

BY EMAIL

November 17, 2017

Madam Francine Charbonneau
Minister responsible for Seniors and Anti-Bullying
Ministère de la Famille
425, rue Jacques-Parizeau, 4^e étage
Québec (Québec) G1R 4Z1

Subject: *Draft Regulation respecting the terms governing the use of monitoring mechanisms by a user sheltered in a facility maintained by an institution operating a residential and long-term care centre*

Madam Minister:

Within the framework of its mandate, the Québec Ombudsman reviews all bills and draft regulations introduced in the National Assembly or published in the *Gazette officielle du Québec*. When it deems necessary, it intervenes under section 27.3 of its constituting act, which empowers it to call the attention of the government or a chief executive officer of a public body to legislative, regulatory or administrative reforms it considers to be in the public interest.

I therefore analyzed the above draft regulation, published in the *Gazette officielle du Québec* on October 11, 2017.

First, I note with satisfaction that the people who live in residential and long-term care centres (CHSLDs) or their representatives may install monitoring mechanisms, hidden or not, without requesting prior authorization from the institution where they live. However, I have reservations on two fronts:

- The draft regulation does not include the Québec Ombudsman on the list of organizations to which the communication of recordings and images is allowed.
- All obligations regarding respect for the confidentiality, privacy and dignity of users, visitors and institutional staff fall to the person who installs a monitoring mechanism.

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More specifically, I would like to comment on the following aspects:

- Communication of information to the Québec Ombudsman;
- Protection of the rights of everyone concerned.

1. Communication of information to the Québec Ombudsman

The draft regulation provides that communication of recordings must be restricted and be done in such a manner as to protect the identity of the people whose picture or voice was captured (section 14). This restriction does not apply to cases in which recordings are communicated to the following people or organizations:

- the institution and the local service quality and complaints commissioner;
- a body that, under the law, is in charge of preventing, detecting or repressing crime or offences against the law, if the recordings are necessary to prosecute an offence against a law;
- anyone to whom the recording must be communicated by reason of an emergency.

Given its role in handling complaints and reports pursuant to the *Act respecting health services and social services* (the Act) and the *Act respecting the Health and Social Services Ombudsman*, notably in cases of alleged maltreatment, the Québec Ombudsman should be added to the list of people or organizations to whom or which the restriction on communication does not apply. This is especially relevant because the investigations by the Québec Ombudsman are conducted privately and it cannot be compelled in any situation (sections 24 and 34 of the *Public Protector Act*).

Consequently, the Québec Ombudsman recommends:

R-1 That section 14 of the draft regulation be amended by adding the Québec Ombudsman to the list of people or organizations to whom or which the restriction on communication does not apply.

2. Protection of the rights of everyone concerned

Residents or their representatives cannot install cameras or other monitoring mechanisms unless done to ensure their safety or that of users' property, or to ensure the quality of the care and services provided to users, in particular to detect cases of maltreatment. It is also up to users or their representatives to reassess, at least every six months, the need to use a camera or to conserve recordings. Only these people can judge whether undertaking and continuing monitoring measures is appropriate.

Throughout this process, the institution's role is limited. Yet, one of the guiding principles of the departmental policy *Un milieu de vie de qualité pour les personnes hébergées en CHSLD* (October 2003) of the Ministère de la Santé et des Services sociaux states that any person sheltered in a facility has the right to a living environment that respects his or her identity, dignity and privacy.¹

¹ Ministère de la Santé et des Services sociaux, *Un milieu de vie de qualité pour les personnes hébergées en CHSLD – Orientations ministérielles*, October 2003, p. 4.

These persons certainly have reasonable expectations of privacy in a CHSLD, equivalent to what they would have at home.

What happens to this fundamental right to the dignity and privacy of a person sheltered in a facility if the installation of a monitoring device violates it? While a person may surrender his or her basic rights, renunciation must be free, informed, clear and unequivocal. Cameras will not fail to capture various moments that call for privacy, especially in the washroom or when personal hygiene is involved.

Given the potential impact of public distribution, restrictions on the dissemination of images and videos should be explained clearly to residents or their representatives. Nowadays it is very easy to record images or videos and to post them on social networks instantaneously, thereby speeding up violation of the right to privacy of residents “protected” by the monitoring device, of other users, of visitors and of institutional staff. These situations require a certain vigilance.

Even if section 23 of the draft regulation specifies that institutions that notice a contravention must provide the support needed to users or their representatives so they can comply with the regulation, there are no provisions for repeated or ongoing violations or for users’ or their representatives’ refusal to comply. To see to respect of the rights of everyone concerned, the draft regulation should provide for institutions’ obligations in such circumstances.

Consequently, the Québec Ombudsman recommends:

R-2 That the provisions of the draft regulation specify the obligations of institutions when they notice repeated or ongoing violations or users’ or their representatives’ refusal to comply with the provisions of the regulation.

Lastly, the draft regulation states that a representative who decides to install a camera in a resident’s room may be a person who proves that he or she has a special interest in the user of full age under legal incapacity (within the meaning of section 12 of the Act). Therefore, this person is not necessarily the resident’s legal representative, contrary to what was announced in January 2017 when the departmental policy directions to regulate the use of cameras in CHSLDs were tabled.² Theoretically, a member of the resident’s family could install a camera unbeknownst to other family members, including the legal representative. I feel that to prevent any misunderstandings, the legal representative should be informed that cameras or other monitoring mechanisms have been installed.

² Bill 115 – Minister Charbonneau tables the departmental policy directions to regulate the use of cameras and other technological means in CHSLDs [courtesy translation], January 18, 2017 news release.

Consequently, the Québec Ombudsman recommends:

R-3 That the provisions of the draft regulation provide that a user's representative—other than his or her legal representative—who installs cameras or other monitoring mechanisms must, where applicable, inform the legal representative.

In closing, overall, the draft regulation appears acceptable. The recommendations are aimed at ensuring that the terms fully secure respect of the rights of everyone concerned.

Yours respectfully,

Marie Rinfret
Ombudsperson

Original signed

c.c.: Mr. Gaétan Barrette, Minister of Health and Social Services
Ms. Marie-Renée Roy, Deputy Minister of Families
Mr. Michel Fontaine, Deputy Minister of Health and Social Services
Ms. Stéphanie Pinault-Reid, Secretary, Committee on Citizen Relations
Ms. Marie-Astrid Ospina D'Amours, Secretary, Committee on Health and Social Services
Ms. Carolyne Paquette, Secretary, Committee on Institutions