

**2017 REVIEW OF  
THE PERSONAL HEALTH INFORMATION ACT (PHIA)  
COMMENTS FROM MANITOBA OMBUDSMAN**

Manitoba mbudsman

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## INTRODUCTION

Personal health information (PHI) is generally regarded as the most sensitive of types of information about individuals. The Personal Health Information Act (PHIA) recognizes that confidentiality of this information must be protected so that Manitobans are not afraid to seek health care or disclose sensitive information to their health-care providers. PHIA supports and facilitates a consistent approach to PHI as many persons other than health professionals now obtain, use and disclose PHI in different contexts and for different purposes.

PHIA provides Manitobans with important rights concerning their PHI. The right of access enables individuals to examine or obtain a copy of their PHI, or seek a correction of any PHI that is inaccurate or incomplete. PHIA provides a right to privacy by setting out rules that restrict how trustees collect, use, disclose, safeguard, retain and destroy PHI. The right of complaint to the ombudsman enables individuals to seek an independent review of how trustees have handled their PHI to ensure that access and privacy rights are respected and upheld.

PHIA, which came into effect on December 11, 1997, was the first law of its kind in Canada concerning access to, and privacy of, PHI. Most provinces and territories have since created health information laws.

PHIA requires that a comprehensive review of the operation of the act, which involves public representations, be conducted. Further to a public review of PHIA in 2004, the act was significantly amended in 2010 and 2011. Periodic reviews of PHIA are essential to examine if the law is operating as intended and to ensure that the law is updated.

Manitoba Health, Seniors and Active Living published a discussion paper, [\*A Review of The Personal Health Information Act: Tell Us What You Think\*](#), on March 29, 2017, which highlights and invites comments on various issues. Many of our office's comments about PHIA relate to issues raised in the discussion paper.

## 1. SCOPE OF PHIA

### TRUSTEES

#### Issue

PHIA applies to “trustees” as defined under this act who “collect or maintain” PHI. This includes health professionals and health-care facilities, in addition to other trustees. Health professionals employed by non-trustees collect, use and disclose PHI in the course of their employment, however the PHI seemingly is maintained by their employer, to which PHIA does not apply. The application of PHIA to PHI that was collected by a health professional on behalf of a non-trustee employer and which is maintained by the employer is unclear.

Pharmacists are trustees because they are defined as “health professionals” under PHIA. Although pharmacies are involved in providing health care and employ health professionals, pharmacies are not trustees.

#### Discussion

A trustee is defined in PHIA as follows:

**"trustee"** means a health professional, health care facility, public body, or health services agency that collects or maintains personal health information.

An individual’s right of access relates to a trustee that “maintains” the PHI:

#### **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.

To “maintain” a record requires the ability to exercise control over it:

**"maintain"**, in relation to personal health information, means to have custody or control of the information;

It is unclear whether a health professional who collects PHI on behalf of a non-trustee employer actually “maintains” the PHI. For example, a health professional may be employed by a private insurance company and may collect PHI in that capacity. However, the records would appear to be maintained by the company, not the health professional. If the employment relationship ends, the records would remain with the company, and this would be an indication that the company “maintains” the records, not the health professional. The definition of trustee, which includes a health professional who collects PHI (but does not maintain it) makes the applicability of PHIA unclear.

Additionally, pharmacies handle vast quantities of PHI that can reveal very sensitive information about medical diagnoses, conditions and treatments. Pharmacies provide health-care services, including prescriptions, health-care advice to individuals and immunizations.

Health professionals are trustees if they are self-employed (for example in private practice) or if they are employed by a non-trustee, such as a pharmacy. However, a pharmacy, rather than its pharmacists, may ultimately have control over the PHI maintained by the pharmacy, despite that it is not a trustee. As a trustee is responsible for policies and procedures and implementing security safeguards, it may be unclear as to who is ultimately responsible for the overall management of PHI maintained by a pharmacy and for compliance with PHIA.

For example, a pharmacy may implement an electronic system that pharmacists use to collect and maintain PHI. If the system does not have adequate security safeguards, it would not be possible to hold the pharmacy accountable for non-compliance with PHIA. However, it is unclear whether all the pharmacists using a system implemented by the pharmacy would be responsible for ensuring the system complies with PHIA.

In situations where a health-care facility such as a hospital employs health professionals, including pharmacists, the hospital is the trustee that maintains and has control of and accountability for the PHI it maintains. Employees and agents of a trustee, such as a facility, are bound by the requirements of PHIA. If a pharmacy is a trustee, pharmacy technicians would also be bound by PHIA as employees of the trustee.

Pharmacies are subject to the federal private sector privacy law, the Personal Information Protection and Electronic Documents Act (PIPEDA), but not Manitoba's PHIA. However, pharmacies are also subject to health information laws in other parts of Canada, including Saskatchewan, Yukon, Alberta, Ontario, Nova Scotia, and Newfoundland and Labrador.

### **Recommendation 1**

PHIA should make it clear whether or in what circumstances the act applies to PHI collected by health professionals employed by non-trustees.

Expand the definition of trustee to include a pharmacy, possibly as a "health care facility."

## **NON-APPLICATION OF PHIA**

### **Issue**

The discussion paper highlighted the issue that PHIA does not have a specific time frame for how long the act covers PHI. The paper noted that it is unclear whether PHI maintained in public archives can ever be released to members of the public and that exempting PHI from the application of PHIA after a period of time would support activities such as genealogical and historical research.

### **Discussion**

There is an important distinction between the non-application of PHIA to PHI after a defined period of time, and the discretion to make an authorized disclosure of PHI under PHIA after that period of time. Non-application would mean that after the time period has expired, no provisions of PHIA would apply. As PHIA would not apply, there would be no requirement for, or discretion by, a trustee to consider the type and sensitivity of the PHI in making it available to the public after the time period expires. In the

case of an authorized disclosure after a time period has expired, a trustee could exercise discretion about such disclosure.

The types of PHI held by trustees and degree of sensitivity of PHI can vary widely across services provided within a trustee organization, as well across various types of trustees. While many trustees provide health care, and would maintain PHI related to diagnosis and treatment of health conditions, some do not. For example, some public bodies may have PHI relating to individuals who may be receiving other types of services for which their PHI may be collected and used by the public body.

FIPPA does not apply to records acquired by the Archives of Manitoba or the archives of a public body from a person or entity other than a public body. However, with respect to other records to which FIPPA does apply and that do contain personal information, FIPPA permits the head of a public body or the archives of a public body to disclose personal information in a record that is more than 100 years old. This provision gives discretion to make a disclosure in such circumstances, however a public body is not required by the provision to do so.

## **Recommendation 2**

If PHIA is amended to permit PHI to be made available to the public after a specified time period, consideration should be given to enable trustees to have discretion to make such a disclosure, rather than an amendment to make PHIA no longer apply to the PHI. If there is an issue with respect to public access to records containing PHI held in an archive, this could be addressed in a separate provision that does not affect the privacy of PHI held by trustees in the health-care sector.

## 2. ACCESS TO PERSONAL HEALTH INFORMATION

### RIGHT OF ACCESS

#### Issue

PHIA provides an individual with a right of access and the language used in the act to describe access is to “examine” and “receive a copy” of PHI. Provisions in the act relating to access are not consistent and sometimes the phrase “to examine or receive a copy” is used and sometimes it is “to examine and receive a copy.” The latter phrase presumes that an individual will always ask to examine information, despite that the individual may not wish to do so and may only wish to receive a copy of it.

#### Discussion

When a provision relates to one individual, the use of “and” presumes that the individual has requested both to examine and receive a copy. It is unclear whether the intent was to enable an individual to request to examine or receive a copy, to always do both, or to have the choice of requesting to examine and/or receive a copy. Where a provision about access relates to multiple individuals, the use of “and” may not be an issue because to examine “and” receive a copy could include any of these scenarios just mentioned.

An individual may not wish to examine the information, but instead wish to receive a copy of it. However, the following provision suggests an individual always does both:

#### **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.

The requirement for a trustee in responding to a request for access also suggests the response address examination or both:

#### **Trustee's response**

**7(1)** In responding to a request, a trustee shall do one of the following:  
 (a) make the personal health information available for examination and provide a copy, if requested, to the individual;

The individual’s right and the trustee’s obligation to respond in a certain manner would be clearer if the above provisions referred to examine and/or receive a copy. The trustee’s response would then be to make the PHI “available for examination and/or provide a copy as requested.”

If an individual wishes only to have a copy, the wording in the act dealing with all matters that flow from a request should align with this scenario. With respect to an individual’s right of complaint, clause 39(1)(a) refers to a complaint about a refusal by the trustee to permit the individual to examine or receive a copy of PHI. Because an individual can complain about any decision of a trustee that relates to the access request, including the example in clause (a), an individual who asked to examine and receive a copy of PHI could complain about a trustee’s decision to refuse access to both aspects of the request.

Nevertheless, as the complaint process connects back to the individual's request and the trustee's decision about it, the language used throughout the act ought to be consistent.

Also, the wording used in the ombudsman's recommendation in clause 47(2)(a) states the ombudsman may recommend that the trustee permit the complainant to examine and receive a copy of their PHI. However, we have proposed deleting subsection 47(2) in our comments contained under the heading of Recommendations about Access and Privacy Complaints.

We note that subsection 48.1(2) relating to the ombudsman's request for a review by the adjudicator refers to a request to examine or receive a copy. This language is also used in reference to the adjudicator's order about access under clause 48.8(2)(a) and the individual's appeal to court under subsection 49(1).

### **Recommendation 3**

The provisions relating to access should ensure that it is clear that an individual may request only to receive a copy of PHI and the wording throughout the act dealing with all matters that flow from a request should align with this scenario. This could be addressed by using the phrase to examine "and/or" receive a copy.

## **ABANDONED REQUESTS**

### **Issue**

Further to making a request for access, an individual may decide not to pursue the request for various reasons. The discussion paper highlighted that PHIA does not set out any circumstances in which a trustee may consider a request to be abandoned.

### **Discussion**

PHIA requires a trustee to respond to an access request, however an individual may abandon an access process without advising the trustee that they are discontinuing their request. Despite that an individual may abandon a request, a trustee may be still obligated to provide a response to the request, as there is no provision in the act to release the trustee from the obligation to respond.

Under the Freedom of Information and Protection of Privacy Act (FIPPA), a request is considered to be abandoned when an individual does not respond to the public body within 30 days about a written estimate of fees for processing a request (by accepting and paying the fee or modifying the request to change the amount of the fee). However, there could be other circumstances in which requests may be abandoned, such as when clarification is needed from the individual about the access request in order to process it and no clarification is provided.

Alberta's Health Information Act sets out the following circumstances in which a request may be considered abandoned:

#### **Abandoned request**

9(1) Where a custodian contacts an applicant in writing respecting the applicant's request, including



- (a) seeking further information from the applicant that is necessary to process the request, or
  - (b) requesting the applicant to pay a fee or to agree to pay a fee,
- and the applicant fails to respond to the custodian, as requested by the custodian, within 30 days after being contacted, the custodian may, by notice in writing to the applicant, declare the request abandoned.

(2) A notice declaring a request abandoned must state that the applicant may ask for a review of that decision by the Commissioner.

The above provision provides a reasonable option, which may be exercised by a trustee in specified circumstances. It ensures accountability as the trustee must contact the individual in writing to seek further information or payment of a fee before a request can be considered to be abandoned. If the individual does not respond to the trustee within 30 days, the trustee may then consider the request to be abandoned. The trustee must provide written notice to the individual about the decision to declare the access request to be abandoned and it is important to include the obligation that the trustee inform the individual of the right of complaint to the ombudsman about that decision.

#### **Recommendation 4**

PHIA should permit a trustee to decide that a request has been abandoned based on specified circumstances, such as when the individual does not provide necessary clarification about their request or accept or pay a fee. The trustee should provide notice of this decision in writing to the individual, explain the reason for the decision, and inform the individual of the right of complaint about the decision.

## **DISREGARDING REQUESTS**

### **Issue**

The right to make requests for access could have the potential to be exercised in a manner that may be considered to be abusive of the access process or may be exercised for purposes other than with the intent of obtaining access to PHI. In such circumstances, although rare, a trustee does not have the ability to disregard or refuse a request. The discussion paper highlighted that PHIA does not set out any circumstances in which a trustee may disregard a request for access.

### **Discussion**

Manitoba's FIPPA permits a public body to disregard a request in certain circumstances. There is a requirement to inform the individual in writing of this decision to refuse access, provide reasons for it and inform the requester of the right of complaint about it.

Both FIPPA and PHIA require that every reasonable effort be made to assist an individual making a request and to respond without delay, openly, accurately and completely. In light of this mandatory duty to assist, a decision to disregard a request should be made only in exceptional and justifiable circumstances.

Some health information laws in Canada permit access requests to be disregarded or refused on the basis that the requests are frivolous or vexatious or an abuse of the right of access. For example, in Nova Scotia, an access request may be refused, as follows:

- 81 (1) Where a custodian believes on reasonable grounds that a request for access
- (a) is frivolous or vexatious; or
  - (b) is part of a pattern of conduct that amounts to an abuse of the right of access,
- the custodian may refuse to grant the request.

As is the case under FIPPA, there should be a requirement to inform the individual of this decision in writing and provide reasons for it, as well as inform the individual of the right of complaint about that decision.

### **Recommendation 5**

PHIA should permit a trustee to refuse a request in specified circumstances, such as if the request is frivolous or vexatious or is part of a pattern of conduct that amounts to an abuse of the right of access. The trustee should provide written notice of this decision to the individual, explain the reason for the decision, and inform the individual of the right of complaint to the ombudsman about the decision.

## **EXTENSION OF TIME LIMIT**

### **Issue**

PHIA requires trustees to respond as promptly as required in the circumstances of a request, but not later than the time limits specified in the act. The discussion paper highlighted the issue that PHIA does not permit a trustee to extend a time limit for responding to an individual's request for access.

### **Discussion**

PHIA was previously amended to create shorter response times when a hospital in-patient requests access to PHI about care currently being provided (response within 24 hours) and when an individual who is not a hospital in-patient requests access to PHI about care currently being provided (response within 72 hours). In such circumstances, as the PHI would relate to current care, access to the information would inform the individual about that care and may enable the individual to make better informed decisions about that care. We are not aware of specific issues or concerns for individuals or trustees relating to these shorter time limits.

In all other circumstances, a response must be made within 30 days. Such requests could relate to previous care provided, possibly many years ago, and may also involve large volumes of records. Sometimes requests for records of previous care may be in storage or may otherwise require time to locate. These requests may also require time for clarification with the individual about the specific time frame in which the care occurred or specific health issue the request relates to, before a request can be processed.

In these circumstances, we believe there should be an ability for a trustee to extend the 30-day time limit. FIPPA permits an extension of up to an additional 30 days, or a longer period if the ombudsman agrees, in certain circumstances. These include when the request does not give enough detail to identify

a requested record, or when a large number of records is requested or must be searched and responding within the time period would interfere unreasonably with the operations of the public body, or when time is needed to consult with a third party or another public body before deciding whether or not to grant access to a record. FIPPA requires that written notice of the extension be provided to the requester indicating the reason for the extension, when a response can be expected, and that a complaint can be made to the ombudsman about the extension.

Other health information laws in Canada set out a 30-day time limit for responding and permit that time limit to be extended in specified circumstances. The discussion paper references Alberta's Health Information Act, which permits a trustee to extend the time limit in circumstances similar to Manitoba's FIPPA. Saskatchewan's Health Information Protection Act also contains language that may be useful in describing the circumstances in which an extension may be taken.

### **Recommendation 6**

PHIA should permit an extension of 30-day time limit for responding in specified circumstances and provided that the trustee gives written notice of the extension to the individual indicating the reason for the extension, when a response can be expected, and that a complaint can be made to the ombudsman about the extension.

A combination of wording from FIPPA and from health information laws in Alberta and Saskatchewan may be useful, such as:

#### **Extending the 30-day time limit for responding**

The trustee may extend the 30-day time limit in clause 6(1)(c) for responding to a request for up to an additional 30 days, or for a longer period if the Ombudsman agrees, if

- (a) the request does not give enough detail to enable the trustee to identify a requested record;
- (b) a large number of records is requested or must be searched, and responding within the original time period would interfere unreasonably with the operations of the trustee;
- (c) consultations that are necessary to respond to the request cannot reasonably be completed within the original time period.

#### **Notice of extension to individual**

If the time is extended under subsection (X), the trustee shall send a written notice to the individual setting out

- (a) the reason for the extension;
- (b) when a response can be expected; and
- (c) that the individual may make a complaint to the Ombudsman about the extension.

## **FEES**

### **Issue**

PHIA permits a trustee to 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." The discussion paper highlighted the issue that PHIA does not set out any parameters for a

trustee's fees to process an access request. As there is no regulation concerning fees, determining reasonableness can be challenging.

## **Discussion**

Our office has examined fees charged by trustees in the context of complaints from individuals contesting the fees. Some trustees have set up a flat rate administration fee in efforts to apply fees in a consistent manner. However, applying the same administration fee to all requests can seem unfair to individuals whose requests involve one or few records, as it is not reflective of time spent on, or costs associated with, processing their requests.

In the absence of a fee structure under PHIA, fees charged by private sector health professionals may be higher than those charged in the public sector. In some cases, health professionals have included their time in processing a request within the fee, such as time spent reviewing a record to ensure it can be released in its entirety. It can be difficult to establish that such a fee is unreasonable. However, under FIPPA the time spent reviewing a record to determine whether all information can be released cannot be charged to the requester.

We have encountered cases where trustees that are also public bodies under FIPPA have charged the same amount of fees set out in FIPPA for access requests made under PHIA. Despite that public bodies could potentially charge higher but still "reasonable" fees under PHIA, it would seem unfair to individuals for a public body to charge a higher fee for access to their PHI under PHIA compared to access to their personal information under FIPPA.

The Access and Privacy Regulation under FIPPA provides a fee structure for charging for certain aspects of processing a request, including time for search and preparation of the records, computer programming or data processing and copying fees. For example, a requester is given two free hours of search and preparation time, after which the cost is \$15 for each half-hour of time. For providing a photocopy or a print out of records, a fee is set at 20 cents per page. FIPPA also specifies matters for which a fee cannot be charged.

Some health information laws in Canada do set out a fee schedule. For example, the regulation under New Brunswick's Personal Health Information Privacy and Access Act specifies the following fees:

### **Search and preparation fees**

9(1) An individual shall pay a search and preparation fee to a custodian if the custodian estimates that search and preparation related to the individual's request to examine or receive a copy of the individual's personal health information takes more than 2 hours.

9(2) The fee payable for search and preparation shall be \$15 for each half-hour beyond the first 2 hours of search and preparation related to the individual's request.

### **Copying fees**

10 An individual shall pay the following copying fees to the custodian when the individual makes a request to examine or receive a copy of the individual's personal health information:

(a) if the information in relation to the request is stored or recorded in printed form and able to be copied using a photocopier or computer printer, 25 cents for each page copied;

(b) if the information in relation to the request is not able to be copied using a photocopier or computer printer, the actual cost of providing copies of the request.

#### **Computer programming and data processing fees**

11 If a custodian requires the use of computer programming or incurs data processing costs in responding to a request to examine or receive a copy of an individual's personal health information, the individual shall pay to the custodian

- (a) ten dollars for each 15 minutes of internal programming or data processing; or
- (b) the actual cost of external programming or data processing incurred by the custodian.

#### **Mail and courier delivery**

12(1) No fee shall be payable by an individual to a custodian for mailing a request to examine or receive a copy of his or her personal health information by regular mail.

12(2) If courier delivery costs are necessary in responding to a request to examine or receive a copy of an individual's personal health information, the custodian may charge to the individual the actual cost of the courier delivery.

The above is very similar to the fees under Manitoba's FIPPA. FIPPA does require a public body to provide a written estimate of search and preparation costs to the requester in advance. This enables the requester to consider whether they wish to modify the request to reduce the fee, or make a complaint about the fee if they believe it to be too high in the circumstances of the request.

FIPPA and the above provisions from New Brunswick offer a model that could be adapted for PHIA. Having a fee structure, regardless of what the specific costs are set at under PHIA, would enhance consistency and fairness for requests made to all trustees. Alternatively, PHIA could set a maximum limit of the amount of fees.

Trustees should not be obligated to charge fees. However, if trustees charge for search and preparation of records, and are required to provide a written fee estimate, there should also be a requirement to inform the individual of a right of complaint to the ombudsman about the fee.

#### **Recommendation 7**

PHIA should set some limits concerning fees, by adding a fee schedule or setting out maximum fees. If a trustee is required to provide a written estimate of search and preparation fees, the trustee should be required to inform the individual of a right of complaint about the fee.

### **FEE WAIVERS**

#### **Issue**

PHIA does not include a provision for waiving fees for providing access. While PHIA does not prevent a trustee from waiving part or all of a fee, it also does not require a trustee to consider an individual's request to waive a fee. As the act is silent on this issue, an individual may be reluctant to ask a trustee to waive a fee. Further, a fee imposed by a trustee may be an impediment to access for individuals who cannot afford to pay it.

## Discussion

The absence of a provision relating to fee waivers results in there being no basis on which an individual should reasonably expect to have a fee waived, and no parameters within which a trustee ought to waive a fee.

FIPPA expressly permits fee waivers in certain circumstances including when payment of the fee would impose an unreasonable financial hardship on the requester or when the request is for personal information and waiving the fees would be reasonable and fair in the circumstances. We have encountered cases where trustees have waived part or all of the fee after a complaint was made about the fee, despite that PHIA does not have requirements or a process for fee waivers.

As noted in the discussion paper, other laws set out rules for waiving fees for access. The basis for waiving a fee under the health information law in Nova Scotia gives reasonable discretion to a trustee and would be fair to an individual, as follows:

82(3) A custodian has the discretion to determine whether to grant a fee waiver and may waive the payment of all or any part of the fee that an individual is required to pay under that subsection if, in the custodian's opinion, the individual cannot afford the payment or for any other reason it is fair to excuse payment.

If an individual requests a fee waiver and the trustee refuses to waive the fee as requested, the trustee should be required to inform the individual of the right of complaint about the fee waiver decision.

## Recommendation 8

PHIA should include a fee waiver provision providing discretion to waive payment of all or part of the fee if, in the trustee's opinion, the individual cannot afford the payment or for any other reason it is fair to waive payment. A trustee should be required to inform the individual of the right of complaint to the ombudsman about a decision not to waive the fee as requested.

## INFORMING INDIVIDUALS OF RIGHT OF COMPLAINT

### Issue

PHIA requires trustees to inform individuals who have requested access of their right of complaint to the ombudsman in certain circumstances. There is no such requirement when access is not provided on the basis that the requested PHI does not exist or cannot be found, and individuals may not be aware that they have a right to an independent review of the trustee's decision.

### Discussion

Individuals who have made a request for access to their PHI have a right of complaint to our office about any decision, act or failure to act by a trustee that relates to their request. It is important that when trustees are writing to inform individuals that access is not being provided, for any reason, that individuals be made aware that they have a right to an independent review of the trustee's decision. Under FIPPA, a public body is required to inform an individual of a right of complaint if the requested information does not exist or cannot be found.

## Recommendation 9

PHIA should require that when a trustee informs the individual that the requested PHI does not exist or cannot be found, the trustee must also inform of the right of complaint to the ombudsman about this decision.

## EXCEPTIONS TO ACCESS

### Issue

PHIA does not permit a trustee to refuse access to PHI on the basis that it is contained within standardized diagnostic tests, such as certain psychological tests. This is problematic when disclosure of the PHI contained in such tests could subsequently harm the future effectiveness of such tests.

### Discussion

We investigated a complaint about a refusal to provide a copy of records that included psychological tests administered to the complainant by a health professional. Some of the tests were publicly available online, so any person could have access to the questions. Other tests were standardized diagnostic tests to which access was tightly controlled to ensure the ongoing effectiveness of the tests and reliability of the test results.

FIPPA has an exception in section 29 permitting access to be refused to information in testing materials and procedures where release of that information could reasonably be expected to prejudice the use or results of such tests. Alberta's health information law contains a provision similar to section 29 of Manitoba's FIPPA.

PHIA should permit a trustee to refuse to provide a copy of standardized diagnostic tests or assessments containing PHI where release of the information could reasonably be expected to prejudice the use or results of the tests. Ensuring that copies of such tests are not disclosed or put in the public domain is important in protecting the ongoing effectiveness of regulated tests and the reliability of the results.

However, as the tests contain an individual's PHI and providing access to it by permitting *examination* of the records would not be expected to prejudice the future use or reliability of the tests, this would be a reasonable way to provide access and protect the ongoing use of such test. An individual should be entitled to access their PHI through examination of the records with the trustee, or alternatively the trustee should facilitate this form of access with another practitioner familiar with such tests.

## Recommendation 10

Include an additional exception to permit a trustee to refuse to provide a copy of PHI in standardized diagnostic tests or assessments used by a trustee, including intelligence tests, if disclosure of the information could reasonably be expected to prejudice the use or results of the particular diagnostic tests or assessments. However, a trustee should be required to permit the individual to examine this information with the trustee, or alternatively the trustee should facilitate this form of access with another practitioner familiar with such tests.

## CORRECTION OF PERSONAL HEALTH INFORMATION

### Issue

Under PHIA, individuals have a right to request a correction to their PHI for purposes of accuracy or completeness. The discussion paper notes that PHIA does not set out specific circumstances in which a trustee may refuse to make a correction. Additionally, there is no requirement for a trustee to inform an individual in writing when the trustee makes a requested correction or when the trustee informs the individual that the PHI no longer exists or cannot be found.

### Discussion

The inclusion of a provision specifying the circumstances in which a trustee may refuse to make a requested correction could assist in clarifying a trustee's obligation to correct the PHI, except in those specified circumstances. This would also clarify for individuals their obligation to provide information to satisfactorily demonstrate that the PHI is inaccurate or incomplete. It would also be useful to clarify for trustees and individuals that it is reasonable for a trustee to refuse to correct a professional opinion or observation that the trustee believes is accurate.

The provisions of Ontario's health information law, to which the paper refers, would provide an appropriate balance between the individual's and the trustee's obligations. That law sets out a duty to correct PHI when the individual demonstrates, to the satisfaction of the trustee, that the record is incomplete or inaccurate and the individual gives the trustee the information necessary to enable the trustee to correct the record. It also sets out the exceptions to the duty to correct the PHI, and provides circumstances in which a trustee may refuse to make a correction, as follows:

- The information consists of a professional opinion or observation that a trustee has made in good faith about the individual.
- The information was not originally created by the trustee and the trustee does not have sufficient knowledge, expertise and authority to correct the information.
- The trustee believes on reasonable grounds that the request is frivolous, vexatious or made in bad faith.

There is no requirement for a trustee to inform an individual that the trustee agrees to make or has made a requested correction. Also, although an individual must make a request for correction in writing, a trustee's response informing the individual that the PHI no longer exists or cannot be found, is not required to be in writing. We believe that a trustee's response to the request for correction in both of these circumstances should be in writing.

### Recommendation 11

PHIA should set out the circumstances in which a trustee may refuse to correct PHI. This could be done by setting out the duty of a trustee to correct PHI and including exceptions to this duty, similar to the circumstances in Ontario's health information law.



There should be a requirement for a trustee to inform an individual in writing when the trustee makes a requested correction or when the trustee informs the individual that the PHI no longer exists or cannot be found.

## **REPRESENTATIVE**

### **Issue**

PHIA identifies certain representatives who can exercise the information rights of the individual under the act. The discussion paper raises an issue that a person with a power of attorney is not recognized as a representative, although they may need access to PHI in order to arrange payment for health services on behalf of the individual or to prepare a tax return in which the individual may qualify for certain medically related tax benefits.

### **Discussion**

PHIA confers various rights to individuals, including the right of access to any or all of their PHI, the right to request correction of it, and the right of complaint to the ombudsman about any matter relating to an access or correction request, or about privacy matters. A person who has a power of attorney performs various financial-related duties on behalf of an individual and may need access to certain PHI to perform those duties. For example, it would be to the benefit of the individual if the person who is acting under a power of attorney obtains the PHI necessary to pay for specific health services for the individual. However, a person performing those duties would not need to exercise the individual's broad right of access because only PHI directly relevant to those purposes would be required.

Alberta's health information law provides a model that could be useful to follow. It enables a right of the individual to be exercised by a person who has been granted the power of attorney by the individual, if the exercise of the right relates to the powers and duties conferred by the power of attorney.

### **Recommendation 12**

Expand the list of representatives to include a person who has been granted the power of attorney by the individual, and restrict the exercise of the right to those matters relating to the powers and duties conferred by the power of attorney, similar to Alberta's health information law.

### 3. PROTECTION OF PRIVACY

#### USE FOR TRAINING PURPOSES

##### Issue

An issue raised in the discussion paper is that PHIA does not have a provision that specifically authorizes the use of PHI without consent of the individual for the training of staff and students, and it was noted that hospitals have extensive training programs for students who are studying in a health-care field at an educational institution.

##### Discussion

PHIA permits PHI to be used for the purpose for which the information was collected or for a consistent purpose. When a trustee collects PHI to provide an individual with health care, the trustee is authorized to use the PHI for that purpose or a purpose directly related to it. A directly related purpose would include sharing an individual's PHI with students or staff in the course of training them how to provide health care to that individual.

Authorizing the use of PHI broadly for training purposes could expose the information to people who do not need to know it, if training could reasonably be accomplished without the use of PHI. In some circumstances it may be convenient to use PHI, rather than necessary. Some training would not require the use of actual PHI and de-identified health information would be sufficient for training purposes. For example, training on care procedures on how to safely lift or transfer patients may not require any PHI to be shared, while training on how to lift a specific patient with specific needs would reasonably require some PHI to be shared.

PHI should only be shared when health information about identifiable individuals is necessary for the specific training purpose.

##### Recommendation 13

PHIA should be amended to clarify for trustees that PHI can be used for training purposes with students and staff when the sharing of health information about an identifiable individual is necessary for the specific training purpose.

#### USE FOR EMPLOYMENT PURPOSES

##### Issue

Some trustees maintain PHI of their employees that was collected in the course of providing health care to them. For example, an employee of a hospital may have also been a patient in the facility at some point in the past. The discussion paper raised the issue of whether PHIA should be amended to clarify that express consent is required before using PHI of an employee or prospective employee for any purpose related to employment, unless it was originally collected for that purpose.

## Discussion

In circumstances where a trustee is both the employer of, as well as the health-care provider to, its employees, it could be helpful to clarify that the employee's express consent is required in order for the trustee to use the PHI collected for a health-care purpose for an employment purpose. Citizens receiving health-care services from a trustee with whom they are employed, should have the same privacy protection as any other citizens employed elsewhere. This protection should ensure that PHI relating to their care cannot subsequently be used for employment purposes, unless the individual gives consent.

The paper referenced a proposed amendment to Saskatchewan's health information law, made by the information and privacy commissioner, to make it clear that express consent of the individual is required for a trustee to use PHI of an individual who is an employee or prospective employee for an employment purpose.

## Recommendation 14

Include a provision to clarify that a trustee must obtain express consent from an individual who is an employee or prospective employee, to use the individual's PHI collected for a health-care purpose, for an employment purpose.

## DISCLOSURE TO PREVENT OR LESSEN A SERIOUS AND IMMEDIATE THREAT

### Issue

One of the circumstances under PHIA in which a trustee is authorized to disclose PHI without consent is if the trustee reasonably believes that the disclosure is necessary to prevent or lessen a serious and immediate threat to the health or safety of the individual the information is about or another individual. The discussion paper raises the issue of whether the threshold of "serious and immediate" is too restrictive.

### Discussion

The provision of PHIA referenced in the paper, clause 22(2)(b), permits a trustee to disclose:

#### **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

(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 health or safety of the individual the information is about or another individual,  
or

(ii) public health or public safety;

At issue is the requirement for the serious threat to also be immediate, which may be difficult for a trustee to determine in some circumstances. This could inhibit a disclosure based on serious health or safety concerns about an individual, if a trustee cannot reasonably conclude that the threat is immediate.

The paper notes that the Protecting Children (Information Sharing) Act includes amendments to PHIA that will permit disclosure of PHI of minors or adults if necessary to “prevent or lessen a risk of harm to the health or safety of a minor.” In comparison to PHIA, the threshold in FIPPA is lower and FIPPA permits a public body to disclose personal information without consent “where necessary to protect the mental or physical health or the safety of any individual or group of individuals.”

A specific concern raised in the paper is whether PHIA should be amended to authorize notification by health-care providers to family members, friends or other immediate caregivers of an individual who is an adult in mental distress or crisis, despite that the individual may not want such notification to occur. The high threshold may prevent disclosure without consent, such that persons who may be able to provide support to the individual cannot be notified if the individual is released from hospital or another health-care facility. As indicated in the discussion paper, individuals would generally not be released if they present a serious threat to the health or safety of themselves or others. We note that PHI may be maintained in a facility designated under the Mental Health Act, which prevails over PHIA. Accordingly, the threshold for a disclosure under the Mental Health Act would apply to records subject to that act, which also relates to a “serious and immediate” threat to health or safety.

Disclosures under clause 22(2)(b) of PHIA relate to potentially any individual seeking any type of health care. It is important to ensure that individuals are not dissuaded from seeking health care due to fear of having their PHI disclosed against their wishes. It can be difficult to strike a balance between the autonomy of an individual to make decisions about with whom to share their PHI, and the need to protect individuals when there are serious concerns about safety or well-being. However, privacy of an individual should not supersede preventing a serious risk of harm to any individual, particularly a risk to an individual’s life.

The paper indicated that six other provinces have a lower threshold in their laws, including three with the threshold of “a risk of serious harm.” One option described in the paper is to lower the threshold under PHIA to permit disclosure where reasonably required to prevent or lessen a risk of serious harm to the health or safety of an adult person. This would remove the requirement for the trustee to determine whether the serious risk is immediate.

The threshold suggested would still restrict such disclosures to circumstances in which there is a risk of serious harm to health or safety, and would permit a trustee to exercise judgement on whether to make a disclosure based on their assessment of the situation. A trustee could still consider the immediacy of the risk as a factor in exercising discretion regarding a disclosure. As noted in the paper, trustees could develop policies to guide such disclosures.

### **Recommendation 15**

PHIA should be amended to permit trustees to disclose when they reasonably believe that the disclosure is necessary to prevent or lessen a risk of serious harm to the health or safety of an individual, without the requirement to determine whether the risk is immediate. This would still permit a trustee to consider the immediacy of the risk, as a factor in exercising discretion regarding a disclosure.

## DISCLOSURE REGARDING SUSPECTED CRIMINAL ACTIVITY

### Issue

PHIA permits disclosure without consent to law enforcement agencies in certain circumstances. However, PHIA does not have a provision that authorizes disclosures to law enforcement officers for the purpose of reporting suspected criminal activity or in response to a request to disclose PHI for the purpose of investigating suspected criminal activity.

### Discussion

The discussion paper indicated that concerns have been raised that PHIA does not permit law enforcement officers to obtain timely information for use in criminal investigations, and notes that safety and law enforcement are important public interests. It is important to balance these interests with ensuring that individuals are not dissuaded from seeking health care because they believe their PHI may be disclosed to police, either proactively to report a possible crime, or in response to a request from police to make a disclosure.

Adult victims of a crime may be concerned that seeking health care could result in the loss of autonomy over their PHI and their decision about involvement of police. For example, adults needing health care in relation to injuries sustained as a result of domestic violence or sexual assault could be dissuaded from seeking care if they believe their PHI might be disclosed to police, without their consent. If PHIA is amended to permit disclosures to police that relate to the possible commission of a crime, it is important to consider how these situations would be addressed.

The discussion paper refers to provisions in Alberta's health information law that permit disclosure of limited PHI to law enforcement if the trustee reasonably believes that the information relates to the possible commission of a crime and that disclosure will protect the health and safety of the public. Alberta's provision also limits what PHI can be shared for this purpose.

### Recommendation 16

If PHIA is amended to permit disclosures about suspected criminal activity, consideration should be given to ensuring that individuals who are victims of suspected criminal activity are not dissuaded from seeking health care. The provision in Alberta's health information law serves as a useful model because it requires disclosures about the possible commission of a crime to protect the health and safety of the public, and it limits what PHI can be disclosed.

## MANDATORY PRIVACY BREACH NOTIFICATION

### Issue

PHIA does not require trustees to notify an individual or the ombudsman when the individual's PHI is stolen, lost, used or disclosed without authority, despite that such breaches may result in significant harm to individuals.

## Discussion

Providing notification to affected individuals enables them to take steps to reduce the risks to themselves arising from the breach. Significant harm may include physical harm, humiliation, damage to reputation or relationships, financial loss, identity theft, as well as loss of employment or business opportunities. Our practice note, [Key Steps in Responding to Privacy Breaches](#), contains guidance on the types of information to be included in a notice to an individual.

Notification to the ombudsman can help to ensure that a trustee takes appropriate steps to address the breach and prevent future breaches. While a small number of privacy breaches are voluntarily reported to the ombudsman, a requirement to report breaches where there may be a significant risk of harm to individuals would make such reporting more consistent and it would enable our office to monitor the trustee's response to the breach and provide advice.

The discussion paper noted that several health information laws in Canada either have requirements to provide notification to individuals and information and privacy commissioners, or have proposed such requirements. PHIA should include requirements to notify individuals and the ombudsman of privacy breaches where a trustee reasonably believes that the breach may result in a real risk of significant harm.

## Recommendation 17

PHIA should include requirements to notify individuals and the ombudsman of a privacy breach where a trustee reasonably believes that the breach may result in a real risk of significant harm to the individual. Prescribing the types of information to include in notification to individuals may ensure adequate notice is given, as a matter of accountability by the trustee and fairness to the individual, and it may assist the individual to take any steps necessary to assess and address their own risks.

## NO ADVERSE EMPLOYMENT ACTION (“WHISTLEBLOWER PROTECTION”)

### Issue

The discussion paper raised the issue of preventing reprisal by all trustees against employees who (proactively) disclose contraventions of PHIA to the ombudsman. The current protection under PHIA relates to employees of trustees who disclose in *response* to a request for information from the ombudsman.

### Discussion

PHIA prohibits a trustee from taking “adverse employment action” against an employee who complied with the ombudsman’s request to provide information, as follows:

#### **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 adjudicator, or a person acting for or under the direction of the Ombudsman or adjudicator, under this Act.

This provision relates to *responding* to the ombudsman and does not refer to situations where an employee may believe that it's important to *proactively* disclose suspected or known contraventions to the ombudsman. Non-retaliation provisions in other health information laws relate to broader circumstances, including proactively disclosing a contravention and protecting employees from various types of retaliatory behaviour.

We also note that employees of trustees have a right of complaint to the ombudsman about their employer's handling of their PHI. No adverse employment action should be taken against an employee who chooses to exercise this right.

Manitoba's Public Interest Disclosure (Whistleblower Protection) Act (PIDA) provides a process for reporting a "wrongdoing" in the public service. A wrongdoing as defined under PIDA includes an act that is an offence under another law, which includes offences under PHIA. PIDA does not apply when the alleged wrongdoing relates to a private sector trustee, such as medical clinics. PIDA also may not apply to all matters under PHIA that are contraventions of PHIA but not "offences."

The paper noted that the Saskatchewan information and privacy commissioner recently recommended that province's health information law be amended to include protection for employees who disclose contraventions of their health information law. This was based on provisions found in other provinces. Newfoundland and Labrador's PHIA, British Columbia's FIPPA (which also applies to PHI), the federal Personal Information Protection and Electronic Documents Act all contain similar wording regarding non-retaliation. Below is the relevant section from Newfoundland and Labrador's PHIA:

#### **Non-retaliation**

- 89.** A person shall not dismiss, suspend, discipline, demote, harass or otherwise disadvantage or penalize an individual where
- (a) the individual, acting in good faith and on the basis of reasonable belief, has disclosed to the commissioner that another person has contravened or is about to contravene a provision of this Act or the regulations;
  - (b) the individual, acting in good faith and on the basis of reasonable belief has done or stated an intention of doing an act that is required to be done in order to avoid having a person contravene a provision of this Act or the regulations;
  - (c) the individual, acting in good faith and on the basis of reasonable belief, has refused to do or stated an intention to refuse to do an act that is in contravention of this Act or the regulations; or
  - (d) another person believes that the individual will do an act described in paragraph (a), (b) or (c).

#### **Recommendation 18**

Subsection 65(2) of PHIA should not limit the protection for employees to situations in which the disclosure has been made at the request of the ombudsman. Also, no adverse employment action should be taken against employees who exercise their right to make a complaint to the ombudsman about the employer. Consideration should be given to whether the phrase "adverse employment action" should be more clearly set out by including the actions described in Newfoundland and Labrador's PHIA.

## BIG DATA ANALYTICS

### Issue

The discussion paper included the issue of using de-identified information to perform data analytics for the purpose of improving services to Manitobans. Big data analytics (BDA) involves the use of technology to analyze large and varied sets of data to uncover hidden patterns, unknown correlations or trends that can be used to inform government policy development and decisions about service delivery.

### Discussion

The paper indicated that BDA in health and social sectors involves two basic enablers, as follows:

- de-identification alters data to remove or obscure personal identifiers and personal information
- data linking joins separate datasets for a more complete view of previously separated information.

There is a risk that if de-identification is not done effectively, that the linking of various sets of de-identified data may make the data identifiable and result in the identification of individuals.

The paper notes that the Manitoba Centre for Health Policy (MCHP) at the University of Manitoba maintains a repository of de-identified data that is used for approved research purposes. The repository was developed to describe and explain patterns of health care and profiles of health and illness, through research in areas such as health care, education and social services. This de-identified data comes from a variety of government departments. Identifiers, such as names and addresses, are removed before the data is transferred to the repository. Each record comes with a scrambled identifier, which enables various de-identified records about a person to be linked together for specific research processes, without knowing who the person is.

There are well-established processes in place in the provincial government to de-identify PHI and personal information and transfer the de-identified data to the repository. MCHP has strict security and protocols in place to manage the de-identified data in the repository, which is treated in the same manner as if it were identifiable PHI. These factors would support data analytics to be performed by the provincial government using the de-identified data in the repository at the MCHP. As the intent of big data analytics is to inform decisions about government policy and delivery of services to the public, transparency about the use of BDA and about the findings or results of conducting BDA would contribute to public trust in the use of their data for this purpose.

### Recommendation 19

The de-identification processes used by the provincial government to provide information to the repository of de-identified datasets at the Manitoba Centre for Health Policy would support an increased use of big data analytics by the provincial government. If amendments to PHIA are necessary to enable this, the risks of re-identifying individuals through the linkage of multiple datasets requires that these processes are carefully managed.



## 4. OVERSIGHT ROLE OF THE OMBUDSMAN

### RENAME TITLE TO INFORMATION AND PRIVACY COMMISSIONER

#### Issue

It is generally understood that access and privacy laws are overseen by an information and privacy commissioner, the title which is associated with such laws. The use of the title of ombudsman when performing duties of an information and privacy commissioner under FIPPA and PHIA may contribute to a perception that Manitobans do not have an information and privacy commissioner.

#### Discussion

In Manitoba, access to information and privacy rights under PHIA and FIPPA are overseen by the ombudsman appointed under the Ombudsman Act. However, the nature of the ombudsman's role and responsibilities under FIPPA and PHIA are not reflected in the title of the person with such oversight. Manitobans also have information access and privacy rights under federal laws, which are overseen federally by an information commissioner and a privacy commissioner.

In every jurisdiction in Canada, except Manitoba, access to information and privacy legislation is overseen by a person called an information and privacy commissioner (the Nova Scotia legislation refers to the person as the review officer, however, that person has changed the title and the name of the office to information and privacy commissioner). Most commissioners have the power to make recommendations, not orders, as is the case in Manitoba. Manitoba's FIPPA and PHIA should be amended to use the term information and privacy commissioner.

In Yukon, where the ombudsman also serves as the information and privacy commissioner, the access and privacy legislation refers to the person in this role as the information and privacy commissioner. The Yukon access and privacy legislation states that the ombudsman appointed under the Ombudsman Act is the information and privacy commissioner under their FIPPA and PHIA equivalent laws. Section 40 of the Access to Information and Protection of Privacy Act (ATIPPA) states that "commissioner" means the Information and Privacy Commissioner appointed under section 40." Yukon's health information law references this by stating that "commissioner" under their health information law means the information and privacy commissioner appointed under ATIPPA.

In Manitoba, the ombudsman has three distinct mandates under four different laws, the Ombudsman Act, the Public Interest Disclosure (Whistleblower Protection) Act as well as serving as the information and privacy commissioner for Manitoba under FIPPA and PHIA. The legislation setting out the mandates of other independent offices of the Legislative Assembly of Manitoba specifically enable the ability to appoint a deputy (deputy chief electoral officer, deputy auditor general, deputy children's advocate—under the proposed act). As well, section 58.3(1) of FIPPA sets out the ability to appoint a deputy information and privacy adjudicator to assist the adjudicator in reviewing matters referred by the ombudsman when recommendations made under FIPPA and PHIA have not been followed. Given the scope of the ombudsman's mandates under FIPPA and PHIA, and the proactive powers and duties in addition to investigations, these acts should specifically provide for the ombudsman to appoint a deputy information and privacy commissioner under FIPPA and PHIA.

## Recommendation 20

PHIA and FIPPA should be amended to change the ombudsman's title under these acts to information and privacy commissioner and the legislation in Yukon could serve as a model. The acts should also be amended to specifically enable the appointment of deputy information and privacy commissioner.

## POWERS OF THE OMBUDSMAN CONCERNING AUDITS

### Issue

In addition to the investigation of complaints, the ombudsman has other responsibilities under PHIA, including the power and duty under clause 28(a) to conduct investigations and audits and make recommendations to monitor and ensure compliance with the act. The provisions which enable the ombudsman to obtain information necessary to perform these duties refer only to investigations and do not specifically include audits.

### Discussion

It is necessary for the ombudsman to be able to obtain or examine all relevant records regardless of whether the duty being performed is an investigation or an audit. Provisions that enable the ombudsman to require records maintained by a trustee to be produced to the ombudsman, and enable the ombudsman to exercise a right to enter the trustee's premises in order to examine or obtain records, do not include being able to do so in relation to conducting an audit. The following provisions refer only to an investigation:

#### 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.

#### 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,

- (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
- (b) to converse in private with any officer, employee or agent of the trustee.

Additionally, it should be clarified that the information that trustees provide during an audit has the same protection under PHIA as that which is obtained by the ombudsman during an investigation. The following provisions refer to investigations but do not specifically include audits:

#### 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;

- (c) in a review conducted by the adjudicator under this Act when the Ombudsman is a party; or
- (d) in an application for judicial review of an adjudicator's order under this Act.

### **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.

### **Recommendation 21**

The provisions that enable the ombudsman to require records maintained by a trustee to be produced to the ombudsman, and enable the ombudsman to exercise a right to enter the trustee's premises in order to examine or obtain records, should be amended to include being able to do so in relation to conducting an audit. The provisions that provide protection for records produced to the ombudsman during an investigation should also include audits.

## **STATEMENTS NOT ADMISSIBLE AS EVIDENCE**

### **Issue**

Under section 50, the ombudsman has a right to intervene as a party to an appeal to court. Accordingly, 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 would seem to be relevant if the ombudsman were to exercise this right. However, under subsection 32(1), such records would not be admissible.

### **Discussion**

Prior to amendments in 2011, the ombudsman could either appeal to court or intervene as a party to an appeal under PHIA. The now former clause 32(1)(c) permitted 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 to be admissible as evidence in court, as follows:

- (c) in an appeal to the court under this Act, when the Ombudsman is a party.

The implementation of the adjudicator process in 2011 meant that it was no longer necessary for the ombudsman to appeal to court, because the ombudsman can request a review by the adjudicator. However, if the ombudsman were to exercise the right under section 50 of the act to intervene as a party to an appeal, it would seem appropriate for the records described above to be admissible as evidence in that appeal. Although this issue has not been problematic, it appears that there is an inconsistency between section 50 and subsection 32(1) that should be addressed.

Alternatively, section 50 could be repealed as there appears to be no foreseeable reason for the ombudsman to intervene in an appeal by the complainant given that since 2011, this situation would only arise if the ombudsman has found that a trustee's refusal of access was in compliance with PHIA. We note that the FIPPA provisions that were parallel to PHIA's section 50 and the former clause 32(1)(c) were both repealed when the adjudicator process was implemented.

## Recommendation 22

The discrepancy between the ombudsman's right to intervene as a party to an appeal under section 50 and the inadmissibility of evidence under section 32 from the ombudsman's investigation should be resolved.

This could be done by either adding back the previously repealed clause 32(1)(c) to ensure that relevant statements and reports may be admissible in evidence if the ombudsman exercises the right to intervene as a party to an appeal to court, or repealing the ombudsman's right to be a party to an appeal under section 50.

## ADDITIONAL COMPLAINTS FOR CERTAIN DECISIONS NOT TO DISCLOSE TO FAMILY

### Issue

Family members may ask trustees to disclose PHI of an individual and trustees must determine whether PHIA permits them to make the disclosure as requested. PHIA specifically permits a disclosure to family about care currently being provided. The act also permits disclosure about a family member who is deceased. There is no right of complaint about a decision not to disclose PHI to family.

### Discussion

A trustee may disclose PHI regarding health care currently being provided to an individual who is a patient in a facility or at home, to the individual's immediate family or someone with whom the individual is known to have a close personal relationship, under subsection 23(1) of PHIA. When a disclosure is requested under this provision of PHIA, there is a 24-hour time limit to make a disclosure when the individual is a hospital in-patient and a 72-hour time limit in other circumstances. However, if a trustee decides not to disclose or does not disclose in a timely manner as required under subsection 23(1.1), there is no right of complaint.

Trustees may also disclose PHI about a deceased individual to a relative of the deceased under clause 22(2)(d) if the trustee reasonably believes that it would not be an unreasonable invasion of the deceased's privacy. Determining whether deceased's privacy would be unreasonably invaded by a disclosure may depend on many factors, including the nature of the PHI and the nature of the relationship between the relative and the deceased. If a trustee believes the disclosure is not permitted and decides not to disclose, and the relative disagrees, the dispute may not be resolved as there is no right of complaint. FIPPA has a parallel provision to PHIA permitting such disclosure, and under FIPPA a relative of a deceased has a right of complaint, as follows:

#### **Complaint by relative of deceased**

59(4) A relative of a deceased individual may make a complaint to the Ombudsman about a decision of a head of a public body not to disclose personal information under clause 44(1)(z).

## Recommendation 23

Provide a right of complaint about a decision under subsection 23(1) not to disclose PHI about a patient's health care to family, and about a failure to disclose to family in a timely manner as required by subsection 23(1.1).

Provide a right of complaint by a relative of a deceased individual about a decision of a trustee not to disclose PHI under clause 22(2)(d).

## INTERJURISDICTIONAL INVESTIGATIONS

### Issue

PHI may be shared across provincial borders, such as when a citizen living in one province receives health care in another province. There may be situations where, for example, a trustee in Manitoba discloses PHI to a trustee who collects the PHI in Saskatchewan. The individual would have a right of complaint under both provincial health information acts, but the oversight offices conducting the investigations would not have authority under their respective acts to share information related to these investigations.

### Discussion

PHI may be shared across provincial borders and the acceleration of electronic health records facilitates trustees in more than one jurisdiction to collect, use and disclose PHI. In such circumstances, oversight offices may be engaged in conducting inter-related investigations under their respective health information law, but under PHIA, the ombudsman would not be permitted to share information relating to such investigations.

Some oversight offices are permitted under their laws to share information in such circumstances, including Alberta, Ontario, Yukon and Canada (under the Personal Information Protection and Electronic Documents Act). The information and privacy commissioner of Saskatchewan has proposed an amendment to enable that office to disclose to another commissioner in Canada with similar powers and duties. For example, the provisions in Yukon's health information law are as follows:

#### **General powers of commissioner**

92 In addition to the specific duties and powers assigned to the commissioner under this Act, the commissioner is responsible for overseeing how this Act is administered to ensure that its purposes are achieved, and may

(f) exchange personal information and personal health information with any person who, under legislation of another province or Canada, has powers and duties similar to those conferred upon the commissioner under this Act or the Access to Information and Protection of Privacy Act;

(g) enter into information-sharing agreements for the purposes of paragraph (f) and into other agreements with the persons referred to in that paragraph for the purpose of coordinating their activities and exercising any duty, function or power conferred on the commissioner under this Act;

### **Recommendation 24**

PHIA should enable the ombudsman to exchange information with another person who under legislation of another province or Canada has powers and duties similar to those conferred upon the ombudsman under PHIA, for the purpose of coordinating activities and handling complaints involving two or more jurisdictions.

## DISCLOSURES BY OMBUDSMAN

### Issue

PHIA does not expressly permit the ombudsman to disclose information in compelling circumstances relating to a risk of serious harm to any individual.

### Discussion

PHIA permits the ombudsman to disclose information obtained in performing duties or exercising powers of investigation under the act, in certain circumstances. This includes when it is necessary to do so to perform a duty or exercise a power, when it's necessary to establish grounds for findings and recommendations contained in a report, or to disclose information relating to the commission of an offence.

However, there may be other circumstances in which disclosure would reasonably be considered necessary, such as when it relates to a serious risk of harm to any individual.

### Recommendation 25

PHIA should expressly permit the ombudsman to disclose information obtained in an investigation where the ombudsman reasonably believes that the disclosure is necessary to prevent or lessen a risk of serious harm to any individual.

## OMBUDSMAN'S RECOMMENDATIONS ABOUT ACCESS AND PRIVACY COMPLAINTS

### Issue

The ombudsman has broad powers to make any recommendations considered appropriate in a report about an access or privacy complaint under PHIA, as well as under FIPPA. However, PHIA appears to restrict that broad power by specifying the types of access and privacy recommendations that can be made, while FIPPA does not.

### Discussion

Although both PHIA and FIPPA give the ombudsman the power to make any recommendations considered appropriate about an access or privacy complaint, only PHIA contains additional provisions that specifically set out the types of access and privacy recommendations that can be made. This is problematic because these additional subsections, 47(2) and (3), appear to contradict the broad power under subsection 47(1) to make any recommendations considered appropriate. Also, these additional subsections do not include all recommendations that would be applicable to all types of access and privacy complaints.

The following are the provisions at issue:

**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.

**Recommendations about access**

**47(2)** In a report concerning a complaint about access, the Ombudsman  
 (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  
 (b) may recommend that the trustee modify or improve its procedures or practices concerning requests for access.

**Recommendations about privacy**

**47(3)** In a report concerning a complaint about privacy, the Ombudsman  
 (a) shall indicate whether, in his or her opinion, the complaint is well founded; and  
 (b) may, as long as the trustee has been given an opportunity to make representations about the matter, recommend that the trustee  
 (i) cease or modify a specified practice of collecting, using, disclosing, retaining or destroying personal health information contrary to this Act, or  
 (ii) destroy a collection of personal health information that was collected in a manner contrary to this Act.

The types of recommendations specified in subsections 47(2) and (3) do not apply to all types of access or privacy complaints. For example, the recommendations about access do not include recommendations that would be made about complaints about a trustee's failure to respond to a request, or about a trustee's fees for access, or a refusal to correct personal health information.

The types of recommendations about privacy do not include recommending actions appropriate to the circumstances, such as recommending that the trustee provide privacy training to staff, or that the trustee comply with requirements to have certain policies required by PHIA, or comply with requirements respecting pledges of confidentiality. We also note that as the ombudsman must give the trustee an opportunity to make representations during an investigation of a privacy or access complaint (under subsection 43(1)), before the report that may contain recommendations is issued, it is unnecessary to have this re-stated in a subsequent provision, under clause 47(3)(b).

Unlike PHIA, FIPPA does not set out any specific types of recommendations about access or privacy and simply states:

**Report**

**66(1)** On completing an investigation of a complaint, the Ombudsman shall prepare a report containing the Ombudsman's findings about the complaint and any recommendations the Ombudsman considers appropriate respecting the complaint.

No issues have arisen under FIPPA relative to the absence of provisions similar to PHIA's subsections 47(2) and (3). We note that if a trustee believed any recommendation was not warranted and chose not to accept it, there is a process through the information and privacy adjudicator to resolve the matter.

**Recommendation 26**

The provisions that specify the types of recommendations that the ombudsman may make about access and privacy complaints, subsections 47(2) and 47(3), should be removed from PHIA, to ensure there is no confusion or conflict with the ombudsman's power under subsection 47(1) to make any recommendations he or she considers to be appropriate respecting the complaint.

**OMBUDSMAN'S RIGHT TO BE A PARTY TO ADJUDICATOR'S REVIEW****Issue**

When the ombudsman requests a review by the adjudicator, the ombudsman has a right to be a party to that review. However, this right is restricted to matters where "the Ombudsman considers that the review raises an issue of public interest."

**Discussion**

The ombudsman could potentially have an interest in any review he or she requests because the review relates to recommendations made by the ombudsman. The ombudsman's right to be a party to the review should not be constrained to an issue of public interest. There may be an issue of importance with respect to an individual's right or a trustee's obligations that does not necessarily raise an issue of broad public interest and the ombudsman should have the right to be a party to such a review. In comparison, the ombudsman's right to intervene as a party to an appeal to court in a refusal of access matter under section 50 is not restricted to an appeal that raises an issue of public interest.

**Recommendation 27**

The ombudsman should have the right to be a party to a review by the adjudicator and the phrase "if the Ombudsman considers that the review raises an issue of public interest" should be deleted.



## 5. ROLE OF INFORMATION AND PRIVACY ADJUDICATOR

### ADJUDICATOR'S ORDERS

#### Issue

The scope of the orders that the adjudicator may make regarding access and privacy does not encompass all matters the ombudsman may make recommendations about and seek review of by the adjudicator.

#### Discussion

On receiving a request from the ombudsman, the adjudicator must conduct a review and further to the review, the adjudicator issues an order, as follows:

##### **Adjudicator's order**

**48.8(1)** Upon completing a review under section 48.3, the adjudicator must dispose of the issues by making an order under this section.

##### **Order re access**

**48.8(2)** If the review concerns a complaint about access, the adjudicator may, by order,

- (a) require the trustee to permit the applicant to examine or copy all or part of the personal health information, if the adjudicator determines that the trustee was not justified under section 11 in refusing to permit the applicant to do so;
- (b) confirm the trustee's decision, if the adjudicator determines that the trustee was justified under section 11 in refusing to permit the applicant to examine or copy the information;
- (c) confirm or reduce a fee, or order a refund of a fee, in the appropriate circumstances;
- (d) confirm a decision not to correct personal health information, or specify how personal information is to be corrected.

##### **Order re privacy**

**48.8(3)** If the review concerns a complaint about privacy, the adjudicator may, by order,

- (a) require the trustee to cease or modify a specified practice of collecting, using, disclosing, retaining or destroying personal health information contrary to this Act;
- (b) require the trustee to destroy personal health information collected in contravention of this Act.

##### **Order may contain terms or conditions**

**48.8(4)** The adjudicator may specify terms or conditions in an order made under this section.

The above provisions do not encompass all matters about which the ombudsman may make recommendations and request a review. With respect to access, the ombudsman may request a review of "any decision, act or failure to act by the trustee relating to an individual's request to examine or receive a copy of his or her personal health information, or for correction of such information". However, the adjudicator's order about access appears to be restricted to only certain matters. For example, it would not appear to address situations in which the ombudsman has made a recommendation in relation to a trustee's decision to refuse access under subsection 4(1) on the basis

that another act restricts or prohibits access or that a trustee must provide the individual with an explanation of any term, code or abbreviation, under subsection 7(2).

With respect to privacy, it would appear that an order by the adjudicator would not address situations in which the ombudsman has made recommendations to a trustee to comply with obligations under PHIA to adopt certain policies, or to provide orientation to employees and agents, or to sign pledges of confidentiality.

### **Recommendation 28**

The scope of the adjudicator's orders about access and privacy should encompass all matters about which the ombudsman may make recommendations and request a review by the adjudicator.

## 6. OTHER ISSUES

### TIME LIMIT TO APPEAL TO COURT

#### Issue

The time limit in which an individual may appeal a trustee's refusal of access decision to court does not take into consideration cases in which the ombudsman's report does not contain recommendations. Accordingly, this time limit should be clarified to ensure that individuals wishing to file an appeal can do so within the time limit.

#### Discussion

An individual may appeal a trustee's refusal of access decision to court in certain circumstances and subsection 49(3) sets out the time limit in which an appeal must be filed:

##### **Appeal within 30 days**

**49(3)** An appeal is to be made by filing an application with the court within 30 days after the deadline set out in subsection 48.1(3) expires, or within any longer period that the court may allow in special circumstances.

The deadline in subsection 48.1(3) referred to above relates *only* to cases in which the ombudsman's report contains recommendations to the trustee. However, an individual also has a right to appeal in cases where the ombudsman's report contains no recommendations, such as when the ombudsman has found the refusal of access complaint to be unjustified. In such cases, subsection 48(3) requires that the ombudsman's report advise the complainant of the right to appeal the decision to court, and of the time limit for an appeal under section 49.

FIPPA also contains a time limit to appeal and it was amended in 2013 to clarify the time limit when no recommendations have been made. The following amended provision of FIPPA clarifies the time limit to appeal in cases where the ombudsman's report does not contain recommendations:

##### **Appeal within 30 days**

**67(3)** An appeal is to be made by filing an application with the court  
 (a) within 30 days after the deadline set out in subsection 66.1(4) expires, if the Ombudsman's report under section 66 contains recommendations respecting the complaint; or  
 (b) within 30 days after receiving the Ombudsman's report, if the report does not contain recommendations.

#### **Recommendation 29**

The time limit to appeal to court under subsection 49(3) of PHIA should be amended to clarify that the time limit is within 30 days after receiving the ombudsman's report, if the report does not contain recommendations, similar to the wording in subsection 67(3) of FIPPA.

## OFFENCE BY EMPLOYEE, OFFICER OR AGENT

### Issue

The offence provision relating to a person who is an employee, officer or agent of a trustee, does not expressly include a person who was, but is no longer, in that position.

### Discussion

The offence provision is as follows:

#### **Offence by employee, officer or agent**

**63(2)** Despite subsection 61(2), a person who is an employee, officer or agent of a trustee, information manager or health research organization and who, without the authorization of the trustee, information manager or health research organization, wilfully

(a) discloses personal health information in circumstances where the trustee, information manager or health research organization would not be permitted to disclose the information under this Act; or

(b) uses, gains access to or attempts to gain access to another person's personal health information;

is guilty of an offence.

This offence provision relates to willful actions by a person who intentionally violated an individual's privacy. There should be no question that the person can be held accountable for such actions, even after their role with the trustee has terminated. This provision should be amended to expressly include a person formerly in that role.

### Recommendation 30

The provision for an offence by an employee, officer or agent of a trustee should be amended to expressly include a person who is no longer in that role, such as by changing the wording to "a person who is or was an employee, officer or agent of a trustee, information manager or health research organization..."

## ADDITIONAL OFFENCES

### Issue

PHIA sets out offences, including those which apply to any person and those which apply specifically to trustees, information managers and health research organizations. Consideration should be given to whether there should be additional offences.

### Discussion

With respect to additional offences, if PHIA is amended to make it mandatory for a trustee to notify individuals and the ombudsman of privacy breaches that may result in a real risk of significant harm to the individuals, there should be an offence for a failure to notify.

Clause 63(1)(c) of PHIA sets out an offence for any person who “wilfully destroys or erases personal health information with the intent to evade an individual’s request to examine or copy the information”. Alberta’s Health Information Act contains a more broadly worded offence that includes concealing a record to evade a request for access, which could be incorporated into clause 63(1)(c) of PHIA.

PHIA requires a trustee that discloses PHI to a researcher, to enter into a written agreement with the researcher, and the act sets out requirements for this agreement. Consideration should be given to having an offence provision relating to a willful breach of the terms of the agreement by a researcher. Alberta’s Health Information Act sets out that “No researcher shall knowingly breach the terms and conditions of an agreement entered into with a custodian pursuant to section 54”, and similar wording may be appropriate under PHIA.

### **Recommendation 31**

Expand the types of offences under PHIA to include the following: a failure to notify the individual and the ombudsman of a privacy breach if it becomes mandatory to provide such notice; concealing PHI with the intent to evade a request for access by an individual; and an offence by a researcher who willfully breaches the terms of an agreement with a trustee.

## **TIME LIMIT FOR STARTING A PROSECUTION**

### **Issue**

A prosecution of an offence under PHIA must be started within two years of the commission of the alleged offence. As noted in the discussion paper, the discovery of an offence may not be made until close to or after that time limit has expired, making a prosecution impossible.

### **Discussion**

If the time limit for the prosecution of an offence were based on the discovery of an alleged offence, rather than two years from when it was committed, this would provide time for the gathering of evidence for a charge to be laid. An offence may not come to light until several months after it was committed. For example, an unauthorized use of PHI or snooping may be a pattern of behavior affecting several individuals over time. When it is detected, the scope of the activity may be revealed and this will require time for a trustee to determine and notify all affected individuals and then time for the investigation of complaints from individuals. If the alleged offences are not detected soon after commission, the time limit may expire despite that there may be strong evidence for a prosecution.

Under Saskatchewan’s health information law, there is a two-year time limit based on the discovery of an offence. This would enable sufficient time after such discovery to conduct an investigation and lay a charge.

### **Recommendation 32**

The time limit for starting a prosecution of an alleged offence under PHIA should be changed from two years from the commission of the alleged offence, to two years from the discovery of it.

## AMOUNT OF FINE FOR CONVICTION OF AN OFFENCE

### Issue

The discussion paper raised the issue of whether PHIA should have higher maximum penalties and different fine levels for individuals and corporations convicted of an offence.

### Discussion

The discussion paper noted that other provinces have implemented higher maximum penalties and different fine levels for individuals and corporations. As an example, the paper referred to Ontario which had recently doubled its maximum fines for offences under its health information law.

Different fine levels for individuals and corporations could provide an appropriate level of discouragement to commit an offence and it would reflect differences in the ability to pay.

### Recommendation 33

PHIA should set a higher fine level for corporations than for individuals.

## REVIEW PERIOD

### Issue

PHIA should be reviewed on a periodic basis to ensure that the act adequately addresses the rights of individuals and the obligations of trustees, as well as to ensure that the oversight mechanisms are effective.

### Discussion

Many access and privacy laws across Canada contain a requirement for periodic reviews of the law. This current review of PHIA was required under the following provision:

#### **Review of Act in five years**

**67(1)** The minister must undertake a comprehensive review of the operation of this Act, which involves public representations, within five years after an adjudicator is first appointed under section 58.1 of *The Freedom of Information and Protection of Privacy Act*.

### Recommendation 34

PHIA should contain a requirement for the act be reviewed on a periodic basis, such as in five years.

## SUMMARY OF RECOMMENDATIONS TO AMEND PHIA

### 1. Scope of PHIA

Number	Recommendation	Page
1	<b>Trustees</b> – PHIA should make it clear whether or in what circumstances the act applies to PHI collected by health professionals employed by non-trustees. Expand the definition of trustee to include a pharmacy, possibly as a “health care facility.”	5
2	<b>Non-Application of PHIA</b> – If PHIA is amended to permit PHI to be made available to the public after a specified time period, consideration should be given to enable trustees to have discretion to make such a disclosure, rather than an amendment to make PHIA no longer apply to the PHI. If there is an issue with respect to public access to records containing PHI held in an archive, this could be addressed in a separate provision that does not affect the privacy of PHI held by trustees in the health-care sector.	6

### 2. Access to Personal Health Information

Number	Recommendation	Page
3	<b>Right of Access</b> – The provisions relating to access should ensure that it is clear that an individual may request only to receive a copy of PHI and the wording throughout the act dealing with all matters that flow from a request should align with this scenario. This could be addressed by using the phrase to examine “and/or” receive a copy.	8
4	<b>Abandoned Requests</b> – PHIA should permit a trustee to decide that a request has been abandoned based on specified circumstances, such as when the individual does not provide necessary clarification about their request or accept or pay a fee. The trustee should provide notice of this decision in writing to the individual, explain the reason for the decision, and inform the individual of the right of complaint about the decision.	9
5	<b>Disregarding Requests</b> – PHIA should permit a trustee to refuse a request in specified circumstances, such as if the request is frivolous or vexatious or is part of a pattern of conduct that amounts to an abuse of the right of access. The trustee should provide written notice of this decision to the individual, explain the reason for the decision, and inform the individual of the right of complaint to the ombudsman about the decision.	10
6	<b>Extension of Time Limit</b> – PHIA should permit an extension of 30-day time limit for responding in specified circumstances and provided that the trustee gives written notice of the extension to the individual indicating the reason for the extension, when a response can be expected, and that a complaint can be made to the ombudsman about the extension.	11
7	<b>Fees</b> – PHIA should set some limits concerning fees, by adding a fee schedule or setting out maximum fees. If a trustee is required to provide a written estimate of search and preparation fees, the trustee should be required to inform the individual of a right of complaint about the fee.	13

8	<b>Fee Waivers</b> – PHIA should include a fee waiver provision providing discretion to waive payment of all or part of the fee if, in the trustee’s opinion, the individual cannot afford the payment or for any other reason it is fair to waive payment. A trustee should be required to inform the individual of the right of complaint to the ombudsman about a decision not to waive the fee as requested.	14
9	<b>Informing Individuals of Right of Complaint</b> – PHIA should require that when a trustee informs the individual that the requested PHI does not exist or cannot be found, the trustee must also inform of the right of complaint to the ombudsman about this decision.	15
10	<b>Exceptions to Access</b> – Include an additional exception to permit a trustee to refuse to provide a copy of PHI in standardized diagnostic tests or assessments used by a trustee, including intelligence tests, if disclosure of the information could reasonably be expected to prejudice the use or results of the particular diagnostic tests or assessments. However, a trustee should be required to permit the individual to examine this information with the trustee, or alternatively the trustee should facilitate this form of access with another practitioner familiar with such tests.	15
11	<b>Correction of Personal Health Information</b> – PHIA should set out the circumstances in which a trustee may refuse to correct PHI. This could be done by setting out the duty of a trustee to correct PHI and including exceptions to this duty, similar to the circumstances in Ontario’s health information law. There should be a requirement for a trustee to inform an individual in writing when the trustee makes a requested correction or when the trustee informs the individual that the PHI no longer exists or cannot be found.	16
12	<b>Representative</b> – Expand the list of representatives to include a person who has been granted the power of attorney by the individual, and restrict the exercise of the right to those matters relating to the powers and duties conferred by the power of attorney, similar to Alberta’s health information law.	17

### 3. Protection of Privacy

Number	Recommendation	Page
13	<b>Use for Training Purposes</b> – PHIA should be amended to clarify for trustees that PHI can be used for training purposes with students and staff when the sharing of health information about an identifiable individual is necessary for the specific training purpose.	18
14	<b>Use for Employment Purposes</b> – Include a provision to clarify that a trustee must obtain express consent from an individual who is an employee or prospective employee, to use the individual’s PHI collected for a health-care purpose, for an employment purpose.	19
15	<b>Disclosure to Prevent or Lessen a Serious and Immediate Threat</b> – PHIA should be amended to permit trustees to disclose when they reasonably believe that the disclosure is necessary to prevent or lessen a risk of serious harm to the health or safety of an individual, without the requirement to determine whether the risk is immediate. This would still permit a trustee to consider the immediacy of the risk, as a factor in exercising discretion regarding a disclosure.	20



16	<b>Disclosure Regarding Suspected Criminal Activity</b> – If PHIA is amended to permit disclosures about suspected criminal activity, consideration should be given to ensuring that individuals who are victims of suspected criminal activity are not dissuaded from seeking health care. The provision in Alberta’s health information law serves as a useful model because it requires disclosures about the possible commission of a crime to protect the health and safety of the public, and it limits what PHI can be disclosed.	21
17	<b>Mandatory Privacy Breach Notification</b> – PHIA should include requirements to notify individuals and the ombudsman of a privacy breach where a trustee reasonably believes that the breach may result in a real risk of significant harm to the individual. Prescribing the types of information to include in notification to individuals may ensure adequate notice is given, as a matter of accountability by the trustee and fairness to the individual, and it may assist the individual to take any steps necessary to assess and address their own risks.	22
18	<b>No Adverse Employment Action (“Whistleblower Protection”)</b> – Subsection 65(2) of PHIA should not limit the protection for employees to situations in which the disclosure has been made at the request of the ombudsman. Also, no adverse employment action should be taken against employees who exercise their right to make a complaint to the ombudsman about the employer. Consideration should be given to whether the phrase “adverse employment action” should be more clearly set out by including the actions described in Newfoundland and Labrador’s PHIA.	23
19	<b>Big Data Analytics</b> – The de-identification processes used by the provincial government to provide information to the repository of de-identified datasets at the Manitoba Centre for Health Policy would support an increased use of big data analytics by the provincial government. If amendments to PHIA are necessary to enable this, the risks of re-identifying individuals through the linkage of multiple datasets requires that these processes are carefully managed.	24

#### 4. Oversight Role of the Ombudsman

Number	Recommendation	Page
20	<b>Rename Title to Information and Privacy Commissioner</b> – PHIA and FIPPA should be amended to change the ombudsman’s title under these acts to information and privacy commissioner and the legislation in Yukon could serve as a model. The acts should also be amended to specifically enable the appointment of deputy information and privacy commissioner.	26
21	<b>Powers of the Ombudsman Concerning Audits</b> – The provisions that enable the ombudsman to require records maintained by a trustee to be produced to the ombudsman, and enable the ombudsman to exercise a right to enter the trustee’s premises in order to examine or obtain records, should be amended to include being able to do so in relation to conducting an audit. The provisions that provide protection for records produced to the ombudsman during an investigation should also include audits.	27
22	<b>Statements Not Admissible as Evidence</b> – The discrepancy between the ombudsman’s right to intervene as a party to an appeal under section 50 and	28

	the inadmissibility of evidence under section 32 from the ombudsman’s investigation should be resolved. This could be done by either adding back the previously repealed clause 32(1)(c) to ensure that relevant statements and reports may be admissible in evidence if the ombudsman exercises the right to intervene as a party to an appeal to court, or repealing the ombudsman’s right to be a party to an appeal under section 50.	
23	<b>Additional Complaints for Certain Decisions Not to Disclose to Family</b> – Provide a right of complaint about a decision under subsection 23(1) not to disclose PHI about a patient’s health care to family, and about a failure to disclose to family in a timely manner as required by subsection 23(1.1). Provide a right of complaint by a relative of a deceased individual about a decision of a trustee not to disclose PHI under clause 22(2)(d).	28
24	<b>Interjurisdictional Investigations</b> – PHIA should enable the ombudsman to exchange information with another person who under legislation of another province or Canada has powers and duties similar to those conferred upon the ombudsman under PHIA, for the purpose of coordinating activities and handling complaints involving two or more jurisdictions.	29
25	<b>Disclosures by Ombudsman</b> – PHIA should expressly permit the ombudsman to disclose information obtained in an investigation where the ombudsman reasonably believes that the disclosure is necessary to prevent or lessen a risk of serious harm to any individual.	30
26	<b>Ombudsman’s Recommendations About Access and Privacy Complaints</b> – The provisions that specify the types of recommendations that the ombudsman may make about access and privacy complaints, subsections 47(2) and 47(3), should be removed from PHIA, to ensure there is no confusion or conflict with the ombudsman’s power under subsection 47(1) to make any recommendations he or she considers to be appropriate respecting the complaint.	32
27	<b>Ombudsman’s Right to be a Party to Adjudicator’s Review</b> – The ombudsman should have the right to be a party to a review by the adjudicator and the phrase “if the Ombudsman considers that the review raises an issue of public interest” should be deleted.	32

## 5. Role of Information and Privacy Adjudicator

Number	Recommendation	Page
28	<b>Adjudicator’s Orders</b> – The scope of the adjudicator’s orders about access and privacy should encompass all matters about which the ombudsman may make recommendations and request a review by the adjudicator.	34

## 6. Other Issues

Number	Recommendation	Page
29	<b>Time Limit to Appeal to Court</b> – The time limit to appeal to court under subsection 49(3) of PHIA should be amended to clarify that the time limit is within 30 days after receiving the ombudsman’s report, if the report does not contain recommendations, similar to the wording in subsection 67(3) of FIPPA.	35

30	<b>Offence by Employee, Officer or Agent</b> – The provision for an offence by an employee, officer or agent of a trustee should be amended to expressly include a person who is no longer in that role, such as by changing the wording to “a person who is or was an employee, officer or agent of a trustee, information manager or health research organization...”	36
31	<b>Additional Offences</b> – Expand the types of offences under PHIA to include the following: a failure to notify the individual and the ombudsman of a privacy breach if it becomes mandatory to provide such notice; concealing PHI with the intent to evade a request for access by an individual; and an offence by a researcher who willfully breaches the terms of an agreement with a trustee.	37
32	<b>Time Limit for Starting a Prosecution</b> – The time limit for starting a prosecution of an alleged offence under PHIA should be changed from two years from the commission of the alleged offence, to two years from the discovery of it.	37
33	<b>Amount of Fine for Conviction of an Offence</b> – PHIA should set a higher fine level for corporations than for individuals.	38
34	<b>Review Period</b> – PHIA should contain a requirement for the act be reviewed on a periodic basis, such as in five years.	38