pieces of paper and numerous boxes did not contain the records reflected on the labels. Only one cage contained a few boxes that appeared to have been sorted and stored with DIIMS labels on them. No one interviewed could provide a detailed description of the materials in the cages, nor does it appear that, in the wake of this breach, there was a plan to do anything about correcting this situation. I find that NTHSSA was, and is, clearly not in compliance with section 86(3).

Section 86(4) requires health information custodians to “comply with requirements set out in the regulations in respect of the retention, transfer, and destruction or other disposal of records containing personal health information”. Unfortunately, there are no such requirements set out in the regulations. The Department does have a policy with respect to “Electronically Stored and Transferred Information” issued by way of Ministerial Directive in May, 2017 and amended in September of 2019. This policy, however, deals only with electronic records, not paper records. As noted above, it does not appear that there has been any policy, process or system direction in place with respect to retention and destruction of health records for the new NTHSSA, and that staff rely on their own shared assumptions that may, or may not, be best practices, with the result that it is generally accepted that health related records are never to be destroyed and are, rather, required to be stored (and protected) indefinitely.

NTHSSA’s RESPONSE TO THE BREACH

NTHSSA’s initial response to the breach was a non-response. The response of the MLA to whom A.B. had revealed that he had records containing personal health information was appropriate. Although he was skeptical about the truth of the information imparted to him by A.B., he took near immediate steps to pass that information on to the proper authority - the COO of the Dehcho Region of NTHSSA. The COO, however, chose not to act in any way in response to receiving that information. The COO indicated that he

shared the MLA's skepticism and was not convinced that the information about the files was true. Unlike the MLA, however, he failed to follow up in any way, even by consulting with those within NTHSSA whose job it is to deal with records management. He did nothing at all. As a result, the records were further disclosed to the CBC reporter who was given free access to the records and went through all of them, and recorded in photographs and written notes, detailed sensitive personal health information. It is glaringly clear that the COO had no depth of understanding as to his responsibility for the records under his custody and control, nor consideration as to the seriousness of the reported breach or the possible consequences of it. He took little to no notice and shrugged off the report from the MLA. He did nothing.

Once NTHSSA headquarters was contacted by the CBC to get their comments on A.B.'s allegation, immediate steps were taken to respond to the report of records being held by A.B. Employees in Fort Simpson were delegated to take appropriate steps and head office staff was dispatched to Fort Simpson. A.B. was contacted by staff of NTHSSA to request the return of the records and the Minister of Health and Social Services and my office were both notified immediately. This allowed me to take steps under the *Health Information Act* to recover the records within a day of the CBC news report. Several trips were made to the Fort Simpson dump by officials of the NTHSSA in an effort to ensure that there were no other records at risk, particularly in light of A.B.'s statements that there had been thousands more records that he had left behind. Although it is now apparent that the files had most likely been in A.B.'s possession for several months when this matter came to light, this was not clear at the time, and this was an appropriate step to take. When A.B. continued to insist that there were thousands of additional records still at the dump, I asked him to accompany officials from the NTHSSA to the dump to show them precisely where he had found the records. He declined to do so.

Once the records were recovered, employees of NTHSSA immediately reviewed the records, in my office and under my supervision, to obtain the information needed to contact affected individuals as required by Section 87 of the *Health Information Act*. Using current information held by the Department of Health and Social Service's Health Services Administration division (responsible for maintaining information in relation to Health Care Cards issued in the Northwest Territories), letters were sent to all affected individuals except for those who were deceased or for whom a current address could not be verified. An information line was set up so that those who had questions could call to receive additional information. There were news releases and public notices, as well as an "FAQ" sheet prepared and made available to the public. Two independent investigators were retained to conduct a thorough investigation into the matter. I am satisfied that NTHSSA took steps to address the disclosures to A.B. and the CBC to the extent possible after the breach became public, and that appropriate steps were taken to advise those affected by the breach and who may have been caused harm by the disclosures.

Very serious concerns, however, remain with respect to the Authority's response to the breach, both before and after it became public knowledge, and especially in terms of taking action to protect similar records still in their possession. Even after the discovery of the breach, it does not appear that any significant or obvious steps were taken to better secure the records remaining in the SISH basement storage. When investigators visited the SISH building several months after the breach was reported, they discovered that there were still opened and unlocked doors and easy access to keys. A large number of files remained in the cages, with no apparent effort having been made to sort through them or identify the contents of these remaining records after the breach. Investigators found many boxes still in the storage area, mostly un-labelled or mislabeled. I was advised by the CEO of NTHSSA that 38 boxes were later repatriated from Fort Simpson and brought to Yellowknife for sorting and appropriate storage, though it is unclear whether these 38 boxes were everything left in the storage cages or

only a portion of those boxes. Nor is it clear whether, if any boxes remain, anyone has been delegated to review them to determine their contents, inventory them and label them appropriately.

SUMMARY

- A member of the public in Fort Simpson (A.B.) came into possession of a box of files mostly related to addictions counseling services, including referrals to programs and discharge papers from various residential addictions programs, counseling records and referrals for addictions treatment. The records were created between November 1988 and January, 2005, but most have dates in the mid-1990s.
- It is impossible to determine exactly where these files originated, though it is probable that the records were created either in Fort Simpson by the LKFN which delivered addiction counselling and referrals through a program called "Fresh Start" in the late 1980s until the first half of the 2000s or on the Hay River Reserve which ran similar programs through the band in that community. In the former case, it is possible that the files had been in the SISH basement since the 1990's. In the latter case, there is evidence that files were likely transferred to Fort Simpson after the GNWT took back responsibility for addictions counselling in approximately 2007.
- Either way, it is probable that the box of files had been stored in the basement of the SISH building in Fort Simpson for some years immediately before they came to be in the possession of A.B.
- The security of the storage area in the basement of the SISH building was at best weak and, at worst, non-existent at the time of the breach. The key box for the

keys to the storage room and cages was located in a public area, not in the line of sight of any employee and not monitored in any way. Furthermore, the key box was often (perhaps always) left unlocked itself so that any member of the public could easily retrieve one of the keys. The storage area was also in a public area, located next to a laundry area used by the public. The door to the storage area also appears to have been often (perhaps always) left unlocked and, in fact, open so that any member of the public could see into the storage area and/or enter the main storage area. While the cages themselves were mostly locked, the steel mesh revealed the contents and any visible information (such as labels on the boxes). This situation had not changed when investigators attended the facility several months later.

- It is impossible to determine exactly how A.B. came to be in possession of these files. He maintains that they were found in the dump, and this is a possibility in light of the fact that a "clean-out" of the storage area in the SISH building took place in July of 2018, which resulted in several trips being made to the dump, with no particular attention being paid to what was being discarded and no clear direction to staff. There was a further disruption of files in SISH in September, 2018 when a boardroom was cleared out to convert the room to office space. Some boxes that had been relocated from the basement to the boardroom during the July clean-up appear to have been still in the boardroom in September when the boardroom was cleaned out to convert it to an office. Again not much attention was paid to what was being discarded and there was no clear direction to staff and in this case it appears there was little or no supervision of a junior employee who was tasked with cleaning out the boardroom. The box could have been accidentally deposited at the dump during either of these clean outs. It is also possible that A.B. simply took a box of files from SISH when they were left in the porch or the foyer of the building during one of these two clean outs. There is also a very real possibility that the files could have been taken directly from the

storage cages, using the keys in the unsecured key box to gain access to the unlocked storage room and the cages in the storage room.

- From 1988 until approximately 2005, mental health and addictions services were provided in the Northwest Territories by NGOs in the communities with funding from the Department of Health and Social Services and/or regional health authorities, including the Dehcho Health and Social Services Authority. Funding from the Department/Authority was granted under contracts which provided that records created in the provision of services remained the property of the Department/Authority and were to be returned to the Department/Authority at the end of the contract. Therefore, the Department/Authority has always been the owner of the records in question.
- The Department/Authority (and the successor to the DHSSA, the Northwest Territories Health and Social Services Authority (NTHSSA)) are all subject to the requirements of the *Health Information Act* (HIA) and the *Access to Information and Protection of Privacy Act* (ATIPPA) before that (and, to a more limited extent, since then).
- The Department of Health and Social Services, the DHSSA and its successor, the NTHSSA are all health information custodians as defined in the *Health Information Act* and public bodies as defined in the *Access to Information and Protection of Privacy Act*.
- Both of these Acts apply to all records in the custody and control of the health information custodian or the public body, regardless of when the records were created.

- The NTHSSA had ownership, custody and control of the records in question prior to them coming into the possession of A.B., and therefore were obligated under the *Health Information Act* to protect them from unauthorized use and disclosure.
- However the records came to be in the possession of A.B., his possession of them constituted an unauthorized disclosure of records under the HIA, and consequently a breach of the privacy of the individuals whose information was contained in the records.
- While A.B. maintained that there were many more boxes of files at the dump where he had found them, subsequent trips to the dump by officials revealed no evidence that this was the case. If there had, at some point, been more records at the dump, they would have been destroyed, either by incineration or by being buried, as part of the general management practices at the local dump by December, 2018. A.B. also suggested that the one box handed over to the Information and Privacy Commissioner was only a sample of the "thousands" of files he had actually retrieved. That said, knowing that he could be prosecuted under the *Health Information Act* for failing to produce documents demanded by the Information and Privacy Commissioner, he later confirmed that he had handed over all records in his possession and had not copied any of them.
- A.B. advised his local MLA that he had the box of "addictions" files in the middle of November, 2018. The MLA encouraged A.B. to bring them to the COO of the Dehcho Region in Fort Simpson. He also advised the COO of A.B.'s allegations the same or the following day. The COO did nothing to either investigate the veracity of the report or to recover the files.
- There are very few policies and procedures in place within the Dehcho Region (or, apparently in any of the other regions) in relation to the management of files

in storage, and in particular, no effective policies with respect to the retention and destruction of records. What policies do exist are extremely dated, very high level and are not readily available to employees. It is clear that most employees have no knowledge at all of any such policies, including the COO. Few of the organization's employees had received even the basic level of privacy training required by the NTHSSA's Mandatory Training Policy. This, again, includes the COO. There is a program entitled "Community Counselling Program" which has been in place since approximately 2016 which deals with some records management and records security issues but which is applicable only to the counselling profession and does not appear to be a policy of the NTHSSA, but of a professional organization. Even this guidance, however, is rather high level and may be impractical in some cases.

- There does not seem to be any written protocol to address the transfer of records from one place to another. There are examples of when such transfers have been done well (the transfer of the Records of the NJK Treatment Centre to Yellowknife) so it is clear that a privacy protective transfer is possible. Most of the transfers of records described by the investigators, however, appear to have been done haphazardly and without any real regard to the content of the boxes being transferred or the privacy or security of the records.
- The NTHSSA did not have adequate administrative, technical or physical safeguards in place as required by section 85 of the HIA to protect the records stored in the basement of the SISH and failed to ensure that personal health information was maintained in a secure manner, or transferred in a secure manner as required by section 86.

- NTHSSA also failed to take reasonable measures to maintain records in an orderly manner and to maintain an organized system of record keeping to ensure ease of access to the records, as required by section 86.

DISCUSSION AND RECOMMENDATIONS

The evidence points to the general absence of appropriate and necessary policies and procedures being in place and operationalized in relation to the handling of closed and/or dated records and the transfer of records. Clearly, the *Health Information Act* came into effect only long after the creation of the records in question and, in fact, long after the transfer of addictions counselling and referral records from NGOs to the Department and/or the Dehcho Health and Social Services Authority. The *Access to Information and Protection of Privacy Act* has, however, applied to all records in the custody or control of public bodies since December 31, 1996. Furthermore, as indicated above, the *Health Information Act* applies to all records in the custody and control of a public body, regardless of when they were created or when they came to be in the possession of the Department or the Dehcho Health and Social Services Authority or the Northwest Territories Health and Social Services Authority. Upon the coming into effect of the *Health Information Act* on October 1st, 2015, the Dehcho Health and Social Services Authority, and thereafter the NTHSSA, were required to have policies and procedures in place and in effect to manage, secure and protect all of the records containing personal health information in their custody or control. Clearly, at the time of this breach, no real thought had been given to the management of these or any other dated records in storage and how they should be handled. Nor, it appears, has this breach changed that situation significantly.

Clearly there were a lot of failures on the part of NTHSSA and its predecessors which resulted in this breach. It is particularly concerning that in the immediate aftermath of this breach coming to light, leadership failed to take any steps to prevent another

breach involving the records in storage in the basement of the SISH building. Months later, when investigators arrived to gather information, they found the key box still located in an unmonitored public area, still unlocked. The door to the storage area was both unlocked and open. No apparent effort had been made to assess or organize the files remaining in the storage cages. I would have expected that head office would have taken immediate steps to assess the security of the storage area and given the COO instructions to immediately institute at least basic safeguards to protect the records still being stored in that area. It is unclear whether head office did this, but it is clear that nothing was done, at least in the first several months after the discovery of the breach.

Beyond the narrow facts of this case, this breach has also brought to light the very real possibility that there are many more similar records sitting around in neglected storage areas throughout the Northwest Territories, ripe for a similar breach to occur. This does not only apply to the Dehcho region, but to all regions and all health information custodians. Due to the same changing of hands and responsibility for health services over the years and various leadership structures and service provision models there are likely to be dated paper records that are being stored without being properly protected and/or archived in accordance with privacy protective principles and general best practices in records management. This is hugely concerning. This may well be an issue for other public bodies as well, though this is well beyond the scope of this review.

I make the following recommendations:

1. That NTHSSA direct a review and inventory of all stored materials in the custody or control of the NTHSSA, throughout the Northwest Territories to ensure that:
 - a) the records are maintained in an orderly manner (i.e. protected from fire, water, mold and other damage, on shelves, etc) and that the content of boxes and other storage containers are inventoried, indexed and easily

searchable to ensure ease of access to the records when personal health information is required;

- b) that appropriate and adequate administrative, physical and technical safeguards are in place to protect the records from any kind of unauthorized use and/or disclosure, including loss or theft;
2. That, if not already done, immediate steps be taken to assess the current administrative, physical and technological safeguards in place for the protection of personal health information at the SISH facility generally (including the active file storage area) and then to implement appropriate safeguards as necessary to protect and appropriately manage all areas where medical records are stored, including mental health and counselling records.

These measures should include, at a minimum:

- a) completing a full inventory of the contents of all items remaining in storage according to GNWT standards and ensuring that all boxes are properly labeled;
- b) moving the key box to an area not accessible to the public and directing that it be kept locked, with one person being designated with responsibility for administration of the keys (including keeping a ledger that clearly documents when keys are issued, who has been given a key, for what cage, for what purpose, under what authorization and when the key is returned) or designate one person responsible for all access to the cages and have them accompany anyone who attends the cages to retrieve records or other items;
- c) assigning specific responsibility for maintenance of the storage area, which would include ensuring that the door to the storage area is kept both closed and locked and for regular daily checks of

the area that are recorded in a log;

- d) providing shelving or another means of lifting the boxes in storage off the ground to better protect the records;
- e) in relation to the active storage area, to assess whether it is appropriate to continue to store health records in the same room as social services or other records, keeping in mind the extremely sensitive nature of these records as well as the requirements of the *Health Information Act*, and the privacy provisions of the *Child and Family Services Act*, which both limit the permissible disclosure of personal information;
- f) to assess current access management to the active records and identify options to improve access management;
- g) to ensure there is a tracking system for all records moved into or removed from the records storage room;
- h) to assess whether it would be appropriate to add additional security features to the file storage room, including additional barriers on the windows, and the addition of electronic key access so that access can be tracked.

3. That a similar assessment be done in all NTHSSA facilities throughout the Northwest Territories.
4. That all COOs and senior managers of all regions complete and verify the successful completion of all privacy training modules currently available through the Department of Health and Social Services and/or the NTHSSA and as mandated under the Privacy Training Policy within 90 days of the lifting of the current public health state of emergency as a condition of continued employment.

5. That those positions that regional COOs report to be made operationally responsible for ensuring that the COOs are aware of and implementing good privacy practices in accordance with the HIA as part of their stated job responsibilities.
6. That the job descriptions of COOs and NTHSSA Executive, regardless of area of management, contain the meaningful and clear requirement to ensure best practices in records management and privacy.
7. That urgent steps be taken to develop or actively adopt system wide policies and standard operating procedures as required by section 8 of the HIA in relation to:
 - a) retention and destruction of records;
 - b) the general management of closed or inactive files to ensure that such records are maintained “in an orderly manner” and adhere to an “organized system of record-keeping”, which allows for the identification of what records are in what box;
 - c) the transfer of paper records from one place to another;
 - d) the appropriate storage of all paper records, regardless of age.
8. Once developed, these policies should be disseminated widely, be made the subject of additional modules in the training schedule, and be posted to both public facing and internal websites so that they are easily accessible to line employees, management, MLAs and the general public.
9. That standard operating procedures be developed and implemented for the “clean-up” of storage areas within NTHSSA facilities, including a schedule for such clean-ups and specific steps to prevent the inadvertent mishandling of records containing personal information and personal health information which would outline, among other things:

- a) that an employee with training in privacy and file management be tasked with supervising and overseeing any such clean-out;
 - b) a duty to document items discarded, including dates and methods used;
 - c) that one person be designated as being responsible for compliance with clean-up procedures
10. That NTHSSA review all of its contracts with third party service providers to ensure that they:
- a) reflect current legislation;
 - b) have clear terms regarding the types of information covered by the agreement, including “personal health information”;
 - c) reflect the requirements of the third party to comply with the HIA, including the standards, policies and procedures implemented by NTHSSA;
 - d) have clear provisions with respect to the return of documents upon the completion of the contract, and how that will be accomplished.
11. That the Mandatory Training Policy be centrally monitored and resources necessary be made available for enforcement, with a means to test understanding of training received, and that responsibility for monitoring and enforcement of this policy be delegated to a specific division of NTHSSA, with immediate and clear consequences for failure on the part of employees to comply, including the removal of access to medical records (e.g. the EMR and other electronic systems). If not already available “on-line” all modules should immediately be made available to all employees electronically so that they can be reviewed and completed at the convenience of the employee. Modules should be reviewed and updated regularly and new modules made available on a consistent and regular basis and should reflect current and future business

environments, policy and regulations. The policy should be made to be explicitly applicable to ALL agents of NTHSSA, including all employees, leadership and contractors.

12. Notwithstanding the fact that it is unlikely, based on all the evidence available, that A.B. continues to have additional records containing third party personal health information in his possession, I recommend that NTHSSA explore what steps might be taken to verify this fact and to retrieve any records that might still be in his possession. I further recommend that NTHSSA contact the CBC reporter who broke this story to attempt to retrieve any pictures that might have been taken of any of these records which include the personal information or personal health information of any individual, or in the alternative to obtain a commitment from that reporter that the pictures will not be further used or disclosed.
13. That consideration be given to prosecuting AB under section 185 of the *Health Information Act* so as to send a clear message to the public that it is not appropriate to disclose found personal health information to the press or to the public, regardless of the circumstances.
14. That steps be taken internally to address the failings of NTHSSA as the health information custodian, and of the NTHSSA-DehCho Region, represented by DehCho Region leadership, to provide adequate protection to the personal health information in their organization.
15. That this report be shared with all GNWT public bodies with a view to initiating similar steps to protect against the unauthorized disclosure of aging paper records which may have been stored away and forgotten over the years. While not all public bodies are subject to the specific provisions of the HIA, they do

have the responsibility to protect personal information under the ATIPP Act, and other legislation and policies of the GNWT may apply that require appropriate records storage retention and thoughtful destruction. .

Elaine Keenan Bengts
Information and Privacy Commissioner