

By Courier

June 9, 2004

Honourable Jim Rondeau
Minister of Healthy Living
Room 310, Legislative Building
Winnipeg MB R3C 0V8

Dear Mr. Rondeau:

I am pleased to have the opportunity to add our input and suggestions relating to *The Personal Health Information Act* (PHIA) as part of the mandatory, comprehensive, and public review of the operation of the Act required under section 67 and now underway. We believe that Legislature's decision to approve the provision requiring a timely and full review of the stature was wise, and should be renewed, especially in view of changing information and communication technologies that are rapidly and radically transforming our information and knowledge environment.

Dedicated to the protection of personal health information, PHIA was pathfinding legislation in Canada when it was passed by the Legislature in 1997. Since that time, Alberta and Saskatchewan have brought into force their own versions of such legislation.

The Freedom of Information and Protection of Privacy Act (FIPPA) was drafted at the same time as PHIA and these companion statutes share a common base of internationally accepted principles of fair information practices with respect to their privacy provisions, including access to one's own personal information. PHIA applies solely to access to and privacy of personal health information, and covers health information trustees as defined in the Act, which include certain health professionals, health care facilities, health services agencies, and public bodies that collect or maintain personal health information. Some entities that collect and maintain personal health information are not covered including professional associations, regulatory bodies, and private sector employers.

This statutory review of PHIA is particularly timely in view of the seemingly ever rising emphasis on and the development of electronic health information networks regionally, provincially, and nationally intended to facilitate better healthcare services and administration. We have flagged this issue in a number of our annual reports and elsewhere since PHIA was introduced. In addition, diverse, opportune, and judiciously selected health research using or deriving from personal health information is of fundamental importance to everyone. Electronic information and communication technologies (ICTs) have made extraordinary strides since 1997 that open up both great opportunities and privacy challenges. It is important to ensure that PHIA

maintains a considered balance between the use of ICTs and personal health information privacy.

The Manitoba Office of the Ombudsman has provided independent oversight of *The Personal Health Information Act* since 1997. During these years, we have investigated complaints, made recommendations, conducted special investigations and commented on the administration of the legislation both in special reports and annual reports to the Legislature.

Based on the lengthy experience of our office, we are providing the attached comments on specific provisions of the legislation along with highlights of certain issues for consideration.

Generally speaking, I believe the purposes and principles incorporated in PHIA are consistent with principles of fair information practices. These principles have been incorporated into most privacy legislation in other Canadian jurisdictions.

While I have previously commented on Manitoba's personal health information legislation in my annual reports to the legislature, I appreciate this opportunity to reinforce and expand on some of these thoughts.

Our experience suggests that those who are involved in the administration of PHIA require ongoing training, advice, and support to ensure that there is consistency among personal health information trustees in terms of an understanding and commitment to the legislation. From time to time, we have encountered a phenomenon apparently called "PHIAnoia" wherein it seems the legislation is not adequately understood or is applied very legalistically sometimes to the detriment of common sense and reasonableness. To help overcome this unfortunate misapprehension, I would suggest that the government establish an annual public forum where privacy issues can be brought forward and discussed, where specialists can share their expertise with those responsible for administering legislation, and where trustees have the opportunity to share their experiences and knowledge. I believe this step would strengthen their commitment to the principles of privacy rights. A number of provinces hold these forums annually.

Our specific comments for consideration of changes relating to PHIA are provided in the attached PHIA Overview document (*Appendix 1*) and spreadsheets for the Act and its Regulation (*Appendix 2*). The *Elements of Consent for Personal Health Information under PHIA* prepared by our Office is also attached for reference purposes, not as a specific suggestion for change (*Appendix 3*). These documents, together with my letter, should be taken as representing our legislative concerns based on our experience with PHIA since its proclamation. Once the Government has developed and introduced amendments to the legislation, we anticipate that there will be a further opportunity to comment.

We have provided our comments on the spreadsheets with regard for the roles of the Government and the Legislature in making amendments to the Act. We have refrained from using the word "recommend" at this stage in our comments since it carries a distinct meaning for our office under Manitoba's access and privacy legislation. We have generally urged that "consideration" be given to changing the legislation. Our use of this rather low-key word should not be taken to downplay the seriousness of our suggestions.

I should also note that we have refrained from commenting on a number of important provisions in the statute that may be subject to amendments since we do not feel that this is the

appropriate stage to anticipate or presuppose amendments that may be introduced to the Legislative Assembly.

There are several comments that I wish to cover in this letter rather than in the attachments. They are:

1. **PRIVACY IMPACT ASSESSMENT (PIA)**

PIAs are analytical tools that are particularly useful in assessing and understanding the potential impact on information privacy of a proposed program, practice, service or system. They may also be applied to existing programs. A number of jurisdictions have made the use of PIAs mandatory, either by law or policy including Alberta, British Columbia, Canada, and Ontario. We strongly support the open and transparent use of PIAs to ensure compliance with PHIA to the extent possible and to maintain or obtain the trust and confidence of Manitobans on how personal health information trustees, including the Government, manage personal and personal health information.

We understand that Manitoba Health has taken what seems to be a very appropriate step of introducing a privacy impact assessment requirement by policy, though its scope of application and focus might be usefully expanded beyond the department and its partners in electronic health information system projects to include other personal health information trustees.

2. **CONSENT**

Authorization to Collect

PHIA section 13(1)

Section 13(1) of PHIA sets out that a trustee may not collect personal health information unless authorized to do so. In our experience, there are circumstances where individuals need programs or services so much that they essentially feel compelled or coerced into giving consent, regardless of the merit of the purpose of collection. In our view, an “authorization to collect” model with good notification requirements may arguably provide stronger protection than a “consent to collect” model.

Consent to Use and Disclose

PHIA sections 21(b), 22(1)(b), 24(3)(c) and s.66(1)(e)

Although trustees must be authorized to collect personal health information, the use and disclosure of such information requires consent. The concept of consent occurs in the following provisions of PHIA: use (section 21), disclosure (section 22) and research (section 24). While the requirement for consent is set out, the form of that consent has not been articulated. Under section 66(1)(e), this could be addressed in a regulation.

As noted in the “Elements of Consent for Personal Health Information under PHIA” developed by our Office (*Appendix 3*), it may be appropriate for consent to take different forms in different situations. We are not certain that prescribing the form that consent should take would solve issues where individuals feel compelled by circumstances to provide their consent. There also may be circumstances where notice provides a sufficient degree of transparency to provide protection comparable to consent.

3. **SPIRITUAL CARE**

In 2000, our office was asked to comment, under PHIA, on privacy issues surrounding the provision of spiritual care to individuals in health care facilities. This generated considerable

discussion within our office and from interested parties who contacted us after we issued our comment in the following year. It is our view that whether or not spiritual care is health care is not a PHIA (legislative) matter, and we have not approached it from this perspective. We have specifically said that our comment did not address the issue of spiritual care as part of holistic patient care.

It is the view of our office that, where the collection of personal information is involved, this is a best practice issue most easily addressed at the outset by simply asking patients or patients-to-be whether they want spiritual care. We do not see a problem in any facility providing these individuals with the information that a facility offers spiritual care services. If the answer to the question is “yes”, then appropriate measures within the provisions of PHIA could be undertaken to provide this service in whatever form is requested and available. Use and disclosure of information received and a patient’s personal health information would be fully subject to the use and disclosure provisions of PHIA, including the limitations entailed by the “need to know” principle and the obligation on health information trustees to provide the minimum information necessary.

As this matter is being addressed under Bill 43, our Office could provide further comments on request.

4. PHIA & FIPPA AND THE FEDERAL PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT – (PIPEDA)

There is a serious gap in the privacy rights of employees who work in the provincially regulated private sector that is not covered by PHIA or by PIPEDA. FIPPA, of course, does not apply at all to the private sector. These employees do not have the same personal and personal health information protections as those who are within the scope of access and privacy legislation. This is inequitable.

5. Access and Privacy Commissioner versus Ombudsman

Most jurisdictions in Canada have an established independent office of the Ombudsman that promotes fairness through the investigation of complaints relating to administrative acts, decisions or omissions by public bodies. Most jurisdictions also have an independent office of an Access and Privacy Commissioner that promotes respect for access and privacy rights and ensures compliance with their jurisdiction’s access and privacy legislation. At the federal level there is both an Access Commissioner and a Privacy Commissioner.

In Manitoba, the independent oversight role under access and privacy legislation has been added to the Ombudsman role. Some have suggested that the more formal order power oversight model, such as exists in British Columbia, Alberta, Ontario, and Quebec, can be more effective and timely than the recommendation model in terms of compliance with access and privacy rights. Others feel that the less formal recommendation power model as practised by the federal level, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and the Yukon Territories is just as effective and timely. I believe that each model has its merits, and that issues of effectiveness and timeliness are influenced more by the degree of commitment than by order or recommendation power.

My concern is that the independent oversight body should be clearly identified as an Access and Privacy Commissioner’s office. I believe it is in the interest of the government and the Legislative Assembly to indicate to the public the importance of access and privacy rights by clearly establishing an Access and Privacy Commissioner role.

After many years of undertaking this role as Ombudsman, I find it is unfortunate that this important role in promoting access and privacy rights is unknown in far too many circles. Manitobans and Canadians need to know that our province has, in fact, not only enacted legislation that respects access and privacy rights, but also has established an independent oversight office dedicated to investigating complaints, auditing and monitoring to ensure compliance with the statutes.

Whether or not there is a separate Commissioner and office or the Ombudsman is appointed to that role in addition to the role under *The Ombudsman Act* is not the issue. In my opinion, I believe the role of Access and Privacy Commissioner for the province needs to be visible and this can be accomplished by referring to the head of the independent oversight office as an Access and Privacy Commissioner.

In view of the complementary nature of PHIA and FIPPA, I am providing a copy of these comments to your colleague, the Honourable Eric Robinson, Minister of Culture, Heritage and Tourism.

In concluding this part of our comments, I would be pleased to meet with you or staff of your department to discuss any matter arising from these comments or relating to possible amendments to FIPPA.

Yours truly,

Barry E. Tuckett
Manitoba Ombudsman

cc. Honourable Eric Robinson, Minister of Culture, Heritage and Tourism
Heather McLaren, Manitoba Health

Attachments

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.

THE PERSONAL HEALTH INFORMATION ACT
SPREADSHEET CONTAINING OMBUDSMAN MANITOBA COMMENTS
FIPPA REVIEW
 June 9, 2004

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
WHEREAS health information is personal and sensitive and its confidentiality must be protected so that individuals are not afraid to seek health care or to disclose sensitive information to health professionals;	
AND WHEREAS individuals need access to their own health information as a matter of fairness, to enable them to make informed decisions about health care and to correct inaccurate or incomplete information about themselves;	
	It is important that individuals know they have to take responsibility for their personal health information, therefore, I would suggest the following be added: AND WHEREAS individuals have the right to control the collection, use and disclosure of their personal health information, subject to limited and narrowly interpreted exceptions;
AND WHEREAS a consistent approach to personal health information is necessary because many persons other than health professionals now obtain, use and disclose personal health information in different contexts and for different purposes;	
AND WHEREAS clear and certain rules for the collection, use and disclosure of personal health information are an essential support for electronic health information systems that can improve both the quality of patient care and the management of health care resources;	
THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:	
PART 1 INTRODUCTORY PROVISIONS	
Definitions 1(1) In this Act,	
“ court ”, for the purpose of an appeal under section 49 or 50, means the Court of Queen’s Bench;	
“ enactment ” means an Act or regulation;	
“ health care ” means any care, service or procedure	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
(a) provided to diagnose, treat or maintain an individual's physical or mental condition,	
(b) provided to prevent disease or injury or promote health, or	
(c) that affects the structure or a function of the body,	
and includes the sale or dispensing of a drug, device, equipment or other item pursuant to a prescription;	
“health care facility” means	
(a) a hospital,	
(b) a personal care home,	
(c) a psychiatric facility,	
(d) a medical clinic,	
(e) a laboratory,	
(f) CancerCare Manitoba, and	
(g) a community health centre or other facility in which health care is provided and that is designated in the regulations;	
“health professional” means a person who is licensed or registered to provide health care under an Act of the Legislature or who is a member of a class of persons designated as health professionals in the regulations;	
“health services agency” means an organization that provides health care such as community or home-based health care pursuant to an agreement with another trustee;	
“information manager” means a person or body that	
(a) processes, stores or destroys personal health information for a trustee, or	
(b) provides information management or information technology services to a trustee;	
“institutional research review committee” means a committee formally established by a health care facility, university or similar body	
(a) to review the efficacy and scientific and ethical value of a research proposal involving human subjects or involving the review of records containing personal health information, and	
(b) to ensure that the person proposing the research has adequate safeguards in place to protect the confidentiality of personal health information;	
“maintain” , in relation to personal health information, means to have custody or control of the information;	
“minister” means the member of the Executive Council charged	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
by the Lieutenant Governor in Council with the administration of this Act;	
“ Ombudsman ” means the Ombudsman appointed under <i>The Ombudsman Act</i> ;	
“ personal health information ” means recorded information about an identifiable individual that relates to	
(a) the individual’s health, or health care history, including genetic information about the individual,	
(b) the provision of health care to the individual, or	
(c) payment for health care provided to the individual,	
and includes	
(d) the PHIN and any other identifying number, symbol or particular assigned to an individual, and	
(e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care;	
“ PHIN ” means the personal health identification number assigned to an individual by the minister to uniquely identify the individual for health care purposes;	
“ public body ” means a public body as defined in <i>The Freedom of Information and Protection of Privacy Act</i> , and for the purpose of this definition, the definitions of “department”, “educational body”, “government agency”, “health care body”, “local government body” and “local public body” in that Act apply;	
“ record ” or “ recorded information ” means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means, including by graphic, electronic or mechanical means, but does not include electronic software or any mechanism that produces records;	
“ representative ”, in relation to an individual, means a person referred to in section 60;	
“ trustee ” means a health professional, health care facility, public body, or health services agency that collects or maintains personal health information.	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Reference to "Act" includes regulations 1(2) A reference to "this Act" includes the regulations made under this Act.</p>	
<p>Purposes of this Act 2 The purposes of this Act are</p>	
<p>(a) to provide individuals with a right to examine and receive a copy of personal health information about themselves maintained by a trustee, subject to the limited and specific exceptions set out in this Act;</p>	
<p>(b) to provide individuals with a right to request corrections to personal health information about themselves maintained by a trustee;</p>	
<p>(c) to control the manner in which trustees may collect personal health information;</p>	
<p>(d) to protect individuals against the unauthorized use, disclosure or destruction of personal health information by trustees;</p>	
<p>(e) to control the collection, use and disclosure of an individual's PHIN; and</p>	
<p>(f) to provide for an independent review of the decisions of trustees under this Act.</p>	
<p>Application of this Act 3 This Act does not apply to anonymous or statistical health information that does not, either by itself or when combined with other information available to the holder, permit individuals to be identified.</p>	
<p>Relationship to other Acts 4(1) A trustee shall refuse to permit personal health information to be examined or copied under Part 2 of this Act to the extent that disclosure of the information is prohibited or restricted by another enactment of Manitoba.</p>	
<p>Conflict with another Act 4(2) If a provision of Part 3 of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless the other enactment more completely protects the confidentiality of personal health information.</p>	
<p>Mental Health Act prevails 4(3) For greater certainty, the provisions of <i>The Mental Health Act</i> prevail over this Act.</p>	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
PART 2	
ACCESS TO PERSONAL HEALTH INFORMATION	
RIGHT TO EXAMINE AND COPY PERSONAL HEALTH INFORMATION	
Right to examine and copy information 5(1) Subject to this Act, an individual has a right, on request, to examine and receive a copy of his or her personal health information maintained by a trustee.	
How to make a request 5(2) A request must be made to the trustee who the individual believes maintains the personal health information.	
Trustee may require written request 5(3) A trustee may require a request to be in writing.	
Trustee must respond promptly 6(1) A trustee shall respond to a request as promptly as required in the circumstances but no later than 30 days after receiving it, unless the request is transferred to another trustee under section 8.	
Duty to assist an individual 6(2) A trustee shall make every reasonable effort to assist an individual making a request and to respond without delay, openly, accurately and completely.	
Failure to respond 6(3) The failure of a trustee to respond to a request within the 30-day period is to be treated as a decision to refuse to permit the personal health information to be examined or copied.	
Trustee's response 7(1) In responding to a request, a trustee shall do one of the following:	<p>Under PHIA there is no provision to decline a request for access on the basis that it is repetitive, incomprehensible or an abuse of process. We would suggest that an amendment be considered to provide for the above.</p> <p>Repetitive or incomprehensible request 13(1) A head of a public body trustee may refuse to give access to a record or part of a record if the request is repetitive, or incomprehensible, an abuse of process or is for information already provided to the individual. applicant or that is publicly available.</p>
(a) make the personal health information available for examination and provide a copy, if requested, to the individual;	
(b) inform the individual in writing if the information does not exist or cannot be found; or	
(c) inform the individual in writing that the request is refused, in whole or in part, for a specified reason described in section 11, and	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
advise the individual of the right to make a complaint about the refusal under Part 5.	
Duty to provide an explanation 7(2) On request, a trustee shall provide an explanation of any term, code or abbreviation used in the personal health information.	
Information in electronic form 7(3) When a request is made for personal health information that a trustee maintains in electronic form, the trustee shall produce a record of the information for the individual in a form usable by the individual, if it can be produced using the trustee's normal computer hardware and software and technical expertise.	
Transferring a request to another trustee 8(1) Within seven days after receiving a request, a trustee may transfer it to another trustee if	
(a) the personal health information is maintained by the other trustee; or	
(b) the other trustee was the first to collect the personal health information.	
Response within 30 days after transfer 8(2) A trustee who transfers a request under subsection (1) shall notify the individual of the transfer as soon as possible, and the trustee to whom the request is transferred shall respond to it as promptly as required in the circumstances but no later than 30 days after receiving it.	
Trustee must take precautions about release 9 A trustee	
(a) shall not permit personal health information to be examined or copied without being satisfied as to the identity of the individual making the request; and	
(b) shall take reasonable steps to ensure that any personal health information intended for an individual is received only by that individual.	
Fees 10 A trustee may charge a reasonable fee for permitting examination of personal health information and providing a copy, but the fee must not exceed the amount provided for in the regulations.	There is no regulation related to fees as in FIPPA. We would suggest that a regulation on fees with a provision for fee waiver be considered for consistency and fairness.

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
REASONS FOR REFUSING ACCESS	
Reasons for refusing access 11(1) A trustee is not required to permit an individual to examine or copy his or her personal health information under this Part if	
(a) knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the individual or another person;	
(b) disclosure of the information would reveal personal health information about another person who has not consented to the disclosure;	
(c) disclosure of the information could reasonably be expected to identify a third party, other than another trustee, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected;	
(d) the information was compiled and is used solely	
(i) for the purpose of peer review by health professionals,	
(ii) for the purpose of review by a standards committee established to study or evaluate health care practice in a health care facility or health services agency,	
(iii) for the purpose of a body with statutory responsibility for the discipline of health professionals or for the quality or standards of professional services provided by health professionals, or	
(iv) for the purpose of risk management assessment; or	
(e) the information was compiled principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding.	
Severance of information 11(2) A trustee who refuses to permit personal health information to be examined or copied under subsection (1) shall, to the extent possible, sever the personal health information that cannot be examined or copied and permit the individual to examine and receive a copy of the remainder of the information.	
CORRECTION OF HEALTH INFORMATION	
Right to request a correction	
12(1) For purposes of accuracy or completeness, an individual may request a trustee to correct any personal health information that the individual may examine and copy under this Part.	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Written request 12(2) A request must be in writing.</p>	
<p>Trustee's response 12(3) As promptly as required in the circumstances but no later than 30 days after receiving a request, the trustee shall do one of the following:</p>	
<p>(a) make the requested correction by adding the correcting information to the record of the personal health information in such a manner that it will be read with and form part of the record or be adequately cross-referenced to it;</p>	
<p>(b) inform the individual if the personal health information no longer exists or cannot be found;</p>	
<p>(c) if the trustee does not maintain the personal health information, so inform the individual and provide him or her with the name and address, if known, of the trustee who maintains it; or</p>	
<p>(d) inform the individual in writing of the trustee's refusal to correct the record as requested, the reason for the refusal, and the individual's right to add a statement of disagreement to the record and to make a complaint about the refusal under Part 5.</p>	
<p>When a trustee refuses to make a correction 12(4) A trustee who refuses to make a correction that is requested under this section shall</p>	
<p>(a) permit the individual to file a concise statement of disagreement stating the correction requested and the reason for the correction; and</p>	
<p>(b) add the statement of disagreement to the record in such a manner that it will be read with and form part of the record or be adequately cross-referenced to it.</p>	
<p>Notifying others of a correction or statement of disagreement 12(5) When a trustee makes a correction or adds a statement of disagreement under this section, the trustee shall, when practicable, notify any other trustee or person to whom the personal health information has been disclosed during the year before the correction was requested about the correction or statement of disagreement. A trustee who receives such a notice shall make the correction or add the statement of disagreement to any record of that personal health information that the trustee maintains.</p>	

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<p>No fee 12(6) A trustee shall not charge a fee in connection with a request for a correction made under this section.</p>	
PART 3	
PROTECTION OF PRIVACY	
DIVISION 1	
RESTRICTIONS ON COLLECTION AND RETENTION OF INFORMATION	
COLLECTION OF INFORMATION	
<p>Restrictions on collection 13(1) A trustee shall not collect personal health information about an individual unless</p>	
(a) the information is collected for a lawful purpose connected with a function or activity of the trustee; and	
(b) the collection of the information is necessary for that purpose.	
<p>Limit on amount of information collected 13(2) A trustee shall collect only as much personal health information about an individual as is reasonably necessary to accomplish the purpose for which it is collected.</p>	
<p>Source of information 14(1) Whenever possible, a trustee shall collect personal health information directly from the individual the information is about.</p>	
<p>Exceptions 14(2) Subsection (1) does not apply if</p>	
(a) the individual has authorized another method of collection;	
(b) collection of the information directly from the individual could reasonably be expected to endanger the mental or physical health or the safety of the individual or another person;	
(c) collection of the information is in the interest of the individual and time or circumstances do not permit collection directly from the individual;	
(d) collection of the information directly from the individual could reasonably be expected to result in inaccurate information being collected; or	
(e) another method of collection is authorized or required by a court order or an enactment of Manitoba or Canada.	

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<p>Notice of collection practices 15(1) A trustee who collects personal health information directly from the individual the information is about shall, before it is collected or as soon as practicable afterwards, take reasonable steps to inform the individual</p>	
<p>(a) of the purpose for which the information is being collected; and</p>	
<p>(b) if the trustee is not a health professional, how to contact an officer or employee of the trustee who can answer the individual's questions about the collection.</p>	
<p>Exception if information already provided 15(2) A trustee need not comply with subsection (1) if the trustee has recently provided the individual with the information referred to in that subsection about the collection of the same or similar personal health information for the same or a related purpose.</p>	
<p>ACCURACY OF INFORMATION</p>	
<p>Duty to ensure accuracy of information 16 Before using or disclosing personal health information, a trustee shall take reasonable steps to ensure that the information is accurate, up to date, complete and not misleading.</p>	
<p>RETENTION AND DESTRUCTION OF INFORMATION</p>	
<p>Retention and destruction policy 17(1) A trustee shall establish a written policy concerning the retention and destruction of personal health information and shall comply with that policy.</p>	
<p>Compliance with regulations 17(2) A policy under subsection (1) must conform with any requirements of the regulations.</p>	
<p>Method of destruction must protect privacy 17(3) In accordance with any requirements of the regulations, a trustee shall ensure that personal health information is destroyed in a manner that protects the privacy of the individual the information is about.</p>	
<p>Record of destruction 17(4) A trustee who destroys personal health information shall keep a record of</p>	
<p>(a) the individual whose personal health information is destroyed and the time period to which the information relates; and</p>	
<p>(b) the method of destruction and the person responsible for supervising the destruction.</p>	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Application of this section 17(5) This section does not override or modify any requirement in an enactment of Manitoba or Canada concerning the retention or destruction of records maintained by public bodies.</p>	
<p>DIVISION 2</p>	
<p>SECURITY SAFEGUARDS</p>	
<p>Duty to adopt security safeguards 18(1) In accordance with any requirements of the regulations, a trustee shall protect personal health information by adopting reasonable administrative, technical and physical safeguards that ensure the confidentiality, security, accuracy and integrity of the information.</p>	
<p>Specific safeguards 18(2) Without limiting subsection (1), a trustee shall</p>	
<p>(a) implement controls that limit the persons who may use personal health information maintained by the trustee to those specifically authorized by the trustee to do so;</p>	
<p>(b) implement controls to ensure that personal health information maintained by the trustee cannot be used unless</p>	
<p>(i) the identity of the person seeking to use the information is verified as a person the trustee has authorized to use it, and</p>	
<p>(ii) the proposed use is verified as being authorized under this Act;</p>	
<p>(c) if the trustee uses electronic means to request disclosure of personal health information or to respond to requests for disclosure, implement procedures to prevent the interception of the information by unauthorized persons; and</p>	
<p>(d) when responding to requests for disclosure of personal health information, ensure that the request contains sufficient detail to uniquely identify the individual the information is about.</p>	
<p>Additional safeguards for information in electronic form 18(3) A trustee who maintains personal health information in electronic form shall implement any additional safeguards for such information required by the regulations.</p>	
<p>Safeguards for sensitive information 19 In determining the reasonableness of security safeguards required under section 18, a trustee shall take into account the degree of sensitivity of the personal health information to be protected.</p>	

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DIVISION 3	
RESTRICTIONS ON USE AND DISCLOSURE OF INFORMATION	
GENERAL DUTIES OF TRUSTEES	
General duty of trustees re use and disclosure 20(1) A trustee shall not use or disclose personal health information except as authorized under this Division.	
Limit on amount of information used or disclosed 20(2) Every use and disclosure by a trustee of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.	
Limit on the trustee's employees 20(3) A trustee shall limit the use and disclosure of personal health information it maintains to those of its employees and agents who need to know the information to carry out the purpose for which the information was collected or received or to carry out a purpose authorized under section 21.	
RESTRICTIONS ON USE OF INFORMATION	
Restrictions on use of information 21 A trustee may use personal health information only for the purpose for which it was collected or received, and shall not use it for any other purpose, unless	
(a) the other purpose is directly related to the purpose for which the personal health information was collected or received;	
(b) the individual the personal health information is about has consented to the use;	
(c) use of the information is necessary to prevent or lessen a serious and immediate threat to	
(i) the mental or physical health or the safety of the individual the information is about or another individual, or	
(ii) public health or public safety;	
(d) the trustee is a public body or a health care facility and the personal health information is used	
(i) to deliver, monitor or evaluate a program that relates to the provision of health care or payment for health care by the trustee, or	
(ii) for research and planning that relates to the provision of health care or payment for health care by the trustee;	
(e) the purpose is one for which the information may be disclosed	

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to the trustee under section 22; or	
(f) use of the information is authorized by an enactment of Manitoba or Canada.	
RESTRICTIONS ON DISCLOSURE OF INFORMATION	
Individual's consent to disclosure	
22(1) Except as permitted by subsection (2), a trustee may disclose personal health information only if	
(a) the disclosure is to the individual the personal health information is about or his or her representative; or	
(b) the individual the information is about has consented to the disclosure.	
Disclosure without individual's consent	
22(2) A trustee may disclose personal health information without the consent of the individual the information is about if the disclosure is	
(a) to a person who is providing or has provided health care to the individual, to the extent necessary to provide health care to the individual, unless the individual has instructed the trustee not to make the disclosure;	
(b) to any person if the trustee reasonably believes that the disclosure is necessary to prevent or lessen a serious and immediate threat to	
(i) the mental or physical health or the safety of the individual the information is about or another individual, or	
(ii) public health or public safety;	
(c) for the purpose of	
(i) contacting a relative or friend of an individual who is injured, incapacitated or ill,	
(ii) assisting in identifying a deceased individual, or	
(iii) informing the representative or a relative of a deceased individual, or any other person it is reasonable to inform in the circumstances, of the individual's death;	
(d) to a relative of a deceased individual if the trustee reasonably believes that disclosure is not an unreasonable invasion of the deceased's privacy;	
(e) required for	
(i) the purpose of peer review by health professionals,	
(ii) the purpose of review by a standards committee established to study or evaluate health care practice in a health care facility or	

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health services agency,	
(iii) the purpose of a body with statutory responsibility for the discipline of health professionals or for the quality or standards of professional services provided by health professionals, or	
(iv) the purpose of risk management assessment;	
(f) in accordance with section 23(disclosure to patient's family), 24 (disclosure for health research) or 25 (disclosure to an information manager);	
(g) for the purpose of	
(i) delivering, evaluating or monitoring a program of the trustee that relates to the provision of health care or payment for health care, or	
(ii) for research and planning that relates to the provision of health care or payment for health care by the trustee;	
(h) to a computerized health information network and database, established by the government or another trustee that is a public body specified in the regulations, in which personal health information is recorded for the purpose of facilitating	
(i) the delivery, evaluation or monitoring of a program that relates to the provision of health care or payment for health care, or	
(ii) research and planning that relates to the provision of health care or payment for health care;	
(i) to the government, another public body, or the government of another jurisdiction or an agency of such a government, to the extent necessary to obtain payment for health care provided to the individual the personal health information is about;	
(j) to a person who requires the personal health information to carry out an audit for or provide legal services to a trustee, if the trustee reasonably believes that the person will not use or disclose the personal health information for any other purpose and will take appropriate steps to protect it;	
(k) required in anticipation of or for use in a civil or quasi-judicial proceeding to which the trustee is a party, or the prosecution of an offence;	
(l) required to comply with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of the personal health information, or with a rule of court concerning the production of the personal health information;	
(m) for the purpose of	
(i) an investigation under or the enforcement of an enactment of	

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Manitoba respecting payment for health care, or	
(ii) an investigation or enforcement respecting a fraud relating to payment for health care;	
(n) for the purpose of complying with an arrangement or agreement entered into under an enactment of Manitoba or Canada; or	
(o) authorized or required by an enactment of Manitoba or Canada.	
Limit on disclosure 22(3) A trustee may disclose information under subsection (2) only to the extent the recipient needs to know the information.	
Disclosure to family about patient's health care 23(1) If an individual is a patient or resident in a health care facility, the trustee may disclose personal health information about the individual to an immediate family member, or to anyone else with whom the individual is known to have a close personal relationship, if	
(a) the disclosure is about health care currently being provided;	
(b) the disclosure is made in accordance with good medical or other professional practice; and	
(c) the trustee reasonably believes the disclosure to be acceptable to the individual or his or her representative.	
Disclosure about patient's condition 23(2) As long as disclosure is not contrary to the express request of the individual or his or her representative, a trustee may disclose to any person the following information about an individual who is a patient or resident of a health care facility:	
(a) the individual's name;	
(b) the individual's general health status, described as critical, poor, fair, stable or satisfactory, or in terms indicating similar conditions;	
(c) the individual's location, unless disclosure of the location would reveal specific information about the physical or mental condition of the individual.	

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<p>No disclosure if possible harm 23(3) A trustee shall not disclose personal health information under this section if the trustee has reason to believe that the disclosure might lead to physical or mental harm to the individual the personal health information is about.</p>	
HEALTH RESEARCH	
<p>Approval for health research 24(1) A trustee may disclose personal health information to a person conducting a health research project only if the project has been approved under this section.</p>	
<p>Who may give an approval 24(2) An approval may be given by</p>	
<p>(a) the health information privacy committee established under section 59, if the personal health information is maintained by the government or a government agency; and</p>	<p>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.</p>
<p>(b) an institutional research review committee, if the personal health information is maintained by a trustee other than the government or a government agency.</p>	
<p>Conditions for approval 24(3) An approval may be given under this section only if the health information privacy committee or the institutional research review committee, as the case may be, has determined that</p>	
<p>(a) the research is of sufficient importance to outweigh the intrusion into privacy that would result from the disclosure of personal health information;</p>	
<p>(b) the research purpose cannot reasonably be accomplished unless the personal health information is provided in a form that identifies or may identify individuals;</p>	
<p>(c) it is unreasonable or impractical for the person proposing the research to obtain consent from the individuals the personal health information is about; and</p>	
<p>(d) the research project contains</p>	
<p>(i) reasonable safeguards to protect the confidentiality and security of the personal health information, and</p>	
<p>(ii) procedures to destroy the information or remove all identifying information at the earliest opportunity consistent with the purposes of the project.</p>	

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<p>Agreement required 24(4) An approval under this section is conditional on the person proposing the research project entering into an agreement with the trustee, in accordance with the regulations, in which the person agrees</p>	
<p>(a) not to publish the personal health information requested in a form that could reasonably be expected to identify the individuals concerned;</p>	
<p>(b) to use the personal health information requested solely for the purposes of the approved research project; and</p>	
<p>(c) to ensure that the research project complies with the safeguards and procedures described in clause (3)(d).</p>	
<p>Limitation for projects requiring direct contact with individuals 24(5) If a research project will require direct contact with individuals, a trustee shall not disclose personal health information about those individuals under this section without first obtaining their consent. However, the trustee need not obtain their consent if the information consists only of the individuals' names and addresses.</p>	
<p>DIVISION 4</p>	
<p>MISCELLANEOUS REQUIREMENTS</p>	
<p>INFORMATION MANAGERS</p>	
<p>Trustee may provide information to an information manager 25(1) A trustee may provide personal health information to an information manager for the purpose of processing, storing or destroying it or providing the trustee with information management or information technology services.</p>	
<p>Restrictions on use 25(2) An information manager may use personal health information provided to it under this section only for the purposes and activities mentioned in subsection (1), which must be purposes and activities that the trustee itself may undertake.</p>	
<p>Agreement required 25(3) A trustee who wishes to provide personal health information to an information manager under this section must enter into a written agreement with the information manager that provides for the protection of the personal health information against such risks as unauthorized access, use, disclosure, destruction or alteration, in accordance with the regulations.</p>	

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<p>Information manager must comply with Act 25(4) An information manager shall comply with</p>	
<p>(a) the same requirements concerning the protection, retention and destruction of personal health information that the trustee is required to comply with under this Act; and</p>	
<p>(b) the duties imposed on the information manager under the agreement entered into under subsection (3).</p>	
<p>Information deemed to be maintained by the trustee 25(5) Personal health information that has been provided to an information manager under an agreement described in subsection (3) is deemed to be maintained by the trustee for the purposes of this Act.</p>	
<p>PHIN</p>	
<p>Production and use of PHIN 26(1) No person other than a trustee may require the production of another person's PHIN or collect or use another person's PHIN.</p>	
<p>Exceptions 26(2) Despite subsection (1), a person may collect or use another person's PHIN</p>	
<p>(a) for purposes related to the provision of publicly funded health care to the other person;</p>	
<p>(b) for purposes of a health research project approved under section 24; or</p>	
<p>(c) in circumstances permitted by the regulations.</p>	
<p>PROHIBITION ON SALE OF INFORMATION</p>	
<p>Prohibition on sale of personal health information 27(1) No trustee shall sell or otherwise dispose of or disclose for consideration personal health information unless</p>	
<p>(a) it is essential to facilitate the sale or disposition of the practice of a health professional or the business of a health care facility or health services agency as a going concern; and</p>	<p>There is no requirement that notice be provided when a trustee sells her or his 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.</p>
<p>(b) subject to subsection (2), the sale or disposition is to another trustee.</p>	

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<p>Exception for pharmacies 27(2) Clause(1)(b) does not apply to a change in ownership of a pharmacy in compliance with <i>The Pharmaceutical Act</i>.</p>	
<p>PART 4</p>	
<p>POWERS AND DUTIES OF THE OMBUDSMAN</p>	
<p>General powers and duties 28 In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may</p>	
(a) conduct investigations and audits and make recommendations to monitor and ensure compliance with this Act;	
(b) inform the public about this Act;	
(c) receive comments from the public about matters concerning the confidentiality of personal health information or access to that information;	<p>We note that FIPPA uses the term “protection of privacy” rather than “confidentiality.” We are not aware of the reason for the difference between the Acts.</p>
(d) comment on the implications for access to or confidentiality of personal health information of proposed legislative schemes or programs or practices of trustees;	<p>COMMENT 1 As above.</p> <p>COMMENT 2 The Ombudsman’s Office reviews current legislation and programs under section 28(d). Consideration should be given to requiring that trustees complete a Privacy Impact Assessment (PIA) for proposed legislative schemes, programs or practices. Upon completion, the PIAs would be submitted to the Ombudsman where they would be placed in a registry similar to the practice in Alberta.</p>
(e) comment on the implications for the confidentiality of personal health information of	<p>We note that FIPPA uses the term “protection of privacy” rather than “confidentiality.” We are not aware of the reason for the difference between the Acts.</p>
(i) using or disclosing personal health information for record linkage, or	
(ii) using information technology in the collection, storage, use or transfer of personal health information;	
(f) consult with any person with experience or expertise in any matter related to the purposes of this Act; and	
(g) engage in or commission research into any matter related to the purposes of this Act.	
<p>Evidence Act powers 29(1) The Ombudsman has all the powers and protections of a commissioner under Part V of <i>The Manitoba Evidence Act</i> when conducting an investigation under this Act.</p>	

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<p>Production of records 29(2) The Ombudsman may require any record maintained by a trustee that the Ombudsman considers relevant to an investigation to be produced to the Ombudsman and may examine any information in a record, including personal health information.</p>	<p>There have been circumstances where our office required evidence from individuals/organizations who were not trustees. This section should be broadened so that it would be similar to section 30(1) of <i>The Ombudsman Act</i> (OA) so that we could request records from non-trustees.</p> <p>Evidence 30(1) Subject to section 34, the Ombudsman may require any person who, in his or her opinion, is able to give any information relating to any matter being investigated by him or her: (a) to furnish the information to him or her; and (b) to produce any record, document, paper or thing that in his or her opinion relates to the matter being investigated and that may be in the possession or under the control of that person. whether or not that person is an officer, employee or member of the department, agency of the government or municipality and whether or not the document, paper or thing is in the custody or under the control of a department, agency of the government or municipality.</p>
<p>Records produced within 14 days 29(3) A trustee shall produce to the Ombudsman within 14 days any record or a copy of a record required to be produced under this section.</p>	<p>For consistency with revised section 29(2) Records produced within 14 days 29(3) A trustee Any person shall produce to the Ombudsman within 14 days any record or a copy of a record required to be produced under this section.</p>
<p>Examination of record on site 29(4) If a trustee is required to produce a record under this section and it is not practicable to make a copy of it, the trustee may require the Ombudsman to examine the original at its site.</p>	<p>For consistency with revised section 29(2) Examination of record on site 29(4) If a trustee person is required to produce a record under this section and it is not practicable to make a copy of it, the trustee person may require the Ombudsman to examine the original at its site.</p>
<p>Production required despite other laws 29(5) No person who is required by the Ombudsman to give information or evidence or to produce a record may refuse to do so on the basis of</p>	
<p>(a) an enactment that requires or permits a person to refuse to disclose information; or</p>	
<p>(b) any privilege of the law of evidence.</p>	
<p>Right of entry 30 Despite any other enactment or any privilege of the law of evidence, in exercising powers or performing duties under this Act, the Ombudsman has the right,</p>	
<p>(a) during regular business hours, to enter any premises of a trustee in which the Ombudsman believes on reasonable grounds there are records relevant to an investigation and examine and make copies of them; and</p>	

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(b) to converse in private with any officer, employee or agent of the trustee.	
Investigation in private 31 The Ombudsman shall conduct every investigation in private.	
Statements and reports not admissible in evidence 32(1) Any statement or report made or opinion given by a person during an investigation by the Ombudsman, and any report or recommendation of the Ombudsman, is inadmissible as evidence in a court or in any other proceeding, except	
(a) in a prosecution for perjury in respect of sworn testimony;	
(b) in a prosecution for an offence under this Act; or	
(c) in an appeal to the court under this Act, when the Ombudsman is a party.	
Not compellable as witness 32(2) The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not be required to give evidence in a court or in any other proceeding about information that comes to the knowledge of the Ombudsman in performing duties or exercising powers under this Act.	
Information provided under qualified privilege 33 Anything said, any information supplied, and any record produced by a person during an investigation by the Ombudsman under this Act is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.	
Ombudsman restricted as to disclosure of information 34(1) The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (4).	
When disclosure permitted 34(2) The Ombudsman may disclose, or may authorize anyone acting for or under the direction of the Ombudsman to disclose, information that is necessary to	
(a) perform a duty or exercise a power of the Ombudsman under this Act; or	
(b) establish the grounds for findings and recommendations contained in a report under this Act.	
However, the Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not disclose personal health	

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information that a trustee is authorized to refuse to disclose in response to a request made under Part 2.	
<p>Information about offences 34(3) The Ombudsman may disclose to the Minister of Justice and Attorney General information relating to the commission of an offence under this or any other enactment of Manitoba or Canada if the Ombudsman considers there is reason to believe an offence has been committed, except that personal health information must not be disclosed without the consent of the individual the information is about.</p>	
<p>Information relating to a prosecution or appeal 34(4) The Ombudsman may disclose, or may authorize anyone acting for or under the direction of the Ombudsman to disclose, information in the course of a prosecution or an appeal referred to in subsection 32(1), except that personal health information must not be disclosed without the consent of the individual the information is about.</p>	
<p>Delegation 35 The Ombudsman may delegate to any person on his or her staff any duty or power under this Act.</p>	
<p>Protection from liability 36 No proceedings lie against the Ombudsman, or against any person acting for or under the direction of the Ombudsman, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty or power under this Act.</p>	
<p>Annual report 37(1) The Ombudsman shall make an annual report to the Legislative Assembly on the work of the Ombudsman's office in relation to this Act, including the following:</p>	
(a) the kinds of complaints received and investigations conducted under Part 5;	
(b) the Ombudsman's recommendations and whether trustees have complied with the recommendations; and	
(c) any other matters about access to and confidentiality of personal health information that the Ombudsman considers appropriate.	We are not certain as to why "confidentiality" is used here rather than "privacy."

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<p>Report to be laid before Legislative Assembly 37(2) The report shall be given to the Speaker who shall lay it before the Legislative Assembly if it is in session and if it is not in session, then within 15 days after the beginning of the next session.</p>	
<p>Special report 37(3) In the public interest, the Ombudsman may publish a special report relating to any matter within the scope of the powers and duties of the Ombudsman under this Act, including a report referring to and commenting on any particular matter investigated by the Ombudsman.</p>	
<p>PART 5 COMPLAINTS</p>	
<p>Definitions 38 In this Part,</p>	
<p>"complaint about access" means a complaint made under subsection 39(1).</p>	
<p>"complaint about privacy" means a complaint made under subsection 39(2).</p>	
<p>MAKING A COMPLAINT</p>	
<p>Right to make a complaint about access 39(1) An individual who has made a request to examine or receive a copy of his or her personal health information in accordance with Part 2 may make a complaint to the Ombudsman about any decision, act or failure to act of the trustee that relates to the request, including but not limited to the following:</p>	
<p>(a) a refusal by the trustee to permit the individual to examine or receive a copy of the information;</p>	
<p>(b) a refusal by the trustee to correct personal health information;</p>	
<p>(c) an unreasonable delay by the trustee in responding to the request;</p>	
<p>(d) an unreasonable or unauthorized fee charged by the trustee.</p>	
<p>Right to make a complaint about privacy 39(2) An individual may make a complaint to the Ombudsman alleging that a trustee</p>	
<p>(a) has collected, used or disclosed his or her personal health information contrary to this Act; or</p>	
<p>(b) has failed to protect his or her personal health information in a secure manner as required by this Act.</p>	

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<p>Complaint in writing 39(3) A complaint must be in writing in a form acceptable to the Ombudsman.</p>	
<p>Ombudsman may initiate a complaint 39(4) The Ombudsman may initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate under this Act.</p>	
<p>INVESTIGATION</p>	
<p>Investigation 40(1) Subject to section 41, on receiving a complaint the Ombudsman shall investigate it.</p>	
<p>Informal resolution 40(2) The Ombudsman may take any steps the Ombudsman considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of this Act.</p>	
<p>Decision to not deal with a complaint 41(1) The Ombudsman may decide not to investigate a complaint if the Ombudsman is of the opinion that</p>	
<p>(a) the length of time that has elapsed since the date the subject matter of the complaint arose makes an investigation no longer practicable or desirable;</p>	
<p>(b) the subject matter of the complaint is trivial or the complaint is not made in good faith or is frivolous or vexatious; or</p>	<p>Consideration should be given to adding “abuse of process” to this section.</p>
<p>(c) the circumstances of the complaint do not require investigation.</p>	
<p>Ombudsman may defer complaint about access 41(2) The Ombudsman may decide not to investigate a complaint about access or may defer investigating it if</p>	
<p>(a) the complaint concerns a health care facility or health services agency and there is an internal appeal procedure that the complainant has not used; or</p>	
<p>(b) the complaint concerns a health professional and there is an expeditious and informal procedure for addressing such complaints available through a body that has statutory responsibility for regulating the practice of the health professional, which the complainant has not used.</p>	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Notifying the complainant 41(3) The Ombudsman shall inform the complainant in writing if he or she decides not to investigate a complaint or defers investigating it, and give reasons for the decision.</p>	
<p>Notifying trustee and others of complaint 42 As soon as practicable after deciding to investigate a complaint, the Ombudsman shall notify the following persons about the complaint:</p>	
<p>(a) the trustee concerned; and</p>	
<p>(b) any other person who the Ombudsman considers should be notified, having regard to the nature of the complaint and the need to protect the complainant's privacy.</p>	
<p>Representations to the Ombudsman 43(1) During an investigation, the Ombudsman shall give the complainant and the trustee concerned an opportunity to make representations to the Ombudsman. The Ombudsman may also give any other person who has been notified of the complaint under clause 42(b) an opportunity to make representations. However, no one is entitled to be present during an investigation or to have access to or to comment on representations made to the Ombudsman by another person.</p>	
<p>Written or oral representations 43(2) The Ombudsman may decide whether representations are to be made orally or in writing.</p>	
<p>Representations by counsel 43(3) Representations may be made to the Ombudsman through counsel or an agent.</p>	
<p>Obtaining opinion of physician or other expert 44 If a complaint about access relates to a trustee's refusal to permit personal health information to be examined or copied under clause 11(1)(a) (endangering health or safety), the Ombudsman may arrange for a physician or other expert chosen by the Ombudsman to provide an opinion on the matter.</p>	
<p>Duty to cooperate 45 A trustee and every officer, employee and agent of a trustee shall cooperate with the Ombudsman in an investigation.</p>	<p>Should be consistent with other provisions within the Act. Proposed change would make this section consistent with revised sections 29(2), 29(3) and 29(4).</p> <p>Duty to cooperate 45 A trustee and every officer, employee and agent of a trustee Any person shall cooperate with the Ombudsman in an investigation.</p>
<p>Time limit for investigation</p>	<p>The time limit for investigating access complaints for personal health information (PHIA)</p>

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>46 An investigation must be completed and a report made under section 47 within 45 days after the complaint is made if it is about access, and within 90 days if it is about privacy, unless the Ombudsman</p>	<p>and personal information (FIPPA) should be consistent.</p>
<p>(a) notifies the complainant, the trustee and any other person who has made representations to the Ombudsman that the Ombudsman is extending that period; and</p>	
<p>(b) gives an anticipated date for providing the report.</p>	
<p style="text-align: center;">OMBUDSMAN'S REPORT</p>	
<p>Report 47(1) On completing an investigation, the Ombudsman shall prepare a report containing the Ombudsman's findings and any recommendations the Ombudsman considers appropriate about the complaint.</p>	<p>We considered <i>The Ombudsman Act</i> in our discussion of this provision. It was our thought that making section 47 parallel with the OA would provide our office with the ability to report out on files verbally where appropriate. Report 47(1) On completing an investigation, the Ombudsman shall prepare a report containing the Ombudsman's his or her findings and any recommendations the Ombudsman considers appropriate about the complaint.</p>
<p>Recommendations about access 47(2) In a report concerning a complaint about access, the Ombudsman</p>	<p>It was our view that including "written" in this provision would clarify that reports containing recommendations would be in writing. Recommendations about access 47(2) In a written report containing recommendations concerning a complaint about access, the Ombudsman</p>
<p>(a) shall indicate whether, in his or her opinion, the refusal is justified in whole or in part and, if not, shall recommend that the trustee permit the complainant to examine and receive a copy of all or part of the personal health information, as the case may require; and</p>	
<p>(b) may recommend that the trustee modify or improve its procedures or practices concerning requests for access.</p>	
<p>Recommendations about privacy 47(3) In a report concerning a complaint about privacy, the Ombudsman</p>	<p>It was our view that including "written" in this provision would clarify that reports containing recommendations would be in writing. Recommendations about access 47(3) In a written report containing recommendations concerning a complaint about privacy, the Ombudsman</p>
<p>(a) shall indicate whether, in his or her opinion, the complaint is well founded; and</p>	
<p>(b) may, as long as the trustee has been given an opportunity to make representations about the matter, recommend that the trustee</p>	
<p>(i) cease or modify a specified practice of collecting, using, disclosing, retaining or destroying personal health information contrary to this Act, or</p>	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
(ii) destroy a collection of personal health information that was collected in a manner contrary to this Act.	
Report given to complainant and others 48(1) The Ombudsman	
(a) shall give a copy of the report to the complainant and the trustee concerned; and	For consistency with the revised section 47 (a) shall give a copy of the report to the complainant and the trustee concerned; and
(b) may give a copy of the report to any other person who has been notified of the complaint under clause 42(b) and who has made representations to the Ombudsman.	For consistency with the revised section 47 (b) may give a copy of the report to any other person who has been notified of the complaint under clause 42(b) and who has made representations to the Ombudsman.
Forwarding report to professional regulatory body 48(2) Unless the complainant objects, if the Ombudsman is of the opinion that the subject matter of a complaint should be considered by a body with statutory authority to regulate health professionals, the Ombudsman may notify that body and give it a copy of the report.	For consistency with the revised section 47 Forwarding report to professional regulatory body 48(2) Unless the complainant objects, if the Ombudsman is of the opinion that the subject matter of a complaint should be considered by a body with statutory authority to regulate health professionals, the Ombudsman may notify that body and give it a copy of the <i>written</i> report.
Notice of right to appeal 48(3) If the Ombudsman finds that a complaint about access that relates to a refusal to permit the complainant to examine or receive a copy of personal health information is unjustified, the report must advise the complainant of the right to appeal the decision to the court under section 49, and of the time limit for an appeal.	For consistency with the revised section 47 Notice of right to appeal 48(3) If the Ombudsman finds that a complaint about access that relates to a refusal to permit the complainant to examine or receive a copy of personal health information is unjustified, the report <i>he or she</i> must advise the complainant of the right to appeal the decision to the court under section 49, and of the time limit for an appeal.
Trustee's response to the report 48(4) If the report contains recommendations, the trustee shall, within 14 days after receiving it, send the Ombudsman a written response indicating	We think that the timelines in PHIA and FIPPA should be consistent with each other.
(a) that the trustee accepts the recommendations and describing any action the trustee has taken or proposes to take to implement them; or	
(b) the reasons why the trustee refuses to take action to implement the recommendations.	Trustees may accept some recommendations and not others. We suggest this section be changed from "the recommendations" to "any recommendation."
Notice to the complainant 48(5) The Ombudsman shall notify the complainant of the trustee's response without delay. In the case of a complaint about access relating to a trustee's refusal to permit the complainant to examine or receive a copy of personal health information, the Ombudsman shall also inform the complainant that he or she may appeal the trustee's decision to the court under section 49 and of the time limit for an appeal.	

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<p>Compliance with recommendations 48(6) When a trustee accepts the recommendations in a report, the trustee shall comply with the recommendations within 15 days of acceptance, or within such additional period as the Ombudsman considers reasonable.</p>	
APPEAL TO COURT	
<p>Appeal to court for access to record 49(1) If a trustee has refused to permit an individual to examine or receive a copy of personal health information following a request made in accordance with Part 2, the individual may appeal the decision to the court.</p>	
<p>Appeal only if complaint has been made 49(2) An appeal may be made under subsection (1) only if the person has made a complaint about access to the Ombudsman and the Ombudsman has provided a report under section 48.</p>	<p>For consistency with the revised section 47 Appeal only if complaint has been made 49(2) An appeal may be made under subsection (1) only if the person has made a complaint about access to the Ombudsman and the Ombudsman has provided a reported under section 48.</p>
<p>Appeal within 30 days 49(3) An appeal may be made by filing an application with the court within 30 days after the person receives the Ombudsman's report under subsection 48(1) or a notice under subsection 48(5), or within such longer period as the court may allow in special circumstances.</p>	<p>It is our suggestion that our office would be notifying complainants in writing of their right to appeal. Appeal within 30 days 49(3) An appeal may be made by filing an application with the court within 30 days after person receives the Ombudsman's report provides notice to the person under subsection 48(1) 48(3) or a notice under subsection 48(5), or within such longer period as the court may allow in special circumstances.</p>
<p>Trustee to be named as respondent 49(4) The application must name the trustee involved in the complaint as the respondent.</p>	
<p>Appeal served on trustee and Ombudsman 49(5) The person appealing shall, within 15 days after filing the application, serve a copy of it on</p>	
<p>(a) the trustee concerned; and</p>	
<p>(b) the Ombudsman.</p>	
<p>Appeal by the Ombudsman 50(1) The Ombudsman may appeal a decision described in subsection 49(1) to the court within the time limit set by subsection 49(3), if the Ombudsman has obtained the consent of the person who has the right of appeal.</p>	
<p>Ombudsman may intervene 50(2) The Ombudsman has a right to intervene as a party to an appeal under section 49.</p>	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Appeal served on trustee 50(3) Within 15 days after filing an application for appeal, the Ombudsman shall serve a copy of it on the trustee concerned.</p>	
<p>Expeditious appeal 51 The court may hear evidence by affidavit and may decide the appeal in an expeditious manner.</p>	
<p>Burden of proof 52 On an appeal, it is up to the trustee to prove that the refusal to permit the applicant to examine and receive a copy of his or her personal health information is justified.</p>	
<p>Court may order production of records 53 Despite any other enactment of Manitoba or any privilege of the law of evidence, for the purpose of an appeal, the court may order production of any record maintained by a trustee that is relevant to the appeal for examination by the court.</p>	
<p>Court to take precautions against disclosing 54 On an appeal, the court shall take every reasonable precaution, including receiving representations ex parte, conducting hearings in private and examining records in private, to avoid disclosure of personal health information.</p>	
<p>Powers of court on appeal 55 On hearing an appeal, the court may</p>	
<p>(a) dismiss the appeal if it determines that the trustee was justified in refusing to permit the applicant to examine or receive a copy of his or her personal health information under section 11; or</p>	
<p>(b) if it determines that the trustee was not justified in refusing to permit the applicant to examine or copy all or part of his or her personal health information under section 11,</p>	
<p>(i) order the trustee to permit the applicant to examine and copy all or part of the information, and</p>	
<p>(ii) make any other order that the court considers appropriate.</p>	
<p>No further appeal except with leave 56 Except with leave of The Court of Appeal, a decision of the court under section 55 is final and binding and there is no appeal from it.</p>	
<p>PART 6</p>	
<p>GENERAL PROVISIONS</p>	<p>The Act should require an annual report be published related to the administration of the legislation.</p>

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Privacy officer for facility and agency 57 A health care facility and a health services agency shall designate one or more of its employees as a privacy officer whose responsibilities include</p>	
<p>(a) dealing with requests from individuals who wish to examine and copy or to correct personal health information under this Act; and</p>	
<p>(b) generally facilitating the trustee's compliance with this Act.</p>	
<p>Role for head of public body 58(1) Where a trustee is a public body, any decision to be made or opinion formed under this Act by the trustee may be made or formed by the head of the public body as defined in <i>The Freedom of Information and Protection of Privacy Act</i>.</p>	
<p>Delegation by head of public body 58(2) The head of a public body may delegate to any person on the staff of the public body any responsibility referred to in subsection (1).</p>	
<p>Health information privacy committee 59(1) For the purpose of approving health research projects under section 24, the minister shall establish a health information privacy committee in accordance with the regulations.</p>	
<p>Public representation 59(2) At least 1/4 of the persons appointed to the health information privacy committee must be public representatives who are not health professionals or persons who conduct health research or employees of the government.</p>	
<p>Responsibilities 59(3) In addition to its responsibilities under section 24, the health information privacy committee may perform any other functions assigned to it by the minister.</p>	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Exercising rights of another person 60 The rights of an individual under this Act may be exercised</p>	<p>There is a gap in the legislation where an individual becomes incapacitated and there is no one who fits the criteria set out in this section to act on their behalf. We recognize this to be problematic for trustees and would suggest incorporating an expanded nearest relative concept from <i>The Mental Health Act</i> that could also include wording such as that in section 23(1) of PHIA:</p> <ul style="list-style-type: none"> ▪ anyone with whom the individual is known to have a close personal relationship [23(1)], and ▪ include a statement recognising that so long as the trustee reasonably believes it would “be acceptable to the individual” the information is about. [23(1)(c)] <p><i>The Mental Health Act</i> defines nearest relative as follows:</p> <p>nearest relative means, with respect to a patient or other person, (a) the adult person listed first in the following clauses, relatives of the whole blood being preferred to relatives of the same description of the half-blood and the elder or eldest of two or more relatives described in any clause being preferred to the other of those relatives, regardless of gender:</p> <ul style="list-style-type: none"> (i) spouse or common-law partner, (ii) son or daughter, (iii) father or mother, (iv) brother or sister, (v) grandfather or grandmother, (vi) grandson or granddaughter, (vii) uncle or aunt, (viii) nephew or niece, or <p>(b) the Public Trustee, if there is no nearest relative within any description in clause (a) who is apparently mentally competent and available</p>
(a) by any person with written authorization from the individual to act on the individual's behalf;	
(b) by a proxy appointed by the individual under <i>The Health Care Directives Act</i> ;	
(c) by a committee appointed for the individual under <i>The Mental Health Act</i> if the committee has the power to make health care decisions on the individual's behalf;	
(d) by a substitute decision maker for personal care appointed for the individual under <i>The Vulnerable Persons Living with a Mental Disability Act</i> if the exercise of the right relates to the powers and duties of the substitute decision maker;	
(e) by the parent or guardian of an individual who is a minor, if the minor does not have the capacity to make health care decisions; or	For greater clarity, we would suggest this section be amended to indicate that a parent of a deceased minor can exercise the rights of the deceased child under PHIA.

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
	(e) by the parent or guardian of an individual who is a minor, if the minor does not have the capacity to make health care decisions <i>or is deceased</i> ; or
(f) if the individual is deceased, by his or her personal representative.	
<p>Information deemed to be maintained by trustees 61(1) Information that is maintained by an officer, employee or member of a trustee in that person's capacity as such is deemed to be maintained by the trustee for the purposes of this Act.</p>	
<p>Actions by employees 61(2) Any action done by, or information disclosed to, a person employed by or in the service of a trustee in the performance of that person's duties is deemed to have been done by, or disclosed to, the trustee for the purposes of this Act.</p>	
<p>Protection from liability 62 No action lies and no proceeding may be brought against the government or a trustee or any person acting for or under the direction of the government or a trustee for damages resulting from the use or disclosure of personal health information in circumstances where the government or the trustee or other person reasonably believed that the use or disclosure was authorized under this Act.</p>	
<p>Offences 63(1) Any person who</p>	
(a) wilfully makes a false statement to, or misleads or attempts to mislead, the Ombudsman or another person in the performance of the duties and powers of the Ombudsman;	
(b) wilfully obstructs the Ombudsman, or any person acting for or under the direction of the Ombudsman, in any manner;	
(c) wilfully destroys or erases personal health information with the intent to evade an individual's request to examine or copy the information;	
(d) obtains another person's personal health information by falsely representing that he or she is entitled to the information; or	
(e) requires production of or collects or uses another person's PHIN contrary to section 26;	
is guilty of an offence.	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
<p>Offence by employee 63(2) Despite subsection 61(2), a person who is an employee of a trustee or information manager who, without the authorization of the trustee or information manager, willfully discloses personal health information in circumstances where the trustee or information manager would not be permitted to disclose the information under this Act, is guilty of an offence.</p>	<p>We are aware that there is a unique employment relationship between physicians, the Regional Health Authorities and various health care facilities. We understand that doctors 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, we would suggest expanding section 63(2) to include “agents” of the trustee.</p>
<p>Offences by trustees and information managers 63(3) A trustee or information manager who</p>	
<p>(a) collects, uses, sells or discloses personal health information contrary to this Act;</p>	
<p>(b) fails to protect personal health information in a secure manner as required by this Act; or</p>	
<p>(c) discloses personal health information contrary to this Act with the intent to obtain a monetary or other material benefit or to confer such a benefit on a trustee or other person;</p>	
<p>is guilty of an offence.</p>	
<p>Due diligence defence 63(4) No trustee or information manager shall be found to have contravened clause (3)(a) or (b) if the trustee or information manager can establish that he or she took all reasonable steps to prevent the contravention.</p>	
<p>Continuing offence 63(5) When a contravention of this Act continues for more than one day, the person is guilty of a separate offence for each day the contravention continues.</p>	
<p>Prosecution within two years 63(6) A prosecution under this Act may be commenced not later than two years after the commission of the alleged offence.</p>	<p>It may take some time before an individual or our office becomes aware of an alleged offence. This being the case, we suggest the following amendment.</p> <p>Prosecution within two years 63(6) A prosecution under this Act may be commenced not later than two years after <i>discovery that</i> the commission of the alleged offence <i>was committed</i>.</p>
<p>Penalty 64(1) A person who is guilty of an offence under section 63 is liable on summary conviction to a fine of not more than \$50,000.</p>	
<p>Directors and officers of corporations 64(2) When a corporation is guilty of an offence, a director or officer of the corporation who authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary</p>	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
conviction to a fine of not more than \$50,000.	
<p>Defence under other enactments 65(1) No person is guilty of an offence or subject to disciplinary action of any kind under any other enactment by reason of complying with a request or requirement to produce a record or provide information or evidence to the Ombudsman, or a person acting for or under the direction of the Ombudsman, under this Act.</p>	
<p>No adverse employment action 65(2) No trustee or person acting on behalf of a trustee shall take any adverse employment action against an employee because the employee has complied with a request or requirement to produce a record or provide information or evidence to the Ombudsman, or a person acting for or under the direction of the Ombudsman, under this Act.</p>	<p>For consistency with revised section 29(2)</p> <p>No adverse employment action 65(2) No trustee or person acting on behalf of a trustee shall take any adverse employment action shall be taken against an employee individual because the employee individual has complied with a request or requirement to produce a record or provide information or evidence to the Ombudsman, or a person acting for or under the direction of the Ombudsman, under this Act.</p>
<p>Regulations 66(1) The Lieutenant Governor in Council may make regulations</p>	
(a) designating facilities for the purpose of the definition "health care facility" in section 1;	
(b) designating classes of persons as health professionals for the purpose of the definition "health professional" in section 1;	
(c) respecting the maximum fees that trustees may charge for the examination and copying of personal health information, including providing for circumstances in which fees may be waived;	For greater certainty, this regulation should be enacted. 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 related to fees.
(d) requiring trustees to provide notice to individuals about	Individuals are not always sure of <u>all</u> information practices of trustees. For transparency, this regulation should be enacted.
(i) the right to examine and copy and to correct personal health information, and	
(ii) the practices of the trustee respecting the collection, use, retention and disclosure of personal health information,	
and providing for the form and content of such notices;	
(e) respecting the giving of authorizations and consents by individuals under this Act;	
(f) for the purpose of section 17, governing policies of trustees concerning retention periods for personal health information and respecting the destruction of that information, and requiring the	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.

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
policies to be made available to the public;	
(g) requiring trustees to maintain a record of disclosures of personal health information made under this Act;	
(h) respecting security safeguards for personal health information that trustees must establish, including requirements for information held in electronic form;	
(i) specifying public bodies for the purpose of clause 22(2)(h);	
(j) respecting agreements for the purposes of subsections 24(4) and 25(3);	
(k) for the purpose of clause 26(2)(c), permitting the collection and use of a person's PHIN number for specified purposes or by specified persons or bodies;	
(l) governing the disclosure of personal health information to persons or bodies outside Manitoba;	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 personal health information.
(m) respecting the appointment of members of the health information privacy committee established under section 59 and governing the duties and functions of the committee and all related matters;	
(n) defining any word or expression used but not specifically defined in this Act;	
(o) respecting any other matter the Lieutenant Governor in Council considers necessary or advisable to carry out the intent of this Act.	
Application of regulations 66(2) A regulation under subsection (1) may be made to apply to particular classes of trustees or persons or to particular classes of personal health information.	
PART 7	
REVIEW AND COMING INTO FORCE	
Review of this Act 67 Within five years after this Act comes into force, the minister shall undertake a comprehensive review of the operation of the Act that involves public representations and shall, within one year after the review is undertaken or within such further time as the Legislative Assembly may allow, submit a report on the review to the Assembly.	Consideration should be given to periodically reviewing the Act.
C.C.S.M. reference 68 This Act may be referred to as chapter P33.5 of the Continuing Consolidation of the Statutes of Manitoba.	

THE PERSONAL HEALTH INFORMATION ACT	COMMENTS
Coming into force 69 This Act comes into force on a day fixed by proclamation.	
NOTE: S.M. 1997, c. 51 was proclaimed in force December 11, 1997.	

PERSONAL HEALTH INFORMATION Act -- REGULATION	COMMENTS
Regulation 245/97	
Registered December 11, 1997	
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SCHEDULE	
Definitions	
1 In this regulation,	
Act means <i>The Personal Health Information Act</i> ;	
agent , in relation to a trustee, includes,	
(a) if the trustee is a corporation, an officer or director of the corporation,	
and	
(b) a student or volunteer;	
removable electronic storage media includes diskettes, magnetic	
tape, CD ROMs, disk drives and laser disks;	
use , in relation to personal health information, includes processing,	
reproduction, transmission and transportation of information.	

PERSONAL HEALTH INFORMATION Act -- REGULATION	COMMENTS
<p>Regional health authorities are specified public bodies 1.1 Every regional health authority established or continued under <i>The Regional Health Authorities Act</i> is a specified public body for the purpose of clause 22(2)(h) of the Act.</p>	
<p>Designation of health professionals 1.2 The following classes of persons are designated as health professionals for the purpose of the Act:</p>	
<p>(a) persons registered or eligible for registration under <i>The Manitoba Institute of Registered Social Workers Incorporation Act</i>;</p>	
<p>(b) persons registered or eligible for registration under <i>The Manitoba Speech and Hearing Association Act</i>;</p>	
<p>(c) persons licensed to operate a business as a massage therapist under the City of Winnipeg Licence By-law No. 6551/95 or any other municipal by-law of similar intent;</p>	
<p>(d) persons certified or eligible for certification as orthotists by the Canadian Board of Certification of Prosthetists and Orthotists;</p>	
<p>(e) persons certified or eligible for certification as prosthetists by the Canadian Board of Certification of Prosthetists and Orthotists.</p>	
<p>Designation of health care facilities 1.3 The facilities set out in the Schedule are designated as health care facilities for the purpose of the Act.</p>	
<p>Written security policy and procedures 2 A trustee shall establish and comply with a written policy and procedures containing the following:</p>	
<p>(a) provisions for the security of personal health information during its collection, use, disclosure, storage, and destruction, including measures</p>	
<p>(i) to ensure the security of the personal health information when a record of the information is removed from a secure designated area, and</p>	
<p>(ii) to ensure the security of personal health information in electronic form when the computer hardware or removable electronic storage media on which it has been recorded is being disposed of or used for another purpose;</p>	
<p>(b) provisions for the recording of security breaches;</p>	
<p>(c) corrective procedures to address security breaches.</p>	
<p>Access restrictions and other precautions 3 A trustee shall</p>	

PERSONAL HEALTH INFORMATION Act -- REGULATION	COMMENTS
(a) ensure that personal health information is maintained in a designated area or areas and is subject to appropriate security safeguards;	
(b) limit physical access to designated areas containing personal health information to authorized persons;	
(c) take reasonable precautions to protect personal health information from fire, theft, vandalism, deterioration, accidental destruction or loss and other hazards; and	
(d) ensure that removable media used to record personal health information is stored securely when not in use.	
Additional safeguards for electronic health information systems 4(1) A trustee shall ensure every electronic information system that the trustee designs or acquires after December 11, 2000	
(a) produces an electronic record of every successful or unsuccessful attempt to	
(i) gain access to the personal health information maintained on the system, (ii) add to, delete or modify the personal health information maintained on the system; and	
(b) records every transmission of personal health information maintained on the system.	
4(2) A trustee shall regularly review the electronic records produced under subsection (1) to detect any security breaches.	
4(3) The requirements of this section only apply to an electronic information system used by a trustee to maintain personal health information.	
Authorized access for employees and agents 5 A trustee shall, for each of its employees and agents, determine the personal health information that he or she is authorized to access.	
Orientation and training for employees 6 A trustee shall provide orientation and ongoing training for its employees and agents, about the trustee's policies and procedures referred to in section 2.	
Pledge of confidentiality for employees 7 A trustee shall ensure that each employee and agent signs a pledge of confidentiality that includes an acknowledgment that he or she is bound by the policy and procedures referred to in section 2 and is aware of the consequences of breaching them.	

PERSONAL HEALTH INFORMATION Act -- REGULATION	COMMENTS
Audit 8.1(1) A trustee shall conduct an audit of its security safeguards at least every two years.	
8.1(2) If an audit identifies deficiencies in the trustee's security safeguards, the trustee shall take steps to correct the deficiencies as soon as practicable.	
Functions of the health information privacy committee 8.1(1) The health information privacy committee shall ensure that each request for approval of a health research project under section 24 of the Act includes the following information:	
(a) the purpose of the health research;	
(b) the name of the principal researcher or researchers responsible for the project, including any collaborating researchers if the project is multi-centre in scope;	
(c) the duration of the project, the date of commencement and the projected date it will conclude;	
(d) a detailed description of the personal health information required for the research;	
(e) a description of any possible linkage or merging of the personal health information with other information and the rationale for that linkage or merger;	
(f) whether the research project will require direct contact with individuals;	
(g) a description of the methods to be employed to maintain security of the personal health information, including disposal of the information;	
(h) the names of persons who will receive the project results, including any proposed submissions for publication;	
(i) identification of the sources and duration of publication; funding for the research project;	
(j) confirmation satisfactory to the committee that the research project has been approved by an institutional research review committee;	
(k) any additional information the committee considers necessary.	
8.1(2) After making a decision to grant or refuse to grant an approval, the committee shall advise the research applicant in writing of its decision.	
8.1(3) The committee may determine its own practice and procedure.	

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8.1(4) The minister shall provide the committee with clerical and administrative support, including the engaging of assistance for the committee, that the minister considers appropriate.	
8.1(5) The committee shall provide the minister with an annual report of its activities.	
Members of the health information privacy committee	
8.2(1) The health information privacy committee is to consist of not less than eight and not more than 12 members appointed by the minister.	
8.2(2) The minister shall appoint at least one representative from nominations received from each of the following:	
(a) the council of chairs of the regional health authorities;	
(b) The College of Physicians and Surgeons of Manitoba;	
(c) the College of Registered Nurses of Manitoba;	
(d) the Manitoba Pharmaceutical Association;	
(e) the Manitoba Health Records Association;	
(f) The University of Manitoba.	
8.2(3) Each committee member may sit for a period of no more than six years.	
8.2(4) The committee shall elect a chairperson from among its members.	
Research agreements	
8.3 An agreement between a trustee and a researcher under subsection 24(4) of the Act must be in writing and must adequately identify the research project for which approval is given.	
Coming into force	
9(1) This regulation comes into force on December 11, 1997.	
Time to comply: one year	
9(2) Notwithstanding subsection (1), a trustee shall comply with this regulation, except section 4, as soon as reasonably possible but not later than December 11, 1998.	
9(3) Repealed.	
SCHEDULE	
(Section 1.3)	

DESIGNATED HEALTH CARE FACILITIES

Aboriginal Health and Wellness Centre of Winnipeg, Inc.
 Beaver Air Services L.P.
 Behavioural Health Foundation Inc.
 Brandon Cardiac Reh-Fit — YMCA
 CFB Shilo Emergency Services
 Canadian Blood Services
 Centre de Santé
 Chemawawin First Nation Ambulance Service
 Clinique Youville Clinic Inc.
 Community Therapy Services Inc.
 Eden Residential Care Services Inc.
 Emerson Volunteer Ambulance Service
 Fisher Ambulance Service Ltd.
 Gilbert Plains Ambulance Service
 Hope Centre Health Care Incorporated
 Jocelyn House Inc.
 Keewatin Air
 Klinik, Inc.
 Laurel Centre Inc.
 MFL Occupational Health and Safety Centre Inc.
 Main Street Project Inc.
 Manitoba Cardiac Institute (Reh-Fit) Inc.
 Melita Ambulance Service
 Mount Carmel Clinic
 Native Addictions Council of Manitoba
 Neepawa & District Ambulance Service Ltd.
 Nine Circles Community Health Centre
 Norway House Cree Nation EMS
 Nor'West Co-op Health & Social Services Centre Inc.
 Perimeter AeroMed
 Pimichikimac Air Ltd.
 Pine Falls Ambulance Service
 Portage Emergency Medical Care Services
 Riverton Ambulance Service
 Rosaire House — The Pas
 St. Amant Centre Inc.
 Ste. Rose and District Ambulance Service
 Salvation Army Inc. — Anchorage Program
 Salvation Army Inc. — Brandon Crisis Stabilization/Mobile Crisis Unit
 Salvation Army Inc. — Interlake Crisis
 Stabilization/Mobile Crisis Unit
 Salvation Army Inc. — Winnipeg Crisis Stabilization Unit
 Salvation Army Inc. — Winnipeg Mobile Crisis Services
 Sarah Riel Inc. — Crisis Stabilization Unit
 SkyCare Air Ambulance

ELEMENTS OF CONSENT FOR PERSONAL HEALTH INFORMATION UNDER PHIA:

In offering the following elements of consent that should be addressed by a trustee of recorded personal health information about an identifiable individual, the Ombudsman's Office is not suggesting that there is a single consent form, activity or process by which informed consent may be obtained in the use or disclosure of personal health information.

Personal health information may only be collected, used or disclosed for purposes authorized under *The Personal Health Information Act*. Note that obtaining consent may not be employed as a means of collecting personal health information not otherwise authorized under the Act. There is no provision for consent in relation to the collection of personal health information from the individual the information is about, but this process is available for use and disclosure of personal health information lawfully collected. PHIA provides for the collection of personal health information from other sources in a limited number of circumstances, including when authorized by the individual.

Notwithstanding this, the limitation principle applies to the collection of personal health information as well as to its use and disclosure. In other words, every collection, use and disclosure must be limited to the minimum amount of personal health information necessary to meet the authorized purpose.

It is the duty of trustees to ensure that consent is obtained in a manner that is consistent with legislative provisions under *The Personal Health Information Act*. Under the legislation, consent may be required whenever personal health information is used by or disclosed to someone other than the individual the information is about.

We have put forward generic elements that could, in our opinion, be addressed in a flexible, reasonable, and effective manner so long as the process follows the law and the result is meaningful consent where it is required or sought. Addressing each of the elements of consent can contribute to ensuring that the trustee is providing the minimum amount of information through clear, specific and informed consent.

To ensure that the trustee will use and disclose the minimum amount of personal health information necessary to accomplish its purpose, the consent should be in writing and should address the following elements of consent:

- a. the specific personal health information to be used or disclosed;
- b. the identity of the person, organization or trustee that the personal health information may be used by or disclosed to;
- c. all the purposes for the use or disclosure;
- d. statement a from the trustee:
 - affirming that a third-party recipient will be instructed not to use or disclose the personal health information provided by the trustee, except for a purpose specified in the consent, and
 - specifying the subsequent disclosures, if any, that a third-party recipient will be instructed it is permitted to make;
- e. an acknowledgement that the consenting individual has been made aware of:
 - why the personal health information is needed, and
 - the risks and benefits to the individual of consenting or refusing to consent to the use or disclosure;
- f. the date the consent is effective, and the date the consent expires;
- g. a statement that the consent may be revoked or amended at any time.

To make our suggestion clear, we reiterate our opinion that a consent form need not articulate every one of these elements under all circumstances, but each of the components should have been carefully considered in the process of preparing such a form. While it is not our role to prescribe or approve a specific form in advance of its use, we would be pleased to discuss the suggested elements with you.

[July 2003]