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# AUTHORIZATION FOR INDIRECT COLLECTION OF PERSONAL INFORMATION

MINISTRY OF HEALTH

Drew McArthur, A/Information and Privacy Commissioner

March 28, 2018

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## **SUMMARY**

Under section 42(1)(i) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), the Acting Commissioner authorizes the Ministry of Health to indirectly collect personal information about individuals seeking or receiving medical assistance in dying, and about witnesses to their written requests, from medical practitioners, nurse practitioners, and pharmacists, in accordance with its obligations as a designated recipient under the federal regulations made by the federal Minister of Health pursuant to s. 241.31(3) of the *Criminal Code* on the conditions set out below.

## **BACKGROUND**

By letter dated March 26, 2018, the Ministry of Health requested my authorization, under s. 42(1)(i) of FIPPA, to indirectly collect personal information from medical practitioners, nurse practitioners, and pharmacists (health care providers) for the purposes of monitoring the provision of medical assistance in dying (MAID) to British Columbians.

MAID is available to Canadians as a result of recent changes to the *Criminal Code*. In the case of *Carter v. Canada*, the Supreme Court of Canada invalidated ss. 241(b) and 14 of the *Criminal Code* insofar as they prohibited physician-assisted death for a competent adult who clearly consented to the termination of life and had a grievous and irremediable medical condition. The Court agreed with the trial judge that the risks

associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards.<sup>1</sup> The Court suspended the invalidity to allow the Parliament of Canada an opportunity to create a new law that addressed the circumstances of the case.<sup>2</sup>

On June 17, 2016, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*<sup>3</sup> received Royal Assent. Among other things, it amends the *Criminal Code* to permit health care providers to provide MAID.

There is a specific provision in the legislation in relation to the collection of information. New s. 241.31(3) of the *Criminal Code* will require medical practitioners and nurse practitioners who receive requests for MAID, and pharmacists who dispense substances in connection with MAID, to collect and disclose information for the purpose of monitoring the delivery of services in relation to MAID. The federal Minister of Health must make regulations that he or she considers necessary respecting the collection of information relating to requests for, and the provision of, MAID. The regulations will name the person who collects this information as a “designated recipient”.

Notice of proposed Monitoring of Medical Assistance in Dying Regulations (federal regulations) has been given by the federal Minister of Health and it is anticipated that they will come into force later this year.

In support of its request, the Ministry of Health provided a copy of a letter dated November 21, 2017 from the Deputy Minister of Health Canada and the Deputy Minister of the Ministry of Health as well as a statement of understanding signed by both of them on March 19, 2018. The letter outlines the option for a person in a provincial or territorial government (or a statutory body that operates under the authority of a provincial or territorial government) to be identified as the “designated recipient” of data collected in its jurisdiction, subject to certain conditions. The statement of understanding includes an agreement in principle that the Deputy Minister of the Ministry acknowledges and commits to certain obligations of the designated recipient, including collecting the data required from health care providers and providing the data to Health Canada in electronic format on a quarterly basis, in its entirety, within 30 days at the end of each quarter.

The Ministry of Health provided me with draft forms that will be in schedules to the proposed federal regulations. They require health care providers to disclose the

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<sup>1</sup> Ibid, para. 117.

<sup>2</sup> [2015] 1 SCR 331 *Carter v. Canada (Attorney General)*, par. 127-128, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>.

<sup>3</sup> An Act to amend the Criminal Code and to make related amendments to other acts (medical assistance in dying,” *House of Commons*, <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-14/royal-assent>.

following information about individuals to whom they provide services in relation to medical assistance in dying:

- name and date of birth of person requesting and/or receiving medical assistance in dying;
- health number;
- province or territory of issue of health insurance;
- sex of the person;
- whether the request was received in a hospital residential care facility or palliative care facility;
- place and postal code of residence of the person;
- marital status;
- principal occupation in working life;
- whether the person received palliative care;
- whether the person died of a cause other than MAID;
- name and address of two witnesses on request for MAID form;
- whether the person met all of the criteria for MAID;
- whether the person was eligible or would have been eligible for health services funded by a government in Canada;
- whether the person was at least 18 years of age;
- whether the individual was capable of making decisions with respect to their health;
- confirm that the request for MAID was voluntary;
- details about the status of the person's state of decline, illness, disease or disability;
- nature of the person's suffering;
- date the substance was administered by the physician or nurse practitioner;
- setting where the substance was delivered to the person;
- whether the person withdrew the request, reasons if known;
- licence or registration number of the physician, nurse practitioner, or pharmacist;
- province or territory the relevant health professional practices in;
- how the relevant health practitioner received the MAID request;
- whether the relevant health practitioner consulted with other professionals and what type of practitioner they were;
- whether the physician or nurse practitioner had a therapeutic relationship with the patient prior to the MAID request; and
- any other relevant details to the case.

Health care providers will also disclose the name and address of witnesses who sign a written request for MAID.

## **DISCUSSION**

Section 27 of FIPPA requires that a public body collect personal information directly from the individual the information is about, with specific exceptions. This requirement is based on privacy principles that individuals should have control of their personal information and that the collection of personal information should be transparent so that individuals can exercise their information rights. One of the exceptions to the requirement of direct collection is authorization from the Commissioner for the public body to collect personal information from sources other than the individual the information is about under s. 42(1)(i) of FIPPA.

In previous decisions where the exercise of the Commissioner's discretion under s. 42(1)(i) was at issue, the following questions have been considered:

1. Has a clear and sufficiently compelling public interest or objective been identified that cannot reasonably be accomplished through direct collection of personal information?
2. Is the requested departure from FIPPA's rule of direct collection clearly justified when judged against the nature of the personal information to be collected and the purpose for which (and to whom) it is to be disclosed or used?

I have considered these same questions in relation to this request.

### **Public Interest or objective**

The Ministry of Health submits that indirect collection by the Ministry of this personal information about a person who has requested medical assistance in dying is for the purpose of health care administration and oversight of the provision of MAID in the province. By collecting this personal information as a designated recipient under the federal regulations, the Ministry of Health is streamlining the collection of this personal information from health care providers and avoiding duplication of that collection by Health Canada.

I accept the Ministry of Health's submission that the provision of MAID warrants care and scrutiny, evaluation, monitoring for compliance and accountability to the public by both levels of government.

The regulatory impact analysis statement of the federal regulations states that:

Medical assistance in dying in Canada is permitted through exceptions to criminal laws that prohibit terminating and participating in the end of human life. A robust monitoring regime reflects the significance and gravity of permitting practitioners to help end life.<sup>4</sup>

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<sup>4</sup> <http://gazette.gc.ca/rp-pr/p1/2017/2017-12-16/html/reg6-eng.html>.

Monitoring the provision of MAID is a clear and sufficiently compelling public interest or objective that cannot be reasonably accomplished through direct collection of personal information.

The Ministry of Health shares the interest of Health Canada in wanting to ensure that MAID is delivered by health care providers in an appropriate manner and in accordance with eligibility criteria and safeguards in the federal regulatory framework. It is important that the Ministry of Health receives information about the provision of these services in a timely manner so that, if there are concerns, the Ministry of Health may take remedial actions such as an investigation, communication with a professional regulatory body or the police, or issuance of policy or guidelines. Given its responsibilities for the delivery of health services in British Columbia, the Ministry has a legitimate and significant role to play in the administration of the federal scheme.

I also agree that the Ministry needs to be able to closely monitor the demand for and the delivery of this new medical service within the publicly-funded health care system for the purposes of health care administration and planning, including in relation to health human resources, accessibility, and funding allocations.

### **Indirect collection**

Section 27(1)(a)(iii) of FIPPA authorizes indirect collection when it is authorized by an enactment. An “enactment” is defined in the *Interpretation Act* to mean an Act of the Legislature or a regulation. Therefore, although the indirect collection at issue is authorized by a federal regulation, it is not authorized under FIPPA.

As a result, the Ministry of Health requires the authorization of the Commissioner pursuant to ss. 27(1)(a)(ii) and 42(1)(i) of FIPPA in order to indirectly collect this information as a designated recipient under the federal regulations.

The Ministry of Health submits that given the statutory imperative of the federal legislation, the indirect collection is clearly justified when judged against the nature of the personal information to be collected and the purpose for which it is to be disclosed or used.

The nature of the personal information that will be indirectly collected by the Ministry of Health as a designated recipient is highly sensitive. This personal information is about individuals who have sought and/or received MAID from health care providers. Personal information about individuals who have served as witnesses to requests for MAID will also be indirectly collected. This indirect collection will occur without notice to the individuals the information is about.

The information will be used by the Ministry of Health for monitoring the delivery of MAID and for administrative and planning purposes. It may only be used and disclosed as permitted by FIPPA and the Ministry must make reasonable security arrangements to protect the data. The data will be disclosed to Health Canada as required by the

statement of understanding. Federal monitoring activities are subject to the federal *Privacy Act*.

Given that the proposed federal regulations specifically mandate the collection of certain personal information I accept that the indirect collection of that personal information by the Ministry of Health is justified. Personal information about individuals who have sought and/or received MAID, the reasons they have chosen to do so, and how MAID was provided are needed to determine whether MAID was delivered in compliance with the law. Health care providers will be directly collecting personal information from the individuals the information is about to a certain extent.

It is in the interests of British Columbians for the Ministry of Health to indirectly collect that personal information in a timely manner in order to fulfill its responsibilities to administer the health care system and in order for it to be able to conduct its own assessments of whether the new medical service is being delivered in compliance with the law and whether improvements or remedial actions are required.

### **AUTHORIZATION**

For the reasons noted above, under s. 42(1)(i) of FIPPA, I authorize the Ministry of Health to indirectly collect personal information about individuals seeking or receiving MAID, and about witnesses to their requests, from health care providers in relation to the provision of MAID in accordance with its obligations as a designated recipient under the federal regulations, subject to the following conditions:

1. The Ministry of Health must notify me of any changes to the federal regulations that would require the Ministry to indirectly collect any personal information beyond what I have identified in this authorization.
2. This authorization will expire on the sooner of the coming into effect of an enactment which expressly authorizes the Minister of Health to indirectly collect the information for the purposes of monitoring the provision of MAID or March 28, 2020.

March 28, 2018



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Drew McArthur  
A/Information and Privacy Commissioner  
for British Columbia