

OVERVIEW OF OMBUDSMAN MANITOBA COMMENTS

PHIA REVIEW

June 9, 2004

INTRODUCTION

Following is a thematic overview of the comments we have made in the more detailed "Spreadsheet Containing Ombudsman Manitoba Comments" attached as *Appendix 2*. To preserve the full context of the Act for examining our annotations, the spreadsheet includes all the provisions of the legislation, whether or not we made comments.

COMMENTS

1. OMBUDSMAN INVESTIGATION ISSUES

Abuse of process

PHIA section 41(1)(b)

Section 41(1)(b) of PHIA provides the Ombudsman with the discretion not to investigate a complaint if the Ombudsman is of the opinion that it is trivial, frivolous, vexatious or not made in good faith. We suggest that "abuse of process" be included as a reason for refusing to investigate.

Gathering evidence

PHIA sections 29(2), 29(3), 29(4), 45, and 65(2)

Section 29(2) concerns the production of records from trustees. There are circumstances where the Ombudsman may require evidence from individuals or organizations that are not trustees. This section should be broadened so that it would be similar to section 30(1) of *The Ombudsman Act* (OA) and permit us to request records from non-trustees. This could be accomplished by replacing references to "trustee" with "any person".

Similarly, sections 29(3), 29(4), 45 and 65(2) should be amended to facilitate the production of records from non-trustees, extend the duty to cooperate with the Ombudsman to non-trustees and protect employees of non-trustees from adverse employment action.

Reporting verbally

PHIA sections 47(1), 47(2), 47(3), 48(1), 48(2), 48(3), 49(2), and 49(3)

Section 47(1) sets out the provisions for reporting out on investigations. Sections 36, 37 and 38 of OA permit verbal and written reports. By making sections 47(1) and 48(1) of PHIA parallel with the OA, the Ombudsman would be able to provide verbal reports under PHIA where appropriate. This would assist the Office in providing more timely service to complainants, trustees and others. So that the Ombudsman can provide verbal reports, we suggest substituting "reporting" for the phrases "a report" or "a written report".

Nevertheless, we believe that there are some instances when information should continue to be provided in writing, as currently required under PHIA. No changes should be made to providing the following in writing: recommendations under sections 47(2) and (3), reports forwarded to regulatory bodies under section 48(2), and notices of appeal under section 48(3) and 49.

Making recommendations

PHIA section 48(4)(b)

Section 48(4)(b) requires the trustee to provide reasons for not implementing “the recommendations”. There may be circumstances where a trustee would accept some, but not all, of the recommendations. Therefore, consideration should be given to replacing “the recommendations” with “any recommendation”.

Time limits

PHIA sections 46, 48(4) and 63(6)

Section 46

The time limit for investigation of refused access complaints under section 46 of PHIA is 45 days, while the time limit is 90 days under FIPPA. The time limits should be consistent.

Section 48(4)

The time limit for a trustee to respond to a report with recommendations under section 48(4) of PHIA is 14 days, while the time limit is 15 days under FIPPA. The time limits should be consistent.

Section 63(6)

The time limit for commencing a prosecution under section 63(6) of PHIA is two years after the commission of the alleged offence. It may take some time before an individual or our office becomes aware of an alleged offence. Consideration should be given to amending this section to allow for the commencement of prosecutions not later than two years after the discovery of an alleged offence.

2. STRENGTHENING RIGHTS AND RESPONSIBILITIES

PHIA preamble

It is important that individuals know they have to take responsibility for their personal health information. We would suggest that an additional section be added to the preamble setting out that individuals have the right to control the collection, use and disclosure of their personal health information, subject to limited and narrowly interpreted exceptions.

3. NOTICE

Notice upon sale of practice

PHIA section 27

There is no requirement that notice be provided when a trustee sells his or her practice to another trustee. Consideration should be given, and a reasonable effort made to notify patients when their personal health information forms part of the sale of a practice.

Notice of information practices

PHIA sections 66(1)(d)(i) and 66(1)(d)(ii)

Currently, the concept of notice occurs only in relation to collection under section 15(1) of PHIA. It is our experience that individuals are not always aware of all information practices of trustees.

For transparency, we would suggest enacting a regulation based on section 66(1)(d)(i) and 66(1)(d)(ii). This would require that trustees provide notice about the right to examine, copy,

and correct information. It would also require the trustee to provide notice about its collection, use, retention, and disclosure practices.

4. THIRD PARTIES
Exercising rights on behalf of an individual
PHIA section 60

Incapacitated persons

Section 60 sets out the criteria for allowing a third party to exercise the rights of another individual under PHIA. In our view, there is a gap in the legislation for individuals who become incapacitated, but have no one who fits the criteria set out in this section to act on their behalf.

To address this gap, consideration should be given to incorporating a revised version of the nearest relative concept from *The Mental Health Act*. We suggest expanding the concept of nearest relative to include anyone with whom the individual is known to have a close personal relationship, similar to section 23(1) of PHIA. In our view, the information should only be provided if the trustee believes the disclosure would be acceptable to the individual the information is about, similar to section 23(1)(c) of PHIA.

Deceased minors

In our experience, there is also a gap in the legislation for parents seeking to exercise the PHIA rights of their deceased minor children. To address this gap, consideration should be given to amending section 60(1)(e), which permits parents to exercise the rights of minor children, to explicitly include deceased minor children.

5. FEES
PHIA sections 10 and 66(1)(c)

Under section 10, the trustee may charge a reasonable fee for the examination and copying of personal health information.

Consideration should be given to enacting a regulation under section 66(1)(c). The regulation should either permit a reasonable fee with a provision to allow for a waiver of the fee, or replicate the scheme set out under FIPPA regarding fees.

6. REPETITIVE REQUESTS
PHIA section 7(1)

Section 13(1) of FIPPA permits public bodies to refuse access if the request is repetitive, incomprehensible or has already been provided. PHIA does not have a parallel provision. Consideration should be given to creating a similar section in PHIA.

7. CROSS-BORDER FLOW OF INFORMATION
PHIA section 66(1)(l)

Personal health information is currently disclosed outside of Manitoba for the purposes of providing health care and conducting health research. Consideration should be given to enacting a regulation governing these disclosures of information.

8. HEALTH INFORMATION PRIVACY COMMITTEE (HIPC)

PHIA section 24(2)(a)

For openness and transparency, we believe that all projects approved by the health information privacy committee should be made public. This could be accomplished by having the “approved projects” published in an annual report.

9. PHIA ANNUAL REPORT

New section

PHIA should require that an annual report be published related to the administration of the Act under *Part 6, General Provisions*.

10. RETENTION AND DESTRUCTION

PHIA section 66(1)(f)

For greater guidance, consideration should be given to enacting a regulation related to retention and destruction. We would suggest that this regulation include the transferring of health information from one medium to another.

11. PRIVACY IMPACT ASSESSMENT (PIA)

PHIA section 28(d)

PIAs are analytical tools that are useful in assessing and understanding the potential impact of a proposed program, service or system on information privacy. Some jurisdictions have made the use of PIAs mandatory, either by law or policy. We support the use of PIAs to ensure compliance with PHIA.

12. CLARIFICATION ITEMS

“Privacy” and “Confidentiality”

PHIA sections 28(c), 28(d), 28(e) and 37(1)(c)

FIPPA uses the term “protection of privacy” rather than “confidentiality.” We are not aware of the reason for the difference between the Acts.

Physicians and midwives as employees

PHIA section 63(2)

Section 63(2) concerns offences committed by “employees” of trustees. In our experience, physicians and midwives have a unique employment relationship with the Regional Health Authorities and various health care facilities. We understand that doctors and midwives are “employed” with the Regional Health Authorities (RHA) and provided admitting privileges to various hospitals. It would appear that they are “employees” of the RHA and “agents” of the health care facilities. Accordingly, consideration should be given to expanding section 63(2) to include “agents” of the trustee.

13. REVIEW OF PHIA

PHIA section 67

Consideration should be given to periodically reviewing the Act.