

MANITOBA OMBUDSMAN PRACTICE NOTE

Practice Notes are prepared by Manitoba Ombudsman to assist persons using the legislation. They are intended as advice only and are not a substitute for the legislation.

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Considerations for Disclosing Personal and Personal Health Information under *The Freedom of Information and Protection of Privacy Act* (FIPPA) and *The Personal Health Information Act* (PHIA)

OVERVIEW OF DISCLOSURE UNDER FIPPA AND PHIA

One of the purposes of both FIPPA and PHIA as defined under section 2 is to protect individuals against unauthorized use or disclosure of recorded personal information by public bodies, and personal health information by trustees.

It is important for public bodies and trustees to differentiate between the concepts of use and disclosure. Our office provides a working definition of use and disclosure contained within our 2005 annual report.

Disclosure is defined as releasing personal or personal health information to any person or organization outside the public body or trustee.

Use is defined as the treatment and handling of personal and personal health information within the public body or trustee.

Recorded information can be disclosed in a number of ways:

- Providing the record itself, or a copy of it
- Transcribing the record, by creating another record
- Verbally disclosing the information from the record

When disclosing information, a public body or trustee should take the precautions deemed appropriate to the circumstances to ensure that information is revealed only to the intended recipient.

Both public bodies and trustees are responsible for ensuring that all disclosures of recorded information are authorized or permitted. Every disclosure must be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed. These requirements are outlined in Part 3, Division 3 of each Act.

Both Acts authorize public bodies or trustees in certain situations to disclose information without the consent of the individual. Consent is not required where disclosure is permitted under another clause. Best practice procedure would be to encourage public bodies and trustees to obtain consent whenever appropriate, even if the disclosure is otherwise authorized under the Act.

CONSIDERATIONS FOR DISCLOSURE UNDER FIPPA:

A public body cannot disclose personal information unless it is in accordance with the requirements of FIPPA. Public bodies can disclose personal information in circumstances which are included in subsection 44(1). This subsection sets out the restrictions placed upon public bodies with respect to disclosure. A public body should consider this subsection in order to satisfy itself that it is not only authorized to disclose personal information, but also to determine whether to disclose as the provision provides for the exercise of discretion by a public body.

The following are some basic considerations which a public body might take into account when determining whether or not to disclose personal information:

- Is the disclosure required or authorized by another Act?
- Is the purpose of the disclosure for crime prevention or a variety of law enforcement or correctional purposes?
- Is the disclosure to officials of the legislature or a public body in order to carry out their responsibilities or duties?
- Is the disclosure for use in a legal proceeding of, providing legal services to, or enforcing a legal right of the provincial government or public body?
- Is the reason for disclosure health related?
- Is the information already publicly available?
- Is the disclosure necessary for a public body to perform its program functions?

Clauses 44(1) (d),(e),(m) are relatively straightforward in the fact that the public body's ability to refuse to disclose personal information may be determined by another enactment.

The remaining provisions in this subsection require more interpretation. In some circumstances, a public body may be authorized to disclose the information, but often the amount of information to be disclosed is as important as the actual disclosure. The information that may be disclosed should be limited to the minimum amount of information as dictated by circumstances. In order to determine whether to disclose information and how much, individuals should analyze each situation and determine what information may be disclosed, the level of sensitivity of the information to be disclosed, to whom it is disclosed, how it should be disclosed, and the reasons for determining why discretion was exercised.

When a privacy complaint under FIPPA is filed with the Ombudsman's office, it is expected that the public body be able to justify the use of its discretion by identifying the reasons it considered in disclosing the information. It is important for public bodies to document the reasons why discretion was or was not exercised. When a provision is cited in support of the information being disclosed the public body should be able to demonstrate how the provision applies.

CONSIDERATIONS FOR DISCLOSURE UNDER PHIA

Consent is one of the underlying principles which govern disclosure of personal health information by a trustee.

It is important to note that both Acts outline a series of circumstances under which personal and personal health information may be disclosed without the individual's consent. Under PHIA a trustee may disclose information in the circumstances outlined under subsection 22(2).

Subsection 22(3) emphasizes that these disclosures must be limited to the extent the recipient needs to know the information.

The following are some basic considerations which a trustee might take into account when determining whether to disclose personal health information without the individual's consent:

- Is the disclosure to a person who has provided or is providing health care to the individual?
- Is the disclosure required to prevent or lessen a serious and immediate threat?
- Is the disclosure required to notify a relative or other person regarding illness, injury incapacitation or death?
- Is the disclosure connected to the purpose of peer review, oversight function or program evaluation, research and planning?
- Is the disclosure to another government, public body, health information network, a database or for the payment of health care?
- Is the disclosure to a person who is carrying out an audit function of or providing legal services to a trustee?
- Is the disclosure required for use in civil or quasi-judicial proceedings to which the trustee is a party or by subpoena or warrant?
- Is the disclosure required for the purpose of investigation, enforcement or compliance with another Act?

Clause 22(2)(a) contains an additional restriction regarding the disclosure of personal health information by a trustee to a person who provides health care. The restriction provides an individual with the ability to instruct a trustee not to make a disclosure. The trustee would be able to disclose when authorized by another provision of the Act.

A similar provision restricting the trustee from disclosure exists in subsection 23(2) when a patient or resident of a health care facility explicitly requests that a disclosure of their personal health information not be made to any person.

When a privacy complaint under PHIA is filed with the Ombudsman's office, it is expected that the trustee be able to identify the provision which authorizes its disclosure and to explain the use of its discretion by identifying the reasons it considered in disclosing the information. It is important for trustees to be able to document how the disclosure was limited only to the extent that the recipient needs to know the information.

REMINDERS

Individuals should carefully examine the wording under the legislation to see if it applies to the specific situation.

Verbal disclosures will be investigated by our office.

Our office has a general expectation that prior to making a complaint to our office, an individual will first contact the public body/trustee to obtain an explanation and request corrective action in the event of an alleged privacy breach.