Honourable George Hickes
Speaker of the Legislative Assembly
Province of Manitoba
Room 244 Legislative Building
Winnipeg, MB
R3C 0V8

Mr. Speaker:

In accordance with section 58(1) and 37(1) of *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* respectively, I am pleased to submit the first Annual Report of the Ombudsman under these new pieces of legislation, covering the calendar year January 1, 1998 to December 31, 1998. This Annual Report also includes the work conducted by our Office in 1998 under *The Freedom of Information Act,* repealed May 4, 1998.

Yours very truly,

Original signed by

Barry E. Tuckett
Provincial Ombudsman

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INTRODUCTION

The Office of the Ombudsman was established on April 1, 1970 to receive and investigate complaints against departments and agencies of the provincial government. After almost 30 years, the primary role of the Office continues to be complaint investigation.

Nevertheless, responsibilities given to the Office under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* have added a new dimension to the mandate. Auditing, monitoring and commenting on programs impacting on access to information and protection of privacy are now legislated activities. While these at times compete with the traditional complaint investigation function in terms of time and resources, they are necessary to ensure compliance with and demonstrate commitment to the values and principles in the legislation.

Manitoba's access legislation puts into place the legislated right of access to government records, supporting principles of openness and accountability. Manitoba's privacy legislation recognizes one's fundamental right of privacy and incorporates international principles of fair information practice.

Critical in these pieces of legislation is the recognition for the need of public bodies to be subject to the rigors of independent scrutiny, which not only has value in terms of promoting principles of accountability and openness, but in building confidence and trust in our governing authorities and institutions. This specialized role was given to the Ombudsman, and it requires vigilance in keeping the spirit and commitment to the legislation vibrant.

The future presents some major challenges to this Office in providing a timely, accessible review process that is informal, non-adversarial and non-legalistic; that promotes administrative fairness, openness and accountability; and, that facilitates resolutions, not as an advocate or mediator, but as an ombudsman.

Privacy issues will be particularly challenging in a changing technological environment where it is becoming difficult to preserve the right to be left alone. Issues we are or will be encountering involve such government initiatives as:

- integrated case management, where databanks of personal information and other information are brought together in the name of better public service;
- the integration of internal administrative information systems about money, people and things in government which are linked electronically for administrative efficiency and better services;
- electronic health information networks aimed at more efficient and effective health care; and,
- single window electronic access to obtain government services (which may implicate public registries).

These initiatives are a potential threat to one's privacy if principles and values are not respected.

I am pleased to say Mr. Peter Bower was recently appointed as Executive Director of our Access and Privacy Division. Mr. Bower was the Provincial Archivist since 1980 and his experience and knowledge in information management, access and privacy legislation and public communications will be a definite asset as our office strives to meet the challenges the future will bring.

The Access and Privacy Division expanded over the last year after the obligations of the new access and privacy legislation began impacting on our Office. Additional staff were recruited in 1998. Joining our Manager of Compliance and Investigation, Ms. Gail Perry, were Ms. Nancy Love, Mr. Aurèle Teffaine, Ms. Jane McBee and Ms. Kim Riddell, bringing the total complement to six, including the Executive Director.

While we have a dedicated and hardworking staff, it is apparent that the additional workload and the challenges facing our Office exceed the existing resources. Backlogs and delays exist. Our policies, procedures, standards, priorities and resources are being carefully reviewed to determine the most cost-efficient and effective way we can address the backlogs and delays while maintaining a high standard of service.

As an Office of the Legislature acting on behalf of the Legislative Assembly, we will continue to consider our response to complaints and concerns a priority, while actively encouraging and promoting commitment to the values and principles built into the access and privacy legislation.

YEAR IN REVIEW

♦ ACCESS AND PRIVACY PRINCIPLES

Access to information and protection of personal privacy are generally accepted as essential facets of democratic societies. There is no doubt that an over-zealous application of one can thwart the other. Finding the sometimes exquisite balance between the two rights is an ongoing challenge, and partly explains the occasionally frustrating complexity of the laws aimed at legally enshrining these two democratic ideals.

Both rights have been described in terms of their values to a democratic society:

> *The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.* [Supreme Court of Canada Justice G. V. La Forest in *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 432-3.]

> *An emblem of vibrant, participatory democracy is the ability of people to develop as individuals, separate and distinct from one another, with the confidence to hold their own political opinions, beliefs, preferences. A free society tolerates -- even revels in -- such individuality, recognizing it as the bedrock of an open society and as a necessary precursor to ensuring free speech and political participation.* [Janlori Goldman, "Privacy and Individual Empowerment in the Interactive Age", *Visions of Privacy*, (University of Toronto Press, 1999) Colin J. Bennett and Rebecca Grant, eds., p. 102.]

The legal right of access is fundamental to both *The Freedom of Information and Protection of Privacy Act* (FIPPA) and *The Personal Health Information Act* (PHIA) proclaimed by Manitoba in May 1998 and December 1997 respectively. After nearly ten years of being in force, *The Freedom of Information Act* (FOI) was repealed on proclamation of FIPPA. To the extent that privacy was protected by the FOI Act, it was as an exemption to the general rule of access. The new Acts provide personal information privacy rights which, from time-to-time, must be balanced against each other in an often complex interplay of interests.

The new Acts introduce strong privacy provisions related to the collection, use, disclosure and security of personal information and personal health information. Once the privacy of personal information has been breached, it usually cannot be fully recovered. Remedial measures may be initiated, but they cannot really undo whatever harm may have been done; consequently, a proactive approach to privacy protection by personal information custodians is encouraged. It is also a reality that compromises of information privacy may not be immediately apparent to the public or even to information custodians themselves. For such reasons, FIPPA and PHIA give broad discretion to the Ombudsman to initiate and conduct investigations in relation to compliance with the Acts:

> ***General powers and duties*** [FIPPA]
> ***49*** *In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may*
>
> *(a) conduct investigations and audits and make recommendations to monitor and ensure compliance*

(i) with this Act and the regulations, and
(ii) with requirements respecting the security and destruction of records set out in any other enactment or in a by-law or other legal instrument by which a local public body acts....

General powers and duties [PHIA]
28 *In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may*
(a) conduct investigations and audits and make recommendations to monitor and ensure compliance with this Act....

Both statutes recognize that it would be insufficient to protect personal information privacy by an oversight body driven solely by external complaints. While most entities covered by the privacy provisions of the new Acts were certainly not unfamiliar with the need to protect personal information, the legislation brought internationally acknowledged standards and best practices to bear on the management of personal information. During the past year, therefore, the Access and Privacy Division has been examining and developing procedures to fulfill the proactive mandate to ensure compliance.

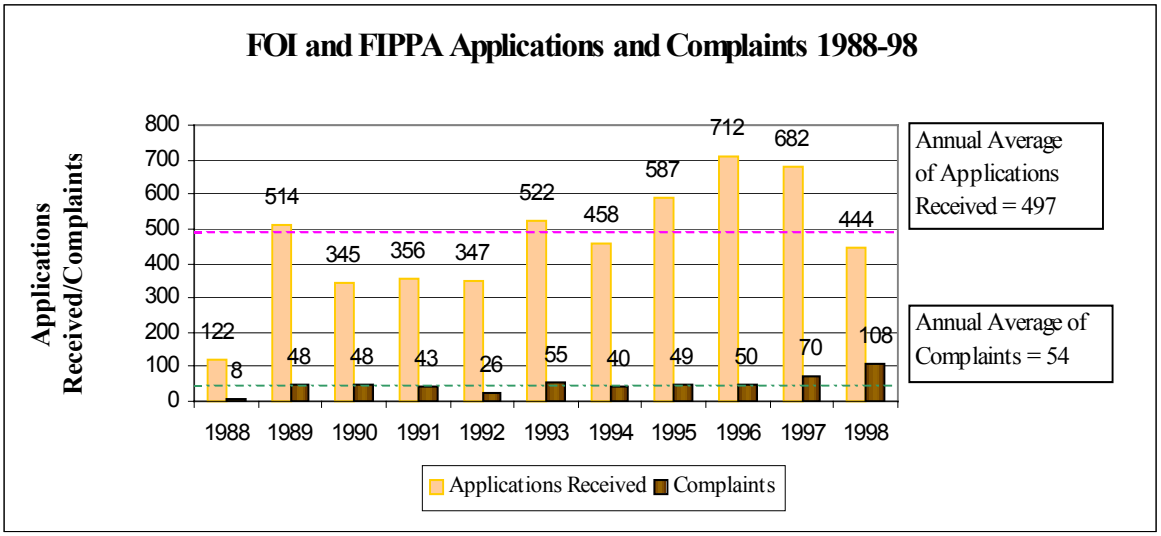
♦ ACTIVITIES IN 1998

By far the bulk of the Access and Privacy Division's staff time has been dedicated to complaint-related investigative work under FIPPA and PHIA.

Under FIPPA, there were 101 access and seven privacy complaints in 1998. This included seven complaints related to the City of Winnipeg, which came under FIPPA at the end of August 1998.

Under PHIA, there were eight access and two privacy complaints. The number of PHIA-based complaints is expected to rise significantly during coming years as rights under the legislation become better known to the public.

In this context, it is useful to look at the ratio of complaints to the numbers of applications for access since the FOI Act was brought into force. The following table relates to provincial departments and agencies only, for which there is historical data. It shows that, to the end of 1997, the average ratio of complaints to applications for access under the FOI Act was almost 10%. The ratio of access complaints to applications rose to about 22% in 1998 when the FOI Act was replaced coincidentally by FIPPA in May. The number of access requests for personal health information under PHIA, which has been in effect since December 11, 1997, is unknown.



It is difficult to suggest, on the basis of the statistical returns for one year, that the sharp drop in applications for access in 1998 represents a trend. On the other hand, the more than doubling of the number of access complaints since 1996 suggests, at least, that public complaints will continue to be a principal activity of the Office regardless of systemic issues which need to be addressed under the legislation. In themselves, these complaints are, of course, important sources of information in identifying areas of broader concern which may lead to the opening of a special investigation file, an investigative approach discussed below.

To monitor compliance with statutory access-to-information requirements as contemplated by FIPPA, we intend to explore means of reviewing the practices and performance of public bodies more broadly and systematically than is possible through a complaint-by-complaint analysis by the Ombudsman's Office. This initiative will reflect some mechanisms now being developed in relation to the privacy impact assessment process and are noted below.

A significant addition to our responsibilities was that, by the end of August, 1998 the City of Winnipeg was brought under FIPPA at its own request and ahead of the extension of the Act to other local governments, health care and educational bodies. This full scope of FIPPA is widely expected to be realized in late 1999 or early 2000. PHIA has been fully in force since its proclamation in December 1997.

Extensive training and educational sessions have been offered to entities falling within the scope of the legislation by Manitoba Health on PHIA, by Manitoba Culture, Heritage and Citizenship on FIPPA, and by the City Clerk's Office for Winnipeg as a local public body.

Our Office undertook numerous presentations and speaking engagements in the course of 1998. These activities involved special interest and private organizations of various types; health care professionals, administrators, and health information managers; and local and provincial government departments and agencies. There were also a number of presentations to school and university classes. All staff participated in these activities.

Preliminary planning has begun on developing an Internet website for the Office and issuing new printed informational materials such as pamphlets and presentation packages. The website will substantially raise the public profile of the work and services of the Office on a timely basis. The rapidly expanding public accessibility of the Internet will make this an increasingly valuable communications vehicle.

♦ THE OMBUDSMAN'S EXPANDED COMPLIANCE ROLE

There are major additions to the scope, powers, and duties of the Ombudsman's Office in providing independent oversight of entities falling under FIPPA and PHIA. While the general role of the Office remains founded on principles of upholding fair information practices, the new Acts broaden the oversight functions from being primarily complaint-driven to include more systemic approaches of ensuring compliance based on investigating, auditing, monitoring, commenting, and recommending on access and privacy concerns and issues.

SPECIAL INVESTIGATIONS AND REPORTS

There are instances when a specific access or privacy complaint -- although resolved for the purposes of an immediate case -- may bring other concerns to the attention of the Ombudsman's Office. In such situations, a S*pecial Investigation* file may be opened. These investigations generally go beyond a review of specific compliance matters under the access and privacy statutes. They may

examine, among other things, systemic access and privacy concerns.

During the course of a special investigation, the complainant and the public body or trustee will have the opportunity to make representations. The Ombudsman may require these to be given orally or in writing. After considering the evidence and circumstances of the case, we determine an appropriate course of action and provide a report of our findings. The substance of these reports may be made public under certain circumstances, for example, as a news release or other reports.

Both PHIA (section 37) and FIPPA (section 58) require an annual report be laid before the Legislative Assembly. In addition to specific areas to be covered, the statutes oblige the Ombudsman to report on any other matters about access to information and protection of privacy *...that the Ombudsman considers appropriate*. In the public interest, the Ombudsman may also *...publish a special report relating to any matter within the scope of the powers and duties of the Ombudsman under... [FIPPA or PHIA], including a report referring to or commenting on any particular matter investigated by the Ombudsman*. The paper entitled "A Privacy Snapshot: Taken September 1999", published concurrently with this Annual Report is an example of a Special Report.

COMMENTING BY THE OMBUDSMAN

Under FIPPA (section 49) and PHIA (section 28), the Ombudsman may comment on the implications for access to or privacy of proposed legislative schemes or programs of public bodies and trustees. As well, the Ombudsman may comment on the implications for the protection of privacy of:

- using or disclosing personal information or personal health information for record linkage or,
- using information technology in the collection, storage, use or transfer of personal information or personal health information.

Our Office introduced the *Comment* after the passage of Manitoba's new access and privacy legislation as a vehicle for making more or less formal remarks based on the underlying principles of the legislation. It is intended to provide a considered opinion on a specific matter or issue, without prejudice to any future investigation. Comments may be initiated by the Ombudsman's Office or at the request of a public body or trustee. During the past year, the Office has provided wide-ranging comments to many entities including:

- To the Advisory Council on Health Infostructure, regarding the proposed integration of health information networks across Canada;
- To Statistics Canada and the Manitoba Centre for Policy Evaluation, pertaining to a proposed health information research project agreement;
- To the Division of Driver and Vehicle Licensing, as to whether the Division ought to obtain consent from drivers before sharing drivers license information with Elections Canada;
- To Manitoba Health, the Manitoba Pharmaceutical Association, and the Manitoba Society of Pharmacists, pertaining to the use of personal health information numbers; and,
- To the City of Winnipeg, regarding the use of employees' social insurance numbers.

Commenting -- without necessarily making formal recommendations -- enables our Office to provide guidance to a public entity or trustee and to give an opinion on issues which affect people in Manitoba. For example, the Ombudsman was invited to review a major federal exploration of the desirability of linking health information networks across the country, known as the Canada Health **Info**way.

If public bodies are uncertain whether a practice complies with privacy legislation, they may ask our Office to comment. This allows us to provide a sense of direction without fettering our ability to respond to future complaints.

The Ombudsman's Office's involvement in an issue may not end with the completion of a comment. Where our comment concludes that a practice or procedure does not comply with the legislation, the public body or trustee is given the opportunity to make representations regarding our position. If our Office continues to hold that the public body is not in compliance, we will consider whether a further investigation or recommendation is required.

AUDITS AND PRIVACY IMPACT ASSESSMENTS

Among our new duties is the conducting of audits to monitor and ensure compliance with FIPPA and PHIA.

Initially, we considered implementing an audit system, and reviewed the practices and experience of other jurisdictions. The British Columbia and Alberta Information and Privacy Commissioner's Offices have each conducted at least one major audit in conjunction with their provincial auditors. We determined that the projects were resource-intensive and time-consuming because of the formal requirements of professional audits. We concluded that our Office would be able to carry out only a very limited number of periodic audits. This seemed consistent with the experience of the Federal Privacy Commission, where full-scale privacy audits have been conducted with decreasing frequency notwithstanding their clear importance to an effective oversight function.

Consequently, we sought an alternative that could be applied on a more widespread basis. The Ombudsman is mandated to carry out the privacy oversight function for hundreds of Manitoba organizations and as yet uncounted personal health information trustees and managers. Given the scope of this mandate, we concluded that conducting a Privacy Impact Assessment would be a more practical alternative in the majority of cases.

The Privacy Impact Assessment (PIA) was developed by the British Columbia Information and Privacy Commission, and successfully adapted by the Alberta Commissioner's Office. While less comprehensive than a professional audit, the purpose of the assessment is to scan for potential compliance problems. We intend to develop such a tool for use in the Manitoba context, and make it available to public bodies and trustees so that they may self-assess their compliance with PHIA and FIPPA personal information privacy requirements.

Although a PIA is intended primarily as a self-assessment and learning tool, the Ombudsman's Office could request the completion of a PIA during an investigation. The Office would monitor compliance by analyzing the results of the assessment. While it may seem onerous to ask an organization to conduct a PIA, we believe it is consistent with their specific obligation to ensure their own compliance with privacy legislation. We intend to develop essentially uniform PIA documents for public bodies and trustees, so that the reviews are consistent, comparable, and measurable.

INFORMATIONAL ACTIVITIES

The Ombudsman has statutory duties to inform the Legislature and the public about the Office's access and privacy work.

Complaint investigations and their outcomes are, in themselves, instructive to the specific complainants, public entities, and trustees immediately involved. Their values may sometimes be enhanced in the public interest by ensuring that there is a broader audience through annual reporting, special reports, and other appropriate means.

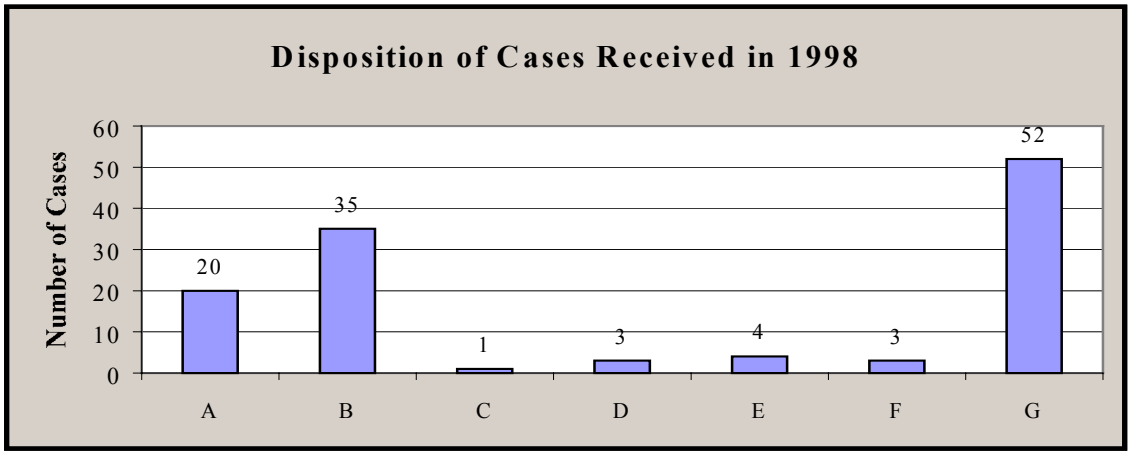
As already mentioned, our Office also participates in public speaking engagements. Our proposed new website will, as well, offer another vehicle for communication of our activities.

STATISTICAL INFORMATION

COMPLAINTS AND DISPOSITIONS IN 1998

One hundred and eighteen complaints were received by our office in 1998. Of these, 66 were closed and 52 were carried forward to 1999. Our office also closed 20 cases carried over from 1997, one case carried over from 1996 and one case carried over from 1995. In total, 88 cases were closed in 1998.

The disposition of the 118 complaints is shown graphically below. The categories of disposition, labelled A to G on the bar graph and used throughout this Annual Report, are also explained below:



A = Resolved or Partially Resolved
Complaint fully/partially supported and access fully/partially granted through informal procedures.
B = Not Supported
Complaint not supported at all.
C = Recommendation Made
All or part of complaint supported and recommendation made after informal procedures prove unsuccessful.
D = Discontinued by Ombudsman
Investigation of complaint stopped before finding is made.
E = Discontinued by Client
Investigation of complaint stopped before finding is made.
F = Declined
Complaint not accepted for investigation by Ombudsman, usually for reason of non-jurisdiction or premature complaint.
G = Pending
Complaint is still under investigation as of January 1, 1999

SOURCE OF COMPLAINTS

COMMUNITY	NUMBER
Bissett	2
Brandon	1
Camp Morton	2
Cardinal	1
East St. Paul	1
Gimli	3
Ile des Chenes	1
Medora	1
Otterburne	1
Portage la Prairie	1
Poplar Point	1
St. Germain	14
St. Norbert	9
Ste. Rose	1
Shoal Lake	2
Sidney	1
The Pas	1
Winnipeg	70
Alexandria VA, United States of America	5
TOTAL	**118**

PROVINCIAL GOVERNMENT DEPARTMENT/AGENCIES

THE FREEDOM OF INFORMATION ACT

JANUARY 1 – MAY 3, 1998

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

MAY 4 – DECEMBER 31, 1998

INTRODUCTION TO *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

WHAT IT IS:

The Freedom of Information and Protection of Privacy Act was proclaimed as law in Manitoba on May 4, 1998, replacing *The Freedom of Information Act,* which had been in effect since September 30, 1988.

Section 2 of *The Freedom of Information and Protection of Privacy Act* sets out the purpose of the Act, as follows:

Purposes of this Act
The purposes of this Act are

- *to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act;*
- *to allow individuals a right of access to records containing personal information about themselves in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act;*
- *to allow individuals a right to request corrections to records containing personal information about themselves in the custody or under the control of public bodies;*
- *to control the manner in which public bodies may collect personal information from individuals and to protect individuals against unauthorized use or disclosure of personal information by public bodies; and*
- *to provide for an independent review of the decisions of public bodies under this Act.*

The Freedom of Information and Protection of Privacy Act contains similar access provisions to the former legislation with respect to records held in the custody or under the control of public bodies. New to the legislation are provisions relating to privacy protection, specifically to the collection, use, disclosure, disposition and security of personal information in the custody or under the control of public bodies. Also new are the number and kinds of public bodies to which the Act applies or will apply in the future. The role of the Ombudsman has been significantly broadened under the new legislation.

WHO IT APPLIES TO:

In addition to applying to Provincial Government departments and agencies since May 4, 1998, *The Freedom of Information and Protection of Privacy Act* has, as of August 31, 1998, encompassed the City of Winnipeg.

The new legislation provides for the inclusion of other public bodies within its purview, upon proclamation of enabling provisions of the Act. These public bodies will be:

Educational Bodies
- School divisions or school districts established under *The Public Schools Act;*
- The University of Manitoba;
- Universities established under *The Universities Establishment Act;*
- Colleges established under *The Colleges Act;* and
- Any other body designated as an educational body in the regulations.

Local Government Bodies
- Municipalities;
- Local government districts;

- Local committees, community councils or incorporated community councils under *The Northern Affairs Act;*
- Planning districts established under *The Planning Act;*
- Conservation districts established under *The Conservation Districts Act;* and
- Any other body designated as a local government body in the regulations.

Health Care Bodies

- Hospitals designated under *The Health Services Insurance Act;*
- Regional health authorities established under *The Regional Health Authorities Act;*
- Boards of health and social services districts established under *The District Health and Social Services Act;*
- Boards of hospital districts established under *The Health Services Act;* and
- Any other body designated as a health care body in the regulations.

ROLE OF THE PROVINCIAL OMBUDSMAN:

As was the case with *The Freedom of Information Act*, a complaint can be made to the Ombudsman under *The Freedom of Information and Protection of Privacy Act* concerning denial of access to records requested under the Act. If, after the Ombudsman's review, a person does not obtain access to all requested records, he or she can appeal to the Court of Queen's Bench. A distinction between the former legislation and the new Act is that now after completing an investigation, the Ombudsman may, if he is of the opinion that the decision raises a significant issue of statutory interpretation or that an appeal is otherwise clearly in the public interest, appeal a refusal of access to the Court in the place of the Applicant (with the Applicant's consent), or may intervene as a party to an appeal.

Under the new legislation, the Ombudsman shall also investigate complaints that an individual's own personal information has been collected, used or disclosed by a public body in violation of *The Freedom of Information and Protection of Privacy Act.* Prior to the new Act, privacy complaints against Provincial Government departments and agencies were handled by our office under *The Ombudsman Act*. For the time being, our office still uses that legislation for investigating access and privacy complaints against local government bodies (with the exception of The City of Winnipeg). Local government bodies, which do not yet come under *The Freedom of Information and Protection of Privacy Act,* come under *The Ombudsman Act* with respect to matters of administration generally.

The Freedom of Information and Protection of Privacy Act sets out other, new, powers and duties of the Ombudsman in addition to the investigation of complaints relating to access and privacy. These include the powers and duties:

- to conduct investigations and audits and make recommendations to monitor and ensure compliance with the Act;
- to inform the public about the Act and to receive comments from the public about the administration of the Act;
- to comment on the implications for access to information or for the protection of privacy of proposed legislative schemes or programs of public bodies;
- to comment on the implications for protection of privacy of using or disclosing personal information for record linkage or using information technology in the collection, storage, use or transfer of personal information; and
- to bring to the attention of a public body any failure to fulfil the duty to assist an applicant.

In some situations, this authority has been used to follow up on broader or systemic issues arising from a complaint or concern

which has come to the attention of our office. In exercising the general powers and duties under the legislation, our office has opened files which we have termed "special investigations". Case numbers referred to in this Annual Report which begin with "S" identify special investigations.

In 1998, our office received 48 complaints under *The Freedom of Information Act* and 60 complaints under *The Freedom of Information and Protection of Privacy Act.* Five special investigation files were opened under *The Freedom of Information and Protection of Privacy Act.* Additional complaints and special investigations were handled under separate access and privacy legislation, *The Personal Health Information Act,* and are discussed in a separate section of this Annual Report.

The following case summaries, organized by department, are interesting and instructive cases relating to Provincial Government departments and agencies that were handled by our office in 1998 under *The Freedom of Information Act* and *The Freedom of Information and Protection of Privacy Act.*

Case summaries relating to the City of Winnipeg are in a separate section of this Annual Report, although our comments on the principles, provisions and spirit of *The Freedom of Information and Protection of Privacy Act* apply equally to Provincial Government departments and agencies and the City of Winnipeg.

MANITOBA EDUCATION AND TRAINING

In 1998, one complaint, an allegation of breach of privacy, was received by our office against Manitoba Education and Training.

It was the first complaint under *The Freedom of Information and Protection of Privacy Act* alleging an over-collection of personal information. The case proved to be a positive one. Our review resulted in the Department changing its collection of tax information for Manitoba Student Loan applications. As well, the issue of data collection raised by this case generally, has caused the Department's Student Financial Assistance Branch to consider the extent of its other collection of personal information practices.

◆ 98-092
Over-Collection: Privacy Rediscovered

The Freedom of Information and Protection of Privacy Act defines the term "personal information" as follows:

> ***"personal information"*** *means recorded information about an identifiable individual, including*
> *(a) the individual's name,*
> *(b) the individual's home address, or home telephone number, facsimile or e-mail number,*
> *(c) information about the individual's age, sex, sexual orientation, marital or family status,*
> *(d) information about the individual's ancestry, race, colour, nationality, or national or ethnic origin,*
> *(e) information about the individual's religion or creed, or religious belief,*
> *(f) association or activity, personal health information about the individual,*
> *(g) the individual's blood type, fingerprints or other hereditary characteristics,*
> *(h) information about the individual's political belief, association or activity,*
> *(i) information about the individual's education, employment or occupation, or educational, employment or occupational history,*
> *(j) information about the individual's source of income or financial circumstances, activities or history,*
> *(k) information about the individual's criminal history, including regulatory offences,*
> *(l) the individual's own personal views or opinions, except if they are about another person,*
> *(m) the views or opinions expressed about the individual by another person, and*
> *(n) an identifying number, symbol or other particular assigned to the individual;*

Section 36(2) of *The Freedom of Information and Protection of Privacy Act* sets out:

> ***Limit on amount of information collected***
> ***36(2)*** *A public body shall collect only as much personal information about an individual as is reasonably necessary to accomplish the purpose for which it is collected.*

Our office received a Freedom of Information and Protection of Privacy Act complaint from the father of a student who had applied for a Manitoba Student Loan.

He noted that the application required parents to submit a copy of their most recent income tax returns, including all schedules. He felt that this was more information than was reasonably necessary to establish the student's entitlement for the upcoming school year. He noted that entitlement appeared to be based solely on total income of the parents and the income and assets of the student. He suggested that the Notice of Assessment form, issued by Revenue Canada, should suffice in providing the necessary financial information.

Enquiries were made with the Student Financial Assistance Branch. We were advised that in order to assess whether students are eligible for assistance, the Student Loan Program requires information about the circumstances of the student. Since the Program is intended to supplement family resources, information on the financial circumstances of parents is also required.

We were advised that the Branch requests copies of income tax returns to verify information provided by parents on the student loan application form. When determining the amount of expected parental contributions, the Branch considers Employment Insurance and Canada Pension Plan as deductions against a parent's gross income. We were advised that the Revenue Canada Notice of Assessment form is not requested by the Branch because that form does not show deductions for Employment Insurance or Canada Pension Plan deducted for parents who are not self-employed.

Whereas the Branch requested the income tax returns of parents, we noted that the student loan application form referred to only four statistics from the income tax returns -- specifically, gross income, Canada Pension Plan or self-employed Canada Pension Plan, Employment Insurance and tax payable. The Branch confirmed that the remainder of the information in the income tax return was not required to verify a parent's financial information. On this basis, we were of the opinion that the collection of the complete income tax returns was not in accordance with section 36(2) of *The Freedom of Information and Protection of Privacy Act.*

It is nonetheless important to draw a distinction between the Branch's collection of information for the purpose of financial verification and collection of information for the purpose of conducting an audit. Every application form contains a release that must be signed by the student and, if relevant, the parents. This release expressly permits the Department to audit loan awards, to request detailed information from financial institutions and to obtain copies of previous income tax returns. In our view, it is reasonable to conduct random audits on awards. As additional data is required to conduct an audit, the collection of supplementary financial information is in accordance with *The Freedom of Information and Protection of Privacy Act* because the collection is connected with that intended audit purpose.

I am pleased to report that further to our review of this matter, the Student Financial Assistance Branch has decided that income tax returns are not required for the verification of financial information on the application forms. The Branch also noted that the issue raised in this case is applicable to the collection of other personal information by the Branch and it is currently reviewing that collection.

The Complainant in this case raised an important privacy issue which was appropriately and co-operatively addressed by the Department.

MANITOBA FAMILY SERVICES

There were three complaints about Manitoba Family Services received by our office in 1998. All were made under *The Freedom of Information and Protection of Privacy Act*. One case concerned refused access and the other two were allegations of breach of personal privacy.

One of these privacy cases raised issues relating to mail management (as did a case concerning Manitoba Highways and Transportation, reported in the section concerning *The Personal Health Information Act*, on page 77 of this Annual Report*)*. We expect that the mail management issues raised in these cases are encountered by all departments and agencies in government. In an attempt to address such issues on a government-wide basis, we have opened a special investigation file and are making enquiries with the Mail Management Agency, a special operating agency used by many of the departments and agencies of the Provincial Government.

◆ 98-095
S99-007
Security Breached: Privacy Sought

Section 41 of *The Freedom of Information and Protection of Personal Privacy Act* sets out:

> ***Protection of personal information***
> ***41*** *The head of a public body shall, in accordance with any requirements set out in the regulations, protect personal information by making reasonable security arrangements against such risks as unauthorized access, use, disclosure or destruction.*

In this case, the Complainant raised concern with our office that reasonable security arrangements had not been taken by Manitoba Family Services respecting his personal information. The Complainant received an envelope from the Department, marked with his incomplete name and address and enclosing details of a social allowance lien. The mail had been opened by an unknown person who had apparently re-addressed it and sent it to the Complainant.

The envelope was hand-written and included the Complainant's first name (prefaced by "Mr. & Mrs".), his box number and community. There was no province or postal code shown. Marked in different handwriting and different ink, was the phrase "opened by mistake" and the postal code. Enquiries were made by our office with Canada Post to establish if the correspondence had been redirected by the post office. We were advised that because there were no initials, bar code or identifying number on the envelope, it would not appear to have been opened by Canada Post. Rather, it was likely misdelivered.

Enquiries made with the Department would suggest that an error was made in this matter. We were advised that this error was brought to the attention of the employee involved. Also, upon notifying the Department of the complaint to our office, the Department wrote a letter of apology to the Complainant. We were of the view that the Department acted appropriately in view of the error.

The Complainant expressed concern to our office that the same thing not happen to any one else and suggested that, in the future, the

Department should send confidential information by registered mail. We considered this suggestion, but noted it would not overcome the problem of an improperly addressed envelope.

However, our office was of the view that a third party would be less likely to open a misdelivered envelope if it were marked "personal and confidential".

Manitoba Family Services and other government departments and agencies routinely handle personal information that is sent by mail. One of the issues we are pursuing is how government departments and agencies should treat outgoing mail containing sensitive personal information. Our own office has recently introduced an additional privacy precaution in our administration by including the word "confidential" on the envelopes of all outgoing correspondence to complainants and public bodies. When appropriate, the word "personal" is also shown on the envelope.

MANITOBA FINANCE

The two complaints received against Manitoba Finance in 1998 were carried forward to 1999. Two other complaints received by our office in the first days of 1999 and handled by the Department in 1998, raised the issue of the duty to assist an Applicant. They resulted in our opening a special investigation file.

◆ 99-001
99-002
S99-003
The Duty to Assist Missed

The Freedom of Information and Protection of Act, unlike *The Freedom of Information Act* which was silent on the issue, explicitly sets out a duty to assist Applicants as follows:

> ***Duty to assist applicant***
> ***9*** *The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.*

The duty to assist an Applicant is an important and pervasive principle of *The Freedom of Information and Protection of Privacy Act* and is reflected in various provisions relating to decisions, actions or failures to act. For example, one of the Ombudsman's new general powers and duties under *The Freedom of Information and Protection of Privacy Act* provides:

> ***General powers and duties***
> ***49*** *In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may*
>
> *(f) bring to the attention of the head of a public body any failure to fulfil the duty to assist applicants;*

This particular matter concerned two applications for access made by an Applicant on forms prescribed under *The Freedom of Information Act*, after that Act was repealed and replaced by *The Freedom of Information and Protection of Privacy Act*. The applications for access were dated November 5, 1998. The Department responded to the applications by letter dated December 3, 1998, denying access and citing exceptions under *The Freedom of Information and Protection of Privacy Act.* The Department's letter also stated "for future reference…your request was not in accordance with the format prescribed by *The Freedom of Information and Protection of Privacy Act*".

On January 5, 1999, the Applicant submitted two complaints of refused access to our office. Enquiries were made with the Department. The Department advised our office that as the applications for access were not made on the form required by *The Freedom of Information and Protection of Privacy Act,* they were not considered by the Department to be applications under that Act. We had several discussions with the Department at this time. We advised the Applicant that we were technically unable to investigate the complaints of refused access under *The Freedom of Information and Protection of Privacy Act*. Nevertheless, we indicated that we would be further considering the matter of how the applications for access were handled by the Department.

In our communication with the Department and the Applicant, we noted the mandatory provision of *The Freedom of Information and Protection of Privacy Act* concerning

the Department's duty to assist an Applicant. Under our general powers and duties to conduct investigations, we opened a special investigation file.

We contacted the Access Officer again and noted that the applications were made on the form prescribed under the repealed *Freedom of Information Act* and not the form prescribed under the recently proclaimed *Freedom of Information and Protection of Privacy Act*. We also observed that the Department responded to the applications by letter, referring to the applications as "information requests". The Department's letter of response denied access to the requested records, relying on exceptions under *The Freedom of Information and Protection of Privacy Act.* The Department also noted in its response that, for future reference, the requests were not on the prescribed form.

In reviewing this matter, it was noted that the Department did not advise the Applicant that his requests for information were made on the wrong application forms until approximately one month after receiving them. The Department did not provide the Applicant with copies of the proper application forms to assist him in exercising his rights under the Act in a timely manner.

We noted that the failure by the Department to assist the Applicant resulted in the Applicant's inability to make a complaint to the Ombudsman about the decision to deny access, which was a decision made by the Department on or before December 3, 1998. We said that the Applicant now had to re-apply, some two months later, and await a response from the Department before obtaining all or some of the documents requested and, potentially, exercising his right under the Act to file a complaint with the Ombudsman. We stated that we felt the manner in which these applications requesting information were handled was not in keeping with the spirit of the Act or with section 9 of the Act, concerning the duty to assist an Applicant.

We advised the Department that any further comments would be considered before our office concluded the review of this matter.

The Access Officer responded to our letter. He advised our office that the Applicant's requests were considered to be informal information requests as they were not made on the forms prescribed under *The Freedom of Information and Protection of Privacy Act*. The Access Officer felt that the Applicant received the benefit of having the Department undertake work consistent with an application while receiving the benefits of timely, no-cost processing of requests associated with an informal process.

We responded to the Department and reiterated our position. We noted that almost one month after the applications were submitted, the Department advised the Applicant that the applications were not made on the proper forms. We advised that we did not feel this was in keeping with the duty to assist an Applicant. The failure by the Department to assist the Applicant resulted in his inability to exercise his rights properly under the Act, including the right to file a complaint with our office concerning the refusal of access. In addition, it required the Applicant to reapply and await a response from the Department, in order to gain the ability to exercise his rights under *The Freedom of Information and Protection of Privacy Act*.

For these reasons, we advised the Department and the Applicant that we felt the manner in which these applications for access had been handled by the Department was not in keeping with the spirit of the Act or with section 9 of the Act.

MANITOBA HIGHWAYS AND TRANSPORTATION

Three complaints were received against Manitoba Highways and Transportation under *The Freedom of Information and Protection of Privacy Act*. One, completed in 1998, was not supported. Two, completed in early 1999, were concluded as discontinued and partially supported, partially resolved informally. Another complaint, which was supported, was made under *The Personal Health Information Act*. It is summarized in the portion of this Annual Report concerning that legislation.

The case summarized below and relating to *The Freedom of Information and Protection of Privacy Act* does not involve a complaint received from an individual about Manitoba Highways and Transportation, but concerns a request by the Department for a comment from our office on an issue.

Among the new powers and duties of the Ombudsman under *The Freedom of Information and Protection of Privacy Act* is provision to comment on access and privacy issues, including to *"comment on the implications for protection of privacy of ... using or disclosing personal information for record linkage"*.

Commenting on an issue enables the Ombudsman's office to provide guidance to a public body, without prejudice to future investigations.

The procedure for providing a comment is similar to other Ombudsman investigations. We obtain information and representations from the public body, and then prepare a written account of our findings. In circumstances where the office concludes that a practice or procedure does not comply with the legislation, we will provide this opinion in our comment. The public body will be provided with a final opportunity to respond to our position. If, upon consideration of the response, our office continues to hold that the public body is not in compliance, we will decide whether a further investigation or recommendation is required.

◆ S99-008
Commenting on the Disclosure of Personal Information for Record Linkage

Considerable work on this file was conducted in 1998, although our involvement continues into 1999.

As background, the Division of Driver and Vehicle Licencing (DDVL) entered into an interim agreement with Elections Canada in July 1998. Under the agreement, DDVL would provide quarterly updates of personal information to the federal department, from the drivers licence database. The DDVL requested that we review the agreement and provide comments.

Our office considered the implications of the data-sharing agreement in the context of fair information principles and *The Freedom of Information and Protection of Privacy Act.* We examined whether consent must be obtained to permit disclosure, whether consent ought to be obtained to promote transparency, and whether consent is required for the continuous collection of information. We concluded that active consent should be obtained from individual drivers before personal information is disclosed to Elections Canada under a new agreement.

The matter arose when Elections Canada developed a "permanent" electoral list that no longer uses periodic door-to-door enumeration to obtain information about

voters. Instead, the federal department now maintains that voters list by obtaining updated information from provincial databases. Elections Canada requested access to personal information collected and stored in a computer database maintained by DDVL.

The interim agreement entered into between Elections Canada and DDVL in 1998 permitted data-sharing for one year, only for the purpose of updating the National Register of Electors. Under the agreement, DDVL agreed to provide some personal information from every driver listed in the Division's database, unless a motorist had specifically requested that his or her personal information not be shared.

The Division did not obtain direct consent from motorists prior to disclosing the information to Elections Canada. Rather, DDVL participated in a joint effort with Elections Manitoba to inform drivers that they could "opt out" of the data-sharing arrangement. The Division gave notice of the agreement in newspapers. By arrangement with DDVL, Elections Manitoba also contacted each person who had requested to be excluded from the Manitoba voters list. These voters were advised of the agreement between DDVL and Elections Canada to ensure they were aware of their right to be excluded from the federal voters list. Elections Canada advertised the change from door-to-door enumeration to data-sharing arrangements.

In our review, we noted that, under *The Freedom of Information and Protection of Privacy Act,* a public body must be authorized to make a disclosure. In this case, DDVL would be authorized if 1) the disclosure purpose were consistent with the collection purpose; 2) the disclosure were permitted or required under other legislation; or 3) DDVL obtained consent from individuals for the disclosure.

We noted that DDVL collects information for the purpose of administering the licencing system. Disclosure to Elections Canada is not consistent with the purpose for collection. Therefore, we were of the view that DDVL was not authorized to release the information under s.44(1)(d) or (e) of *The Freedom of Information and Protection of Privacy Act.*

Consequently, we concluded that the information should only be disclosed if DDVL obtained consent as required under s.44(1)(b). In the alternative, we were of the view that DDVL would have to consult with Privacy and Access Review Committee under s.46 of *The Freedom of Information and Protection of Privacy Act*, as this section applies to all disclosures that are not otherwise authorized.

Transparency involves the concept of information and procedures being open and apparent. To promote greater transparency in this situation, we suggested that DDVL obtain direct consent from individual drivers.

This was consistent with the position taken by the federal departments. It is interesting to note that the Revenue Canada tax forms ask taxpayers to indicate whether they consent to sharing data with Elections Canada and federal departments have a mandatory duty to obtain express consent under the *Canada Elections Act*.

We noted that the *Canada Elections Act* does not impose the requirement for express consent on information obtained from the provinces. Consequently, unless provincial legislation imposes an obligation to obtain consent, information from provincial sources is subject to a lower standard of privacy protection than information from federal sources.

Most provinces have not required consent for sharing data with Elections Canada. The exception has been Alberta, where the Information and Privacy Commission has recommended that consent be obtained at the time of collection.

We observed that each time drivers renew their licences, DDVL collects information directly from them. This means that every licence renewal represents a new or "continuous" collection of information. Accordingly, subsequent to signing the agreement, the DDVL would be engaging in a new "activity" -- compiling quarterly updates for Elections Canada. We noted that this activity meets the definition of collection "purpose" under *The Freedom of Information and Protection of Privacy Act* [s.36(1)(b)].

Where information is collected directly from an individual, *The Freedom of Information and Protection of Privacy Act* stipulates that the public body "shall" inform each individual of 1) the purpose for collecting the information; 2) the legal authority for the collection; and 3) a contact person to answer questions regarding the collection [s.37(2)].

On this basis, after the agreement was signed, DDVL would be obliged to inform drivers of the updating purpose on an individual basis. Therefore, we concluded that it would not be too onerous for DDVL to also ask for consent while providing this information.

We provided DDVL with a detailed account of our opinion. At the time of writing this Annual Report, the matter is ongoing.

MANITOBA HOUSING AUTHORITY

Our office received a complaint against the Manitoba Housing Authority in 1998. The case was partially supported and, I am pleased to report, partially resolved informally. It serves as an example of the competing interests of access and privacy often encountered in the handling of an access request, and the need to consider the unique circumstances concerning the issue of access in any one case.

◆ 98-033
Release of "Public" Housing Information

The Applicant requested from the Manitoba Housing Authority "a list of properties managed by MHA in Winnipeg".

The Access Officer for the Manitoba Housing Authority advised that access to the requested record was denied for reason of section 17(1) of *The Freedom of Information and Protection of Privacy Act,* which reads:

> ***Disclosure harmful to a third party's privacy***
> ***17(1)*** *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*

Upon receipt of the complaint, enquiries were made about the denial of access. The Manitoba Housing Authority advised that providing the requested information would identify the financial circumstances of all people living in accommodations managed by the Authority. Reference was made to section 17(2)(g) of *The Freedom of Information and Protection of Privacy Act*, which sets out:

> ***17(2)*** *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*
> *(g) the personal information describes the third party's source of income or financial circumstances, activities or history;*

We reviewed a list of properties maintained by the Manitoba Housing Authority. We were advised that the list included buildings that were identified by public signage as being Manitoba Housing Authority projects. We were informed that smaller buildings, housing fewer individuals, were not identified with Manitoba Housing signage for reason of the occupants' personal privacy.

We had further discussions with the Department regarding release of a list of the properties with public signage. While we acknowledged the Department's concern for the protection of the privacy of persons living in Manitoba Housing Authority accommodations, it was our opinion that it was reasonable to grant to the Applicant a list of the properties displaying Manitoba Housing Authority signage. These were properties that the Department had already publicly identified and we believed that, in the case of larger premises, such release was not contrary to the provisions of *The Freedom of Information and Protection of Privacy Act*. In the case of premises where fewer individuals lived, we felt that the occupants were more readily identifiable and that release of their addresses would be an unreasonable invasion of their privacy.

After further discussions, the Department agreed to release to the Applicant a partial listing of Winnipeg properties managed by

the Manitoba Housing Authority, specifically those having Manitoba Housing Authority signage.

MANITOBA INDUSTRY TRADE AND TOURISM

Our office received two complaints against Manitoba Industry Trade and Tourism in 1998. One complaint was not supported. The other complaint was supported and resulted in a recommendation. The case was one of the rare instances when a recommendation by the Ombudsman concerning access was not followed by a public body.

In this case, the Department gave a broad interpretation to "Assembly records" under *The Legislative Assembly Act*, holding that records in the custody and under the control of the Minister, relating to the administration of the Department, were not subject to access legislation. I felt this interpretation was not in keeping with the spirit and intention of the legislation. A review by our office of other jurisdictions indicated that a prevailing principle in Canada is that records from Members of the Legislative Assembly to departments or agencies of the provincial government, relating to the mandate and functions of the respective departments or agencies, are subject to access legislation.

◆ 98-022
Assembling Reasons that Deny Access

Under *The Freedom of Information Act*, the Applicant requested access to a letter from a Member of the Legislative Assembly (MLA) to the Minister of Industry, Trade and Tourism, or any government staff person regarding the Applicant or his company.

The Department responded to this request, advising that the record was deemed to be in the sole custody and under the sole control of the Legislative Assembly by virtue of section 52.1(1) of *The Legislative Assembly Act*, which reads:

> ***Assembly records***
> ***52.1(1)*** *Notwithstanding any other Act, every record relating to a member or to the administration of the Assembly that is in the possession of a department or branch of the executive government or a Crown agency is deemed to be and always to have been in the sole custody and under the sole control of the Assembly.*

The Department further advised that the right of access under *The Freedom of Information Act* did not extend to records under the custody or control of the Assembly, and access to the record was denied.

The withheld record and the legislation were reviewed. Based on our review, our office was of the opinion that this record, although written by an MLA, was not a record of the Assembly, as it did not relate to an MLA or to the administration of the Assembly. Rather, the record was a communication relating to the administration of government which was sent from an MLA to a Minister of a government department. Accordingly, the record in our opinion, did fall under *The Freedom of Information Act*.

During our review, discussions took place with the Department concerning the applicable sections of *The Freedom of Information Act*, specifically section 41(1), which provides:

> ***Protection of personal privacy***
> ***41(1)*** *... the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of the third party...*

As *The Freedom of Information Act* was replaced by *The Freedom of Information and Protection of Privacy Act* on May 4, 1998, the corresponding provision of the new Act was considered. Section 17(1) of the new Act reads:

> ***Disclosure harmful to a third party's privacy***
> ***17(1)*** *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*

The Department remained of the view that release of the record would be an unreasonable invasion of the privacy of the third party, namely the MLA. Yet, from our investigation of this matter, we understood that the Applicant had obtained a copy of a letter from the Minister to the MLA responding to the requested letter, wherein the identity of the MLA and the concerns he had expressed were disclosed. On this basis, we did not feel that access to the requested letter would constitute an unreasonable invasion of the privacy of the MLA. There were, however, other third parties mentioned in the letter, whose personal privacy could be breached by the disclosure of their identity.

Accordingly, I recommended that the Applicant be given access to the requested record with appropriate severing of the identifying information relating to third parties contained in the body of the letter.

The Access Officer responded to the recommendation by advising that the Department believed it was correct in denying access to the requested record and, consequently, that it was not in a position to implement the recommendations.

The Access Officer stated that the Department continued to believe that the requested letter related to the opinions and concerns of an MLA which were expressed in confidence to a Minister of the Manitoba Government. The Department continued to believe that *The Freedom of Information Act* did not extend to records deemed to be under the custody or control of the Assembly, as defined by *The Legislative Assembly Act.* The Access Officer stated that the MLA had been contacted by the Department to ascertain his views on release of the record and that he had advised that his letter was provided to the Minister in confidence and its release would represent an unreasonable invasion of his privacy. The Access Officer stated that the Department also believed that to ensure and encourage the free flow of potentially sensitive and privileged information from MLA's to the Minister, the provisions of *The Legislative Assembly Act* and the confidential nature of certain communications between Members and the Minister must be respected.

Further to the Department's response, I spoke to the Deputy Minister (who is also an Access Officer) in an attempt to resolve the matter. The Deputy Minister advised that the MLA did not give his consent to the release of the record and he felt that the Minister wanted to support the feelings of a fellow MLA and respect his wishes. Our position was reiterated and the Deputy Minister advised that he would review the matter and speak to our office later.

I also spoke with the MLA. He advised there was a principle that he and the Minister wanted to respect: the confidentiality of letters written from one MLA to another. I noted that the letter had been written to the Minister as the head of a Department, and the Minister had responded, not as an MLA, but as a Minister of the Department. It was further noted that, in our view, the principle that the Department and the MLA referred to would not be breached in this case. The circumstances of this particular case supported access in that the communication between the Minister and the MLA had already been released. The MLA said he

understood the point being made, but he would not consent to release of the record.

I again spoke to the Deputy Minister and explained that the MLA felt that he and the Minister should respect the confidentiality of communications between two MLA's and he was not prepared to consent to release. The Deputy Minister indicated that the Department's position was firm.

A final letter was written to the Access Officer wherein I stated I was still of the opinion that the record fell within *The Freedom of Information and Protection of Privacy Act*. Section 4 of the Act states: "This act applies to all records in the *custody or under the control of a public body …*" (emphasis added). The definition of "public body" includes "the office of a minister".

It was also noted that where a record is a personal or constituency record of a Minister, the access legislation would not apply. This, however, was not the situation regarding the record which had been requested by the Applicant. The record in question was a communication relating to the administration of a government program sent from an MLA to a Minister of a government department. This record was clearly in the custody and under the control of the Minister's office. It did not appear that the record related to an MLA or the administration of the Assembly and, therefore, I did not feel that this record would be considered an "Assembly record" in accordance with *The Legislative Assembly Act*.

I noted that, in the Department's response, it was stated the record related to the opinions and concerns of a Minister of the Manitoba Government. The validity of these comments was acknowledged; however, I suggested that the following provisions of *The Freedom of Information and Protection of Privacy Act* addressed those concerns:

> ***Disclosure harmful to a third party's privacy***
> ***17(1)*** *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy*.
>
> ***Disclosures deemed to be an unreasonable invasion of privacy***
> ***17(2)*** *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*
>
> *(c) disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an enactment;*

The record referred to in this case was, in my opinion, subject to the above provisions of the legislation. Nevertheless, it appeared that the identity of the third party and the information provided in confidence to the Department had already been disclosed. Accordingly, I stated that I believed the use of the exemption in this case was not justified.

MANITOBA JUSTICE

In 1998, our office received 21 complaints against Manitoba Justice. Of these, 16 were concluded in 1998, one being discontinued, nine not supported and six supported in whole or in part. We found this to be a better year than 1997 in terms of the Department's administration of access requests.

Several cases carried over from 1997 were concluded in 1998, one of which was similar to a case reported in last year's Annual Report, relating to ministerial briefing notes and entitled "Access under the Blanket? A Case of Too Little Too Late". The case reported below addresses the Department's more recent approach concerning ministerial briefing notes.

The handling of this case was not without serious flaws. Notably, during the administration of this case, some of the requested records were destroyed in accordance with records schedules under *The Legislative Library Act.* The Department's position that ministerial briefing notes were not accessible resulted in the records not being retrieved and considered for release before some were destroyed. While we felt this was wrong, it should be noted that the Department's ultimate position on release of the existing records was positive. This year's case summary is entitled "The Blanket Unfurled: Considering Access Page-by-Page".

Another case resolved in a manner consistent with the provisions and spirit of access legislation involved the Department's transcription of an illegible record for an Applicant. It, too, is summarized below.

A very important case in 1998, because of its relevance to all departments and agencies, set out our opinion that a public body's legal counsel is not a third party in an access request. This principle would apply whether the lawyer is counsel from Manitoba Justice or a private law firm. In the specific case, it was our view that the time needed for consulting with one's own legal counsel is not a basis for extending the period for responding to a request under *The Freedom of Information and Protection of Privacy Act*. The case is highlighted under the heading "When is a Lawyer Not a Third Party?…"

◆ 97-001
The Blanket Unfurled: Considering Access Page-by-Page

By application dated December 10, 1996, a request was made for "copies of any or all briefing notes on Headingley Correctional Institution prepared between 1990 and 1996".

The Access Officer responded in a letter dated December 16, 1996 that, as briefing notes are submitted to a Minister for consideration in the formulation of policy or the making of decision, the request was being denied as provided for by section 39(1) of *The Freedom of Information Act*, as follows:

> ***Policy, opinions, advice or recommendations.***
> ***39(1)*** *…the head of a department may refuse to give access to any record which discloses*
> *(a) an opinion, advice or a recommendation submitted by an officer or employee of a department, or a member of the staff of a minister, to a department or to a minister for consideration in*
> *(i) the formulation of a policy, or*
> *(ii) the making of a decision, or*

(iii) the development of a negotiating position of or by the department or the government; or

(b) a plan relating to the administration of a department, including a plan relating to the management of personnel, which has not yet been implemented; or

(c) the contents of any draft enactment.

The complaint concerning the denial of access, although dated January 9, 1997, was not received by our office until April 3, 1997. It was only after the Applicant contacted our office on April 1, 1997, that it became apparent that our office had no record of receipt of the complaint. Accordingly, the Applicant sent a copy of the complaint to our office on or about April 1, 1997.

Upon receipt of the complaint, enquiries were made with the Department and arrangements were made to review the records. At that time, we were advised that the 1990 and 1991 records had been destroyed. We were informed that the 1990 records had been destroyed prior to the access request being made and that the 1991 records had been destroyed after the access request was made. The destruction was conducted pursuant to *The Legislative Library Act*.

In reviewing the records that existed, it was apparent that hundreds of pages fell within the access request. The Department had taken the position in its response dated December 16, 1996, that each page was subject to section 39(1) of *The Freedom of Information Act* and was not releasable, with or without severing.

Our Compliance Investigator undertook a line-by-line consideration of severing, something that should have been done by the Department initially. Based on our investigation and review, a report was sent to the Access Officer on April 3, 1998, providing our findings and conclusions. The Department was advised of our opinion that the failure to retrieve the 1991 records following receipt of the application for access was wrong. Our opinion was also given that the decision to deny all of the requested records, with no consideration given to release or to severing as required under section 12(1) of the Act, was contrary to the provisions and spirit of the Act. Section 12(1) provides:

Severability.

12(1) *Notwithstanding any other provision of this Act, where a department receives an application for access to a record which contains exempt information, the head of the department shall give access to all the information in the record which is not exempt and which can reasonably be severed from the exempt information.*

We advised the Department that consideration was being given to recommending release of approximately 75 pages unsevered, and another approximately 75 pages with severing. The Department was offered the opportunity to make written representations.

Between April 3 and September 3, 1998, several conversations were held with the Department's Access Coordinator. We were informed that the Access Coordinator attended the Manitoba Archives where, it was determined, some records from ministerial files from 1990 and 1991, pertaining to the Headingley Correctional Institution, had been deposited. These records, consisting of 26 pages, had not been destroyed. We were advised that all records coming under the request were reviewed by access personnel on a line-by-line basis. This consisted of over 300 pages in total.

Our office encouraged this approach, as the duty to consider records under an access to information request lies with departments, not with the Ombudsman's Office, as does the onus of proof to withhold rather than release records. As section 39(1), a

discretionary exemption was being considered, it was for the Department to determine the parameters of that exemption and to exercise the discretion to release or not to release all or parts of records. Under Manitoba's access legislation, in a review by the Ombudsman, unlike a proceeding before the Court, the Ombudsman can consider the exercise of discretion, not just whether records fall strictly within the ambit of the exemption. Therefore, it was felt that this exercise would result in the broadest possible release of records.

By letter dated September 3, 1998, the Access Officer provided our office with the Department's position on release of the requested records, including severing. The Department indicated that it was willing to release more than 200 pages in full or in severed form. In most instances where information was being withheld, the Department relied on section 39(1). Nevertheless, the Department also cited the following exemptions on a single occasion or sparingly:

> ***Cabinet confidences.***
> ***38(1)*** *...The head of a department shall refuse to give access to any record which discloses a confidence of the cabinet, including but not restricted to a record which discloses*
>
> *(d) a communication or discussion between ministers on a matter relating to the making of a government decision or the formulation of government policy.*

> ***Law enforcement and legal proceedings.***
> ***40(1)*** *The head of a department may refuse to give access to any record the disclosure of which could reasonably be expected*
>
> *(b) to facilitate the commission of an offence or to threaten the security of a correctional institution or other building, a computer or communications system, or any other property or system;*

> ***Protection of personal privacy***
> ***41(1)*** *...the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party ...*

Clarification was sought from the Department and subsequently discussions resulted in agreement on the issue of a further release of several pages. In the course of this matter, *The Freedom of Information Act* was repealed and replaced by *The Freedom of Information and Protection of Privacy Act*, so this complaint was also considered under that legislation. The Department finally advised it would be releasing to the Applicant 108 pages in full and 118 pages in severed form.

In reviewing this complaint, it was my opinion that the Department initially applied a blanket exemption to the records. In addition, it appears that records which may have fallen under the request were inadvertently destroyed when the records were not retrieved for review at the time of the request. I did not feel, from our review, that these records were deliberately or wilfully destroyed.

The issue that contributed to a protracted investigation of this complaint related to the matter of release of ministerial briefing notes. This issue generated extensive discussions between our office and the Department. By the conclusion of our discussions, the Access Officer wrote to our office indicating that the Department is not taking the position that briefing notes are not accessible. The Department stated that it agreed with our office that briefing notes need to be reviewed on a document-by-document basis. I was satisfied that this was ultimately done in this case.

◆ 98-001
Illegible Information is No Information

In this case, the Applicant requested several records from Manitoba Justice, including a "legible, typed certified true copy" of two medical entries made by a physician on the Applicant's medical record held by the Department.

The Department responded to the request, advising that full access was being granted to the records which existed, noting that some records that had been requested did not exist. It was stated that the Department could not provide a typed certified true copy of the medical entries as this could only be provided by the physician and would be subject to any fees the physician might charge. The Department provided the address of the physician for pursuing a certified true copy.

The Applicant submitted a complaint to our office under *The Freedom of Information Act*. He wrote:

> *If the information a department provides is illegible, it is useless and defeats the very purpose of the Act. Indeed, as the name of the very Act itself implies: "Freedom of Information Act." Illegible "information" is no information.*

Further to the complaint, enquiries were made with the Department. The relevant sections of the legislation were reviewed and there were discussions with the Department. In the course of reviewing this case, *The Freedom of Information Act* was repealed and replaced by *The Freedom of Information and Protection of Privacy Act*. In a section similar to a provision of the old legislation, *The Freedom of Information and Protection of Privacy Act* sets out:

> ***Explanation***
> ***14(2)*** *The head of a public body who gives access to a record may give the Applicant any additional information that the head believes may be necessary to explain it.*

In discussions with the Department we expressed our opinion that, in the circumstances, it would be in accordance with the spirit of the legislation to provide an explanation of the record. Also, it was noted that the legislation did not appear to allow fees to be charged in instances such as this.

The Department considered the situation. We were pleased to note that the Access Officer sent to the Applicant a typed version of the requested entries, certified by a nurse as being a true copy of the original document, at no cost to the Applicant.

◆ 98-031
When is a Lawyer Not a Third Party? When Representing a Public Body

The Freedom of Information and Protection of Privacy Act sets out that a public body shall respond in writing to an access request within 30 days of receiving an application, unless it extends the time for responding in accordance with the Act.

Section 15 sets out four specific circumstances where the time for responding may be extended. In this particular case, the Department advised the Applicant that it was extending the response time under the following provision:

> ***Extending the time limit for responding***
> ***15(1)*** *The head of a public body may extend the time for responding to a request for up to an additional 30 days, or for a longer period if the Ombudsman agrees, if*
>
> *(c) time is needed to consult with a third party or another public body*

before deciding whether or not to grant access to a record;

Under *The Freedom of Information and Protection of Privacy Act,* an Applicant can complain to the Ombudsman about an extension of the time limit, as did the Applicant in this case.

Upon receipt of the complaint, enquiries were made with Manitoba Justice. The Department advised that additional time was needed to consult with legal counsel and to consult with others about granting access to the requested record. We were informed that these other consultations were with the RCMP, a third party under the Act. Based on the information provided by the Department, our office was not satisfied that the time needed to consult with the RCMP required an extension of the 30-day response time under the Act.

In addition, we advised the Department that, in our opinion, consultations with a legal advisor would not fall under section 15 of *The Freedom of Information and Protection of Privacy Act*. We notified the Department of its right to make representations under the Act and, subsequently, representations were made in writing and orally. The Department took the position that its legal counsel is a third party under the Act.

Having considered the Department's representations, our office was not satisfied that the Department's consultation with legal counsel was consultation "with a third party or another public body" as is contemplated by the legislation. Legal counsel acts as the agent of the client and is under the control of the client. As such, in our opinion, an extension of time by a public body, based on time needed to consult its legal counsel, is not justified under *The Freedom of Information and Protection of Privacy Act.*

MANITOBA NATURAL RESOURCES

There were 22 complaints filed against Manitoba Natural Resources in 1998. Of these, 13 complaints were filed by one individual and six were from another person. There were 14 complaints of refused access, of which seven were not supported, six were supported in whole or in part and one was discontinued. There were seven presumed refusal complaints: five were supported, one was not supported and one was discontinued. There were two complaints contesting extensions of response times, one of which was supported.

In 1998, of the many public bodies under our jurisdiction, there were just two departments where complaints of presumed refusal were supported (seven complaints in all). Five of these complaints were with Manitoba Natural Resources. Having said this, three of the complaints involving the Department came out of 14 applications that were received by the Department from the same individual on one day. Another two complaints received on a single date were not answered within the 30-day deadline and we note this occurred around the July 1st holiday, when the Access Officer was away from the office.

On a government-wide basis, the number of supported presumed refusals over the years has declined considerably. This is not the case with Manitoba Natural Resources and this should be of some concern to the Department in terms of meeting its obligations under the Act.

There were three interesting cases concerning Manitoba Natural Resources in 1998, and they are discussed below.

One of these cases highlights the difference between obtaining records through the access to information legislation and through the discovery process when a matter is at issue before the Courts.

Our office is not of the view that access to information legislation is a substitute for the discovery process. Certainly any person may request access to records in the custody or under the control of a public body under *The Freedom of Information and Protection of Privacy Act*. The requested records may be accessible under the Act, depending on the records and circumstances in question.

The fact that the same records are available under the Court discovery process does not mean that they will necessarily be releasable under the terms of *The Freedom of Information and Protection of Privacy Act.* The rules of access are distinct under *The Freedom of Information and Protection of Privacy Act* (that a record is releasable subject to provisions of the legislation) and the rules of discovery (that a record should be disclosed if it is not subject to solicitor-client privilege and is relevant to the matters at issue in Court). They are two separate paths which may result equally in access for different reasons.

Another interesting case relating to the Department concerned access to an opinion prepared by Civil Legal Services of Manitoba Justice for Manitoba Natural Resources. I am pleased to say that Manitoba Natural Resources chose to release most of the record to the Applicant at the outset of the request rather than taking the position that the record could not be released because it was subject to solicitor-client privilege. The complaint to our office concerned the severing of the record which, after our review, we did not find to be unreasonable, based on the exception of *The Freedom of Information and Protection of Privacy Act* concerning solicitor-client privilege.

The third matter, under the heading "Sound Evidence Silenced", did not come to our attention until 1999 but related to the destruction in 1998, of audiotapes, which are records under *The Freedom of Information and Protection of Privacy Act.*

As this matter received considerable media attention in 1999, I feel it is in the public interest to report on our review at this time. The case was also the subject of a news release by our office in July 1999. While this investigation focussed on the Manitoba Water Commission and Manitoba Natural Resources, I have a concern that the lack of adherence to legislated recordkeeping requirements and related policies is not restricted to these particular entities in the Provincial Government. Undertaking a broad review of provincial departments and agencies in this respect is simply beyond the resources of my office, but I hope that the message of this investigation and of my recommendations is received broadly through the Government and its entities.

◆ 98-019
Courting Access

By an application for access under *The Freedom of Information and Protection of Privacy Act,* the Applicant requested access to:

> *Minutes of April 10/97 meeting of licesing [sic] Advisory Committee (L.A.C.) Appeals Committee.*

The Access Officer for Manitoba Natural Resources responded by letter, stating that access to the requested record was being granted, with information falling under section 39(1)(a)(ii) of *The Freedom of Information Act* being severed from the record. This provision states:

> ***Policy opinions, advice or recommendations.***
> ***39(1)*** *Subject to subsection (4), the head of a department may refuse to give access to any record which discloses*
> *(a) an opinion, advice or a recommendation submitted by an officer or employee of a department, or a member of the staff of a minister, to a department or to a minister for consideration in*
> *(ii) the making of a decision*

A complaint was received, enquiries were made with the Department and the withheld information was reviewed and considered in relation to *The Freedom of Information Act*.

Our review of the withheld record indicated that some of the severed information appeared to be statements of fact rather than an opinion, advice or a recommendation. It was also noted from our review that personal information about third parties, a mandatory provision for withholding information under the Act, was contained within the information severed by the Department.

Section 41(1) of *The Freedom of Information Act* provides:

> ***Protection of personal privacy.***
> ***41(1)*** *...the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party...*

As *The Freedom of Information Act* was repealed and replaced by *The Freedom of Information and Protection of Privacy Act*, the complaint was also considered in relation to that legislation, the corresponding provisions of which are as follows:

> ***Disclosure harmful to a third party's privacy***
> ***17(1)*** *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*

Advice to a public body
23(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;*

In the course of our review, we learned that through the litigation process in a suit between the Applicant and the Department, the Department had released the record in question to the Applicant without severing. As the record had already been provided to the Applicant, the Department indicated it would release the record without severing of the information falling under the discretionary exception, section 23(1). However, the Department took the position that personal information about third parties falling under the mandatory exception, section 17(1), would remain severed from the record.

Under the provisions of access legislation, a public body shall not release information subject to a mandatory exception. Simply put, rules of discovery in legal proceedings are different from the provisions under access legislation. We understand that is why the Applicant could gain access to the record without any severing in the Court process.

The Applicant confirmed with our Compliance Investigator that he wished to obtain a copy of the record, although information falling under the mandatory exception would be severed from it. We understand that the Department provided him with a copy, with less severing than was originally conducted.

Based on our review of the withheld information, we were of the opinion that section 17(1) applied to the withheld information. Accordingly, a recommendation for the further release of information could not be made in this matter.

◆ 98-100
Waiving Solicitor-Client Privilege And Having It Too

This application for access concerned a memorandum dated April 1, 1998, from a crown counsel of Civil Legal Services (Manitoba Justice) to an officer of the Water Planning and Development Section (Manitoba Natural Resources). By an undated letter, the Access Officer for Manitoba Natural Resources responded that partial access was being granted to the record, with information severed for reason of the following exceptions under *The Freedom of Information and Protection of Privacy Act:*

Advice to a public body
23(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*
(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;

Solicitor-client privilege
27(1) *The head of a public body may refuse to disclose to an applicant*
(a) information that is subject to solicitor-client privilege;

Enquiries were made with Manitoba Natural Resources and the requested record was reviewed and considered in relation to *The Freedom of Information and Protection of Privacy Act*. As well, enquiries were made about the date of response. The Applicant had noted that his application was delivered to the Department on September 10, 1998, but that he did not receive a response until October 21, 1998. The Department advised that the 30-day time limit was not met due to an administrative oversight. The fact that the response was undated did not assist in clarifying this situation. We reminded the Department of the mandatory requirement set out in section 11(1)(a) of *The Freedom of*

Information and Protection of Privacy Act, which provides:

> ***Time limit for responding***
> ***11(1)*** *The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it unless*
> *(a) the time limit for responding is extended under section 15;*

Our review indicated that the record in question consisted of four pages and that the severed portion was the top paragraph on page four. The entire record was subject to solicitor-client privilege because it consisted of communication of a confidential nature between a client (the Department) and a legal advisor, directly related to the seeking, formulating or giving of legal advice or legal assistance. Nevertheless, because the exception is discretionary and the Department was the client, who could waive the privilege, the Department could decide to release or to withhold the information.

The Department waived privilege to that part of the record it chose to release. We asked the Department why the one paragraph was severed. The Department was of the view that release of the paragraph, which included a recommendation, could reasonably be expected to affect the openness and frankness of future communications with its lawyers. I concluded that the Department's position was reasonable. Accordingly, no recommendation was made in this matter.

◆ S99-012
Sound Evidence Silenced

This matter arose out of an access to information application under *The Freedom of Information and Protection of Privacy Act* for "…written transcripts of all public presentations to the 1997 Manitoba Water Commission".

The Access Officer for Manitoba Natural Resources responded: "…we do not have the records you have requested…[C]opies of the written presentations are currently being forwarded to the Legislative Library … for the public to view without an application for access under this act [FIPPA]".

The audio tapes were known to have been made. On being informed that transcripts of the public presentations did not exist, the Applicant made enquiries about the audio tapes with Manitoba Natural Resources and with the Manitoba Water Commission, a body responsible to the Crown through the Minister of Natural Resources. The Applicant was told that no transcripts had been made and that the audio tapes had been destroyed.

The Applicant had wished to review the information further to concerns regarding the actions taken during and after the 1997 Red River flood and about flood compensation. The Applicant also expressed profound concern with the alleged loss of the material as an historical record for the people of Manitoba and as an act of "witnessing" for the people who were directly affected by the "Flood of the Century".

As a result of a complaint from the Applicant about the denial of access to transcripts, it was confirmed that the audio records had indeed been destroyed. As it appeared that the destruction was not authorized, our office initiated an investigation under Part 4 of *The Freedom of Information and Protection of Privacy Act*, which states:

> ***General powers and duties***
> ***49*** *In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may*
> *(a) conduct investigations and audits and make recommendations to monitor and ensure compliance*

(ii) with requirements respecting the security and destruction of records set out in any other enactment or in a by-law or other legal instrument by which a local public body acts;

(h) make recommendations to the head of a public body or the responsible minister about the administration of this Act.

Several Acts of the Manitoba Legislature needed to be considered in our investigation of the alleged unauthorized destruction of the audio records, including *The Water Commission Act, The Legislative Library Act* and Regulations, and *The Freedom of Information and Protection of Privacy Act*. In addition, our office met with personnel from Manitoba Natural Resources and Manitoba Culture, Heritage and Citizenship (Government Records), and obtained information from the Province's Documents Committee, which deals with the retention and destruction of all records falling under Part II, "Public Records and Archives" of *The Legislative Library Act.*

There were ten public meetings held by the Manitoba Water Commission concerning the 1997 Red River Flood between November 13 and December 16, 1997. The oral presentations made at these public meetings were audio taped. Subsequently, the Commission submitted a report dated June 1998 entitled, "An Independent Review of Actions Taken During the 1997 Red River Flood: A Report to The Honourable J. Glen Cummings, Minister of Natural Resources".

The Commission requested that presenters provide a written copy of their presentation in advance of the public meetings. We were advised that most presenters did submit a written copy of their presentation to the Commission. Copies of these written submissions have been provided to the Legislative Library and the originals should form part of the Commission's records submitted to the Provincial Documents Committee under *The Legislative Library Act.*

I noted that the Commission's consultations with government bodies involved meetings during which these bodies provided, in total, eleven written submissions. I understand that the Commission made copies of these written submissions available to the public at its Niverville office. We were advised that these written submissions have been provided to the Department, along with other records of the Commission. Our review confirmed that these meetings were not recorded on audio tape.

Concerning the issue of other audio records made by the Commission, the Chair advised our office that the Commission had taped their internal Commission meetings. We understand that the purpose of making these tapes was to assist in the preparation of the minutes of these meetings. Once minutes of these meetings were prepared, it was felt that there was no other purpose for keeping these tapes. Our review confirmed that these minutes were provided to the Department along with other records of the Commission.

Our investigation confirmed that the audio tapes of the presentations made to the Commission at the public meetings were destroyed in July, 1998 in Niverville. The Chair advised that he had asked an employee to destroy the audio tapes of the Commission's meetings, meaning the audio tapes of the internal Commission meetings, which had been transcribed into minutes of these meetings. Apparently, the employee was not aware that, included among the tapes of the internal Commission meetings, there were tapes of the presentations made at the public meetings. All of the Commission's tapes were destroyed. The Chair advised us that he was not aware that all of the Commission's tapes had been destroyed until inquiries were made in February, 1999 concerning the tapes of the public presentations.

The Chair of the Commission advised our office that he was not aware of the recordkeeping requirements under *The Legislative Library Act* at the time of the destruction of these records. He indicated that he did not become aware that the destruction of the audio tapes breached this Act until it was reported in the media. During our investigation, the Chair also commented that, in retrospect, he would suggest that Commissions of the government be provided with a written statement or guidelines of obligations and requirements under *The Legislative Library Act*.

In March of 1999, the destruction of the records became the subject of media attention. The Chair of the Commission was quoted as taking responsibility for the destruction. He affirmed this statement during our investigation.

Our investigation confirmed that the audio tapes of the public meetings and the internal Commission meetings were destroyed in contravention of *The Legislative Library Act*, as this destruction was not authorized under the Act.

Our investigation did not disclose any evidence to support a finding that these records were wilfully destroyed. Rather, the Water Commission was not aware of the legislative requirements under *The Legislative Library Act,* as sufficient guidance was not provided to the Commission by Manitoba Natural Resources.

When a governing entity or information trustee undertakes a public inquiry into a matter, this alone would seem to be a good signal that there may be both short and long-term interest in the information obtained. Yet, it is probably in the nature of most public bodies to focus on the tasks that are seen as central to their mandate rather than on maintaining good information systems. For such a reason, laws and policies are in place to protect and safeguard information, but these are of little value if they are not properly communicated to people in charge.

Failure to comply with legislative requirements and sound recordkeeping requirements is not an exception under *The Freedom of Information and Protection of Privacy Act*. While I appreciate the demands of public service and the conduct of public business, information is held as a public trust and this trust is supported by numerous Acts of the Manitoba Legislature in one form or another. Openness, transparency, and public body accountability depend on exemplary recordkeeping practices.

In the course of the investigation, our office considered the records management practices of the Department, and, in particular, of the Water Resources Branch, which would be the component of the Department most closely associated with the records of the Water Commission. This included a review of entries for Natural Resources in the *Directory* required by *The Freedom of Information and Protection of Privacy Act*.

This review suggested that, while some attention had been given to the scheduling of administrative and housekeeping records, the scheduling of operating divisions' records required attention. The records of the operational components of Natural Resources are, of course, at the very core of the reasons why the Department exists. While we did not conduct an exhaustive inquiry into this matter, the information we obtained from the records of the Secretariat to the Provincial Document Committee (which considers the retention and disposition of all records), leaves me with little doubt that Natural Resources should undertake an early review of its records scheduling process, submit schedules to the Provincial Documents Committee, and implement the schedules without delay.

Notwithstanding the daily rush of work, the principles that underpin our democratic

institutions must not be obscured. In a Supreme Court of Canada decision in 1997 (Dagg v. Minister of Finance *et al*. File No. 24786), Mr. Justice LaForest observed:

> *As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those who govern them.*
>
> *The overarching purpose of access to information legislation, then, is to facilitate democracy.*

Because the issue is so fundamental, I emphasize the public's right to know includes the right to know what information the government holds. The *Directory* required by *The Freedom of Information and Protection of Privacy Act* is a primary and legislated vehicle for fulfilling this right. I also point out that determination of a person's rights and what is the "right thing to do" in a given circumstance may depend on the accumulation of evidence over time. In short, an archival record may be as important to the public's right to know as a more contemporary record. Further, the finality of the destruction of a record from an access-to-information perspective clearly requires the kind of rational and independent review contemplated under *The Legislative Library Act* through the Provincial Documents Committee.

Our review indicated that the Manitoba Water Commission destroyed the audio tapes of the public presentations in contravention of *The Legislative Library Act*. It was also apparent from our review that the Commission was not aware of the recordkeeping requirements under this Act and the exclusive responsibilities of the Provincial Documents Committee. It is the duty of this high-level and expert Committee to take into account in its deliberations all laws, policies, and practices in the government as a corporate entity, including *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act*, when considering the long and short-term disposition of records, regardless of physical form or characteristics.

Our review also indicated that the Department's entries in the *Directory* required by *The Freedom of Information and Protection of Privacy Act* need to be updated to more accurately reflect the records held by the public body, particularly with respect to records of the operational divisions and branches of Manitoba Natural Resources. We noted this would require that Manitoba Natural Resources undertake a systematic review, on a priority basis, of its records scheduling process, and proceed with obtaining the necessary disposition approvals through the Provincial Documents Committee. This would then enable the Department to ensure that its entries in the Directory reflect what records exist or have existed, how long they are to be kept, and the retention or destruction authorization.

Based on our review, I made the following recommendations:

1. That Manitoba Natural Resources take steps forthwith to ensure that all boards and commissions operating in association with the Department are specifically and routinely informed, in writing, about recordkeeping requirements under Part II, "Public Records and Archives" of *The Legislative Library Act* and applicable regulations, policies and guidelines.

2. That Manitoba Natural Resources take steps to ensure that the link between access and privacy rights under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health*

Information Act and lawful recordkeeping practices is clearly understood within the Department and its associated boards, commissions, associations, and agencies as defined in *The Freedom of Information and Protection of Privacy Act.*

3. That Manitoba Natural Resources bring its entries in the Access and Privacy Directory into more ample compliance with the requirements of section 75 of *The Freedom of Information and Protection of Privacy Act.*

Under *The Freedom of Information and Protection of Privacy Act*, the Department was permitted 15 days to respond in writing to our office to indicate whether the recommendations were accepted or what action was being taken to implement them or reasons for not following the recommendations.

The written response from Manitoba Natural Resources indicated that the recommendations were accepted by the Department. Specifically, the Department's response stated that it would undertake the following steps to implement the recommendations:

- Develop specific policy and procedures that will inform and monitor the recordkeeping practice of boards and commissions that come under its umbrella and which are subject to *The Legislative Library Act* and *The Freedom of Information and Protection of Privacy Act.*

- Re-embark on a program of information dissemination regarding recordkeeping practices and its relationship to the legislation.

- Conduct a review of the records scheduling program in light of records that still require scheduling and a review of current schedules that may require changes to bring the scheduling process up to date to comply with section 75 of *The Freedom of Information and Protection of Privacy Act.*

The Ombudsman's Office will follow-up with Manitoba Natural Resources on the implementation of the recommendations to review the Department's progress.

The Ombudsman's report was also provided to the Minister of Manitoba Culture, Heritage and Citizenship, who has responsibilities for authorizing the disposition of records through the documents committee process under *The Legislative Library Act*; for the *Directory* under *The Freedom of Information and Protection of Privacy Act*; and for reporting on the general administration of these Acts.

MANITOBA RURAL DEVELOPMENT

One complaint about refused access was made to our office in 1998 concerning Manitoba Rural Development. It was discontinued by the Applicant when there was clarification between the Applicant and the Department of the records in question.

Nevertheless, throughout 1998 and well into 1999, our office continued to investigate a 1997 complaint of refused access relating to Manitoba Rural Development. It was a case fraught with delays and changing positions by the Department. While the request involved hundreds of pages of records, our discussions with the Department centred on just 55 pages. After numerous meetings and seemingly countless communications with the Department, our office had sufficient explanation concerning the contents of the records to recommend release of two records in full and one with less severing than had been conducted by the Department. The Department followed our recommendation concerning two of the records but, with respect to the third, essentially adhered to its earlier position to release the record with severing.

After all our communications and after our issuing a recommendation, the Department raised a new mandatory exception in relation to the one outstanding record. This was unreasonable at this stage of the case. While the Department's ultimate position provided detail for our office to conclude that the Department was justified in withholding part of the record, the lack of timeliness was not in keeping with the spirit of the legislation.

◆ 97-012
A Slow Trickling of Access to Information

By an application under *The Freedom of Information Act* the Applicant requested access to:

> *All records pertaining to a regional water supply for Manitoba's capital region, from Dec. 1 1995 to present.*

The Department responded to the request by advising that partial access had been granted to the Request for Qualifications pertaining to the Cartier Regional Water System and that other information within the following exemptions had been severed:

> ***Commercial information belonging to third party.***
> ***42(1)*** *Subject to this section, the head of a department shall refuse to give access to any record*
> *(b) which discloses financial, commercial, scientific or technical information supplied to a department by a third party on a confidential basis and treated consistently as confidential information by the third party;*
>
> ***Economic interests of Manitoba.***
> ***43*** *The head of a department may refuse to give access to any record*
> *(c) the disclosure of which could reasonably be expected to prejudice the competitive position of a department or the government, or to interfere with contractual or other negotiations of a department or the government;*

A complaint was filed with our office in October 1997, and we contacted the Applicant to seek clarification on specifically what information the Applicant was requesting from the Department. We were advised that the Applicant was seeking records about water volumes, land-use plans

and records generated between officers and employees of the Provincial Government relating to the Capital Region.

Our Compliance Investigator attended the Manitoba Water Services Board in Brandon and was shown what were identified as being the records relevant to the request. Our Compliance Investigator reviewed all of the records and marked those which fell within the request. These consisted of hundreds of pages, many of which, it was evident, were subject to section 42(1)(b). However, it was apparent that not all of these records fell within the exemption. It also appeared that they had not been considered in terms of release or severing. Accordingly, our Compliance Investigator suggested that further consideration be given to the matter of accessibility to the records.

Discussions continued with the Department until early February 1998 when the Department agreed to release most of the records in question, approximately 100 pages. However, on March 10, 1998, the Department applied an Estimate of Costs to the application in the amount of $200. This became the subject of a separate fee complaint under *The Ombudsman Act.* Ultimately the Department agreed to release these records without fee, in consideration of the time that had elapsed. This was in September 1998.

Our office sought further information about the Department's position to withhold 16 other records, consisting of 55 pages. On March 23, 1998, the Department provided reasons, under the legislation, for withholding these records. These reasons included the following provisions under *The Freedom of Information Act*, which had not been cited initially:

Cabinet confidences.
38(1) *Subject to subsection (2), the head of a department shall refuse to give access to any record which discloses a confidence of the Cabinet, including but not restricted to a record which discloses*

(d) a communication or discussion between ministers on a matter relating to the making of a government decision or the formulation of government policy.

Policy opinions, advice or recommendations.
39(1) *Subject to subsection (4), the head of a department may refuse to give access to any record which discloses*

(a) an opinion, advice or a recommendation submitted by an officer or employee of a department, or a member of the staff of a minister, to a department or to a minister for consideration in

(ii) the making of a decision,

Law enforcement and legal proceedings.
40(1) *The head of a department may refuse to give access to any record the disclosure of which could reasonably be expected*

(c) to violate solicitor-client privilege;

Commercial information belonging to third party.
42(1) *Subject to this section, the head of a department shall refuse to give access to any record*

(c) the disclosure of which could reasonably be expected to

(ii) prejudice the competitive position of a third party,

Economic interests of Manitoba.
43 *The head of a department may refuse to give access to any record*

(c) the disclosure of which could reasonably be expected to prejudice the competitive position of a department or the government, or to interfere with contractual or other negotiations of a department or the government; or

(d) the disclosure of which could reasonably be expected to injure

significantly the financial interests of a department or the government, or to result in undue gain to any person or organization

Where discretionary exemptions appeared to apply, an explanation was sought for why the Department chose to withhold rather than release these records. Based on the information provided, which included information from third parties, our office was satisfied that several of these exemptions did not apply and that many of the records could reasonably be severed.

In view of the complexities of the issues concerning some of these records, further information was required, without which our office was not prepared to recommend release. There was considerable communication with the Department, including meetings involving the Ombudsman and the Assistant Deputy Minister on September 30 and December 11, 1998. On these occasions, discussions took place about the spirit of the legislation, including the concept of severing.

It was not until February 22, 1999, that a further definitive position, with more information, was provided by the Department concerning the 16 remaining records. At that time, the Department advised that it would be providing the Applicant with another record in full and seven more in severed form, totalling 15 additional pages. Forty other pages continued to be withheld. Further discussions took place with the Department following which the Department agreed to release a further four pages in full and two pages with severing. The Applicant was advised by letter dated March 11, 1999, of the Department's position.

Our office considered the Department's position concerning the remaining 16 records. We reviewed the records, the provisions cited by the Department (largely the same ones as provided on March 23, 1998) and the additional explanations provided. Since, in the course of this matter, *The Freedom of Information Act* was replaced by *The Freedom of Information and Protection of Privacy Act,* consideration was also given to the provisions of that legislation.

Our review took into account the requirement that, to support denial of access, a record must clearly fall within the ambit of an exemption. Where an exemption provides a department with the discretion to refuse access, the discretion should be exercised in a manner that recognizes the access-biased principles of the legislation.

I advised the Department that, in my opinion, to exercise discretion in favor of denial, the Department must be able to support that there would be a reasonable expectation of harm should disclosure of the record be made. I advised that a denial of access to a record is not justifiable on the basis of a possibility of harm.

In reviewing the requested records, our office was of the opinion that, in the case of 11 documents, all or part of records were not releasable under the legislation and, in the case of discretionary exemptions, the withholding was reasonable. We were of the view that there was a reasonable expectation that release could affect the candor of future communications with legal counsel, that release of the records could reasonably be expected to provide an unfair advantage to a person privy to the information and/or release could reasonably be expected to prejudice the competitive position of the Department or Government in a contractual or other negotiations.

I did not feel that the Department's position concerning three documents was justified. I therefore recommended that two of the documents be released to the Applicant in full and that another be released with less severing than had been conducted by the Department.

The Department responded to our office, accepting the recommendation with respect to the release of one record without severing and the release of another with some severing. The Department, however, advised that it had serious concerns about releasing most of the severed information in the third record. This related to the evaluation of the proponents' proposals in a public-private partnership project, including the ratings given to each of the proponents under the selection criteria. The Department had agreed to release information in the document relating to the weight given by the Department to each of the criteria used to evaluate the proponents and their proposals.

In the response to our recommendation, the Department developed, for the first time in this very protracted matter, its position regarding the applicability of the exemption relating to commercial information belonging to a third party [section 42(1)]. The Department apologized for inadvertently failing to reference this exemption in its previous correspondence to the Applicant and our office.

It was the Department's position that the severed information referenced financial and technical information provided by the three proponents in confidence [section 42(1)(b)]. It was noted that the "Request for Proposal Documents" stated that the information supplied by the proponents would be treated as confidential by the Department. The Department also noted that the proposal document indicated that the proponents would keep details pertaining to their proposals confidential.

We were advised that the Department contacted and confirmed with two of the three proponents that they have consistently treated the information supplied to the Department as confidential. The Department advised that at the time of responding to our recommendation, they had not been able to contact the third proponent.

For the first time in this matter, the Department also took the position that evaluation of the merits of the proponents' proposals, particularly respecting the references to the proponents' technical expertise and business viability, could reasonably be expected to prejudice the competitive position of a third party if it were released [section 42(1)(c)(ii)].

We were advised that the two proponents contacted felt that release of this information could reasonably be expected to harm their competitive position because the financial information could convey information to competitors on future bids. It was noted that there are a number of private companies that are part of the consortia which do not have to prepare an annual report releasing financial information. The Department advised that, since the evaluation on the technical and financial portions of the proposal might be subjective in nature, the release of such information could cause a negative impact on future bids. It was the Department's understanding that the proponents would be identifiable from the information contained in the record by someone in the industry.

Finally, the Department advised that all the severed information disclosed opinions, advice and recommendations for consideration in the making of a decision and the development of a negotiating position by the Department [section 39(1)(a)(ii) and (iii)].

The Department's response did not, in my opinion, support the position that all the information severed in the document clearly fell within the exemptions cited under *The Freedom of Information Act* or the exceptions under the successor legislation, *The Freedom of Information and Protection of Privacy Act*. While the Department suggested that some possible harm might result if the severed information were released, I believe it is the Department's obligation to establish that there is a

reasonable expectation of harm should the severed information be disclosed.

The exemption relied on by the Department relating to refusal to give access to any record which discloses an opinion, advice or recommendation is discretionary. I noted that, to exercise discretion to refuse access, the Department must envision some legitimate harm that could reasonably be expected if the information were disclosed. In reviewing the Department's response, I was not satisfied that the Department had provided any justifiable reasons for exercising its discretion to refuse access to the severed information.

Nevertheless, the Department advised that it intended to continue to refuse access to the severed information in the document, except for information on the weight given to the various criteria used for evaluating the proposals. Accordingly, I informed the Applicant that if she wished to pursue the refusal of access further, she could file an appeal with the Court of Queen's Bench.

WORKERS COMPENSATION BOARD

In 1998, there were two complaints of refused access made against the Workers Compensation Board (WCB). One complaint was partially supported and partially resolved informally and the other, completed in 1999, was supported and resolved informally.

The latter case was satisfactorily resolved using section 62(2) of *The Freedom of Information and Protection of Privacy Act,* which provides:

> ***Informal resolution***
> ***62(2)*** *The Ombudsman may take any steps the Ombudsman considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of this Act.*

In this particular case, the Applicant was seeking specific information, essentially an answer to a question. He advised our office that he was willing to accept a written response from the WCB containing the information rather than have access to severed records disclosing the same information. The matter was concluded with the WCB sending a letter to the Applicant, outlining the information he was seeking.

Although the matter was resolved, we reminded the Applicant that *The Freedom of Information and Protection of Privacy Act* is not a vehicle for requesting answers to questions, but for applying for access to records in the custody or under the control of a public body.

We were especially pleased that this case was resolved because, in the course of our discussions with the WCB, the WCB took the position that section 97 of *The Freedom of Information and Protection of Privacy Act* applied. Specifically, it was the WCB's view that there is an inconsistency or a conflict between that legislation and a provision of *The Workers Compensation Act* and, therefore, the latter legislation prevails. This was a similar argument to one raised by the WCB in a 1996 *Freedom of Information Act* case reported in our 1996 Annual Report.

In the recent case, our office was of the view that there was no inconsistency or conflict between the two pieces of legislation and that the terms of *The Freedom of Information and Protection of Privacy Act* applied.

Senior personnel from our office met with representatives of the WCB and, for the purpose of this case, resolved the issue. The relationship of the respective access and privacy provisions in Manitoba's access legislation and *The Workers Compensation Act* has arisen only in this, and the 1996 cases. Both these cases were unusual in that the Applicants were not seeking information about themselves; rather, they were seeking information that was contained in the file of a third party.

In the 1998 case, our office was of the opinion that, with severing, the requested information was not claim-related. This was not the interpretation shared by the WCB for reasons detailed below. I would add that it is important to note that the location of a record within a public body's custody or control is not a relevant issue when considering release under the access legislation.

◆ 98-012
Inconsistent? In Conflict? In a Third Party Claimant's file?

The Applicant requested access to:

> *The identity of the two WCB Medical Advisors who had diametrically opposite opinions on the use of "Synvisc" with respect to the treatment of the unnamed claimant in Appeal Commission Decision No. 102/97.*

The Applicant's reference was to a public decision of the Appeal Commission which did not disclose the identity of the claimant involved.

The WCB responded that access was refused in accordance with the following provisions under *The Freedom of Information and Protection of Privacy Act*:

> ***Disclosure harmful to a third party's privacy***
> **17(1)** *The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.*
>
> ***Disclosures deemed to be an unreasonable invasion of privacy***
> **17(2)** *The disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*
> *(a) the personal information is personal health information;*

Further to the complaint, enquiries were made with the WCB and with the Applicant. The Applicant advised our office early in the investigation that he would be satisfied with an answer to his question from the WCB rather than have to pursue access to the records that answered his question. The WCB was not prepared to provide an answer to the question, so our investigation continued with a review of the records.

The request encompassed two records. One was a memorandum prepared by a Review Officer setting out information from a discussion with one of the Medical Advisors on the subject of the drug Synvisc. The claimant's name was shown on the top right side of the page. The other record was a memorandum from a second Medical Advisor to the Recording Secretary of the Appeal Commission. The memorandum was referenced as relating to the claimant, showing his name and claim number, and was entitled "Re: Use of Synvisc in Arthritic Joints".

Concerning its reliance on section 17(1), the WCB advised our office that release of the Medical Advisors' names was a release of personal information concerning the claimant. The WCB was of the position that release of the Medical Advisors' names, in combination with other information, could reveal the identity of the claimant.

At this point it was also suggested that the location of the records in a third party claimant's file caused the information to be personal, rather than general information. This is never a relevant argument in access requests.

Our office noted that the two records in question related to the drug Synvisc. Essentially, the only information in these records, other than the Medical Advisors' information on Synvisc, was the names of the claimant and WCB personnel, including the names of the Medical Advisors.

Our office observed that *The Freedom of Information and Protection of Privacy Act* defines "personal information" as information about an identifiable individual. While the Appeal Commission decision referred to in the application was a public record, the name of the claimant had been severed from that record and, therefore, the decision did not identify the individual.

Our office also noted that the Appeal Panel decision made public such detailed information as the nature of the accident, the extent of the claimant's injuries and subsequent physical difficulties, the fact that the claimant submitted a prescription receipt for Synvisc and information from two WCB Medical Advisors on the subject of Synvisc. We did not accept that the disclosure of the Medical Advisors' names, linked to their comments, would reasonably be expected to reveal the claimant's identity any more than the information already made public.

The WCB also took the position that the names of the Medical Advisors would be an unreasonable invasion of the Medical Advisors' privacy in that it disclosed their opinion on Synvisc.

It was our observation that much of the information provided by the Medical Advisors was not opinion, but factual information, albeit conflicting information. We noted that by the reasoning of the WCB, any opinion put forward by WCB's medical employees would not be releasable. However, this is routinely not the case. Both claimants and employers have access to medical opinions held by the WCB. In this case, for example, the claimant and the claimant's employer would have been able to see the names of the two Medical Advisors linked to their comments.

Furthermore, we did not accept that the information produced by the Medical Advisors working for the WCB was the Medical Advisors' personal information. It was the information of the WCB.

As we did not see how release of the requested information violated the privacy of a third party, we could not accept the position that section 17(1) of *The Freedom of Information and Protection of Privacy Act* applied in this case.

In the course of our investigation, the WCB took the position that section 97 of *The Freedom of Information and Protection of Privacy Act* applied, which provides:

> ***Consequential amendment, C.C.S.M. c. W200***
> ***97*** *The Workers Compensation Act is amended by adding the following after 116:*
>
> ***Conflict with the Freedom of Information and Protection of Privacy Act***
> **117** *If a provision of this Act is inconsistent or in conflict with a provision of The Freedom of Information and Protection of Privacy Act, the provision of this Act prevails.*

As this was an issue of jurisdiction, it had to be addressed by our office once it was raised. Nevertheless, we are of the firm position that all exceptions to an application for access must be provided to the Applicant by the public body at the time of responding to the request. The apparent inconsistency or conflict identified by WCB was with section 101 of *The Workers Compensation Act*, which sets out, in part:

> ***Information obtained to be divulged***
> ***101(1)*** *No officer of the board, no worker advisor or person appointed under section 109.5 and no person authorized to make an inspection or inquiry under this Part shall divulge or allow to be divulged, except in the performance of his or her duties or under the authority of the board, any information obtained by him or her or which has come to his or her knowledge in making or in connection with any claim of a worker or dependent under this Part of any Part or any proceeding of the board.*
>
> ***Information for consideration, appeal***
> ***101(1.1)*** *Notwithstanding subsection (1) and section 20.1 (medical reports), a worker or dependent of a deceased worker, or the agent of either of them, who is a party to a reconsideration of a*

decision by the board or an appeal to the appeal commission, may examine and copy all documents in the board's possession respecting the claim of the worker or the dependent.

Employer's access to information
101(1.2) *Notwithstanding subsection (1) and section 20.1 (medical reports), an employer or the agent of the employer who is a party to a reconsideration of a decision by the board or an appeal to the appeal commission may examine and copy such documents in the board's possession as the board considers relevant to an issue in the reconsideration or appeal and the information shall not be used for any purpose other than a reconsideration or appeal under this Act, except with the approval of the board.*

The WCB expressed the opinion that section 101 of *The Workers Compensation Act* is inconsistent or in conflict with *The Freedom of Information and Protection of Privacy Act* because, whereas the access legislation provides that all records in the custody or under the control of a public body are accessible subject to exceptions under that Act, *The Workers Compensation Act* provides that claims information shall not be divulged except to complainants, certain representatives and employers.

In our opinion, section 101 of *The Workers Compensation Act* is not inconsistent or in conflict with *The Freedom of Information and Protection of Privacy Act*. Subsection 101(1) is a confidentiality provision stating that WCB officers are not to divulge, outside of the performance of their work, any information which has come to their knowledge in connection with a claim for compensation or any proceeding of the Board. Notwithstanding this provision, subsection 101(1.1) and (1.2) set out that, in the circumstances of an appeal, the worker, certain representatives and employer can examine and copy documents in the Board's possession.

Section 101 does not address the right of any other person to seek access to WCB records, nor does it address access to records by workers, certain representatives or employees in a context other than an appeal or a review. Section 101 does not proscribe access to records except to workers, certain representatives or employers.

On the other hand, *The Freedom of Information and Protection of Privacy Act* provides a broad right of access to all persons to any record in the custody or under the control of a public body, subject to exceptions. These exceptions include provisions for the protection of personal privacy which are also not inconsistent or in conflict with *The Workers Compensation Act.*

Having made our views known to the WCB, a meeting was held to discuss this case and the relationship between *The Freedom of Information and Protection of Privacy Act* and *The Workers Compensation Act.* It is fair to say that the jurisdictional issue remains open at the time of writing this report and the issue may arise again on a case-by-case basis.

I am pleased to advise that the particular case was resolved with the WCB providing the information that the Applicant was seeking. This was achieved by way of a written reply to the Applicant's question rather than by providing severed records containing the requested information. This complaint was resolved informally in a manner consistent with the purposes of *The Freedom of Information and Protection of Privacy Act.*

THE CITY OF WINNIPEG

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

AUGUST 31 – DECEMBER 31, 1998

INTRODUCTION TO THE CITY OF WINNIPEG

Initially, *The Freedom of Information and Protection of Privacy Act* applied to only Provincial Government departments and agencies. The Act provides for its extension, upon proclamation, to educational bodies, health care bodies and local government bodies. At the request of the City of Winnipeg, the Act was amended to enable proclamation for the City on August 31, 1998.

The companion legislation to *The Freedom of Information and Protection of Privacy Act, The Personal Health Information Act*, applied to the City of Winnipeg as of December 11, 1997. In 1997 and 1998, our office received no complaints against the City under *The Personal Health Information Act*.

Access to information legislation was not a new concept to the City of Winnipeg in that, on January 1, 1996, a City of Winnipeg Access to Information By-law came into force. By-law No. 6420/94 set out that every person had a right of access to any record held by the City unless it was exempt under the By-law. There were mandatory and discretionary exemptions to release under the By-law similar to, but less developed than, the exemption provisions under the provincial legislation (then *The Freedom of Information Act)*. The By-law set out an appeal to the Chief Commissioner of the City and a further appeal to the City of Winnipeg Ombudsman. During the two years and eight months that the City administered the Access to Information By-law, there were 162 access requests made to departments and 13 complaints made to the City of Winnipeg Ombudsman.

In the four months of 1998 that *The Freedom of Information and Protection of Privacy Act* applied to the City of Winnipeg, 18 access requests were made to the City under the legislation. Six of these cases were appealed to our office. A seventh case was declined by the Ombudsman because an access request under the Act had not first been made to the relevant City department. The six access cases were pending at the end of the 1998 calendar year. Nevertheless, at the time of writing this report, I can advise that one case was supported, two were partially supported, two were not supported and one is still pending. There were no privacy complaints under *The Freedom of Information and Protection of Privacy Act* registered against the City of Winnipeg in 1998.

Our office has attempted to discharge an educational role when dealing with the City of Winnipeg in these early cases under the new legislation. Upon contacting a department for the first time about an access complaint, senior staff of our Access and Privacy Division have met with the department's access personnel to discuss the legislation and the role and function of the Provincial Ombudsman. We have found the City personnel with whom we have met to be receptive to the principles of access. In our discussions with the City about privacy, it has come to our attention that certain privacy concepts under the legislation are new to City personnel. Again, we expect to fulfil an educative role in that regard. We look forward to meeting with more City departments over time.

As the following case summaries indicate, our experience with the City of Winnipeg in relation to access to information complaints has been fruitful. As is apparent from the cases, however, there are access principles which were little known in some City departments. For some, the concept of considering each record and each part of a record for release (as opposed to considering records globally, as

a class) was novel. So, too, was the concept of severing, which is central to the proper administration of access legislation by realizing maximum release under the letter and spirit of the Act.

These principles are discussed in relation to the five City cases below. Additional examples of these principles and discussion of other provisions of *The Freedom of Information and Protection of Privacy Act* were described earlier in this Annual Report in the case summaries under "Provincial Government Departments and Agencies".

ACCESS RULES!

Under *The Freedom of Information and Protection of Privacy Act,* disclosure is the rule, not the exception. In that the exceptions to access under the Act derogate from the thrust of the Act, they must be strictly and narrowly interpreted. Therefore, unless an access request falls squarely within one of the exceptions, the information must be disclosed. Where a discretionary exception applies, there should be a reason why the public body chooses to withhold, rather than release the record.

There can be no presumptions about an access request. Each access application must be handled on a case-by-case basis. The decision on release will depend on the specific records in question, as well as the specific circumstances.

Our first investigation involving the City of Winnipeg concerned the Corporate Finance Department, which had not been in the practice of releasing records respecting possible claims. Access to records requested under the new *Freedom of Information and Protection of Privacy Act* was initially denied. However, when the records were reviewed in relation to the legislation, the City determined that they could be released.

◆ 98-036
The Case-by-Case Solution

The Applicant requested a copy of the "engineer's report" relating to a water main break that, he said, had caused mud to seep under his fence and into his backyard.

The City responded to the Applicant, stating that it was denying access under the following provisions of *The Freedom of Information and Protection of Privacy Act:*

> ***Advice to a public body***
> ***23(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*
> *(b) consultations or deliberations involving officers or employees of the public body or a minister;*
>
> ***Disclosure harmful to law enforcement or legal proceedings***
> **25(1)** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*
> *(n) be injurious to the conduct of existing or anticipated legal proceedings.*
>
> ***Solicitor-client privilege***
> ***27(1)*** *The head of a public body may refuse to disclose to an applicant*
> (a) *information that is subject to solicitor-client privilege;*
> (b) *information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence;*

Further to the complaint, enquiries were made with the City, followed by a meeting about the handling of the request.

We were advised by the City that there was no "engineer's report" relating to the water main break. Nevertheless, the City had interpreted several records as coming within the requested record. These were documents prepared by or for the City on or around the day of the water main break, as well as a record prepared pursuant to the Applicant's claim to the Corporate Finance Department concerning damage to his property.

In responding to the access application, the City had not specified the exception(s) of the Act relied upon in denying access to each individual record and part of each record requested. In any access request under the legislation, every record coming under the request must be considered for release, and if an exception is deemed applicable to the record, it should be marked in relation to each part of the record. This, and other principles of *The Freedom of Information and Protection of Privacy Act* were discussed with the individuals of the City department who, in the course of this case, had encountered *The Freedom of Information and Protection of Privacy* Act for the first time.

Subsequent to the meeting with City personnel, our office considered each of the cited exceptions in relation to each record and part of each record of the request. We later contacted the City with our opinion.

Based on our review of the records, our office was not satisfied that section 23(1)(b) of *The Freedom of Information and Protection of Privacy Act* applied to the records in question. It was our opinion that the records could not reasonably be expected to reveal consultations or deliberations involving officers or employees of the City. Our review indicated that the records set out factual information concerning the water main break. They revealed no discussion or consideration by the City.

As well, our office was not satisfied that section 25(1)(n) applied, specifically how disclosure of the information contained in the records could reasonably be expected to cause harm to legal proceedings. It was not sufficient reason, in our opinion, that the Applicant had made a damage claim to the Corporate Finance Department or that the Department had gathered existing records for its file in anticipation of legal proceedings. In denying access, there is a duty on a public body to consider the records and the circumstances. The determination of harm must be based on objective grounds and based on reason.

The City also relied on section 27(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act*, that the records would disclose information subject to solicitor-client privilege and information prepared for a lawyer of the public body in relation to a matter involving the provision of legal advice or legal services.

We informed the City that, in our opinion, the records pre-existing the claim were not privileged. These records did not contain communications between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance. Also, they were not records created or obtained especially for a lawyer's brief for litigation. Further, if legal proceedings were anticipated, it would be expected that these records would be relevant to such proceedings.

It was not clear if two of the records were prepared for the City solicitor in anticipation of a claim. We noted that if they were, and if they fell within the scope of solicitor-client privilege, the City was the client and could waive the privilege. As section 27(1)(a) and (b) are discretionary, we questioned why the City chose to withhold these records rather than release them.

Based on our comments, we asked that the City consider release of the records, with or without severing.

I am pleased to report that the City reviewed the situation and, based on a document-by-document review, concluded that the records requested in this case could be released to the Applicant in full. Accordingly, this access complaint was resolved informally.

SEVERING

Access to information under *The Freedom of Information and Protection of Privacy Act* is not an "all or nothing" matter. Section 7(2) of the Act sets out an important principle, as follows:

> ***Severing information***
> ***7(2)*** *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*

In considering severing, the operative question is: what is reasonable? Conventional wisdom on the issue, as articulated by Canadian Courts, Access Commissioners and Ombudsmen, is that it is unreasonable and possibly a mockery of the legislation to provide an Applicant with an incomprehensible record consisting of simply unconnected words and phrases.

Severing may hamper the "flow" of the information provided; however, so long as the remaining passages can be understood, severing would be reasonable.

The severing process may be described as more of an art than a science and even experienced access personnel may sever a record differently. Nevertheless, the reasonableness of severing can be objectively assessed, based on the legislative provisions, the contents of a particular record and the circumstances surrounding the record. Severing is often time-consuming, but a lawful handling of an access request requires application of this fundamental principle.

It is possible that, after a record has been severed, an Applicant may feel that he or she has not received as much information as should be provided. At the same time, the access personnel might feel that the product, after severing, is not worthy of the effort. This is where an independent office of review, such as the Ombudsman, may serve both parties well by making the principles of access, including severing, known and by assessing whether, in a particular request, the principles of access to a record were properly applied.

Three City cases from 1998 provide interesting insights into severing and are discussed below. Two of these cases focused on the severing of reports that were largely subject to exceptions under the Act. The third case was an example of effective severing of a videotape record.

◆ 98-096
98-097
Spirited Severing

Two requests were made for access to City of Winnipeg reports. A request was made to the Office of the Chief Administrative Officer for a "copy of the report in draft and/or final form prepared by consultants regarding the future of Winnipeg Hydro". Another request was made to the City Clerk's Department for a "copy of the GBR Strategic Facilities Master Plan". In both cases, access to the reports was denied in full.

Access to the report concerning Winnipeg Hydro was denied under the following provisions of *The Freedom of Information and Protection of Privacy Act:*

Advice to a public body
23(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*

(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;

(b) consultations or deliberations involving officers or employees of the public body or a minister;

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Manitoba or the public body, or considerations that relate to those negotiations;

(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

Disclosure harmful to economic and other interests of a public body
28(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of the public body or the Government of Manitoba, including the following information:*

(b) financial, commercial, scientific, technical or other information in which the public body or the Government of Manitoba has a proprietary interest or right of use;

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with or prejudice contractual or other negotiations of, the public body or the Government of Manitoba;

(e) information the disclosure of which could reasonably be expected to result in an undue loss or benefit to a person, or premature disclosure of a pending policy decision…

Access to the GBR report was denied on the basis of the following exceptions under the Act:

Local public body confidences
22(1) *The head of a local public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its elected officials or governing body, if an enactment or a resolution, by-law or other legal instrument by which the local public body acts authorizes the holding of that meeting in the absence of the public.

Advice to a public body
23(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*

(a) *advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;*

The two cases were handled by personnel in different departments of the City. Upon receipt of the complaints, enquiries were made with these departments and the reports in question were reviewed by Compliance Investigators from our office. Provisions of *The Freedom of Information and Protection of Privacy Act* were considered and discussed with City personnel, including section 7(2), which provides:

Severing information
7(2) *The right of access to a record does not extend to information that is*

excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.

Further to our discussions, the City was of the view that there were portions of the requested documentation, which were possibly releasable. We were advised by both Departments that particular pages would be released in whole or in part. This related to 17 pages in the case of the report on Winnipeg Hydro and 30 pages in the case of the GBR report.

Our office reviewed the City's position on release, including the proposed severing. Based on our investigations, we were satisfied that all portions of the requested documentation, other than those portions the City was willing to release, appeared to be subject to one or more of the exceptions cited.

As the exceptions were discretionary and so the City could choose to release or to withhold, there were discussions on why the City decided not to release most of the reports. The City provided our office with information on why release of most portions of the documentation could reasonably be expected to result in harm or be detrimental to the City.

The severing in both of these cases was considerable in relation to the size of the records requested. Nevertheless, having reviewed the records and based on the information provided to us, our office was satisfied that release was made in accordance with the provisions of *The Freedom of Information and Protection of Privacy Act*.

A separate but related issue raised in these cases was the extent to which the Ombudsman can report on his findings in an investigation. Provisions of section 55 of *The Freedom of Information and Protection of Privacy Act* set out:

Ombudsman restricted as to disclosure of information

55(1) *The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).*

When disclosure permitted

55(2) *The Ombudsman may disclose, or may authorize anyone acting for or under the direction of the Ombudsman to disclose, information that is necessary to*

(a) perform a duty or exercise a power of the Ombudsman under this Act; or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

Reasonable precautions to avoid disclosure

55(3) *In conducting an investigation and in performing any other duty or exercising any power under this Act, the Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall take every reasonable precaution to avoid disclosing and shall not disclose*

(a) any information the head of a public body is authorized or required to refuse to disclose under Part 2; or

(b)whether information exists, if the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12(2).

Because of the nature of these records, we felt any detailed reporting by our office could, in these instances, divulge information subject to exceptions under the Act, to the detriment of the City. In reporting the Ombudsman's findings about the complaints, we were constrained to

discussing the process undertaken and, very narrowly, the exceptions which were found to apply.

◆ 98-107
Best Editing in Film …

An unusual example of severing, consistent with both the provisions and spirit of *The Freedom of Information and Protection of Privacy Act*, was undertaken by the City of Winnipeg Police Service. It related to a videotape, a medium other than the paper or electronic formats most frequently encountered under the Act.

This particular case serves as a reminder of the many forms a record may take where, under the access legislation:

> *"**record**" means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means including by graphic, electronic or mechanical means, but does not include electronic software or any mechanism that produces records;*

This matter came to our attention as a complaint. It appears that access, with severing, would have been provided to the Applicant at the application stage, had the City been aware that he was acting on behalf of two third parties, whose personal privacy the City felt obliged to protect.

As explanation, the Applicant requested a copy of the police videotape of a public demonstration, showing two individuals (the Applicant's clients) being arrested. Earlier, in the associated Court matter, the Applicant had not gained access to the videotape under the usual Court procedure. The criminal charges against the individuals were, by the time of the access application, no longer being pursued.

In responding to the Applicant, the City applied the following provisions of *The Freedom of Information and Protection of Privacy Act:*

> ***Disclosures deemed to be an unreasonable invasion of privacy***
> **17(2)** *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*
>
> *(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of a law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;*

Upon receiving the complaint, we learned from the Applicant that he was the lawyer for the two individuals who were shown being arrested on the videotape. We discussed this with the access personnel who had handled the request. They advised that they had initially considered all of the recorded information on the videotape to be personal information about third parties, noting that the film captured not only the persons arrested, but other demonstrators and dozens of passersby while the demonstration and arrests took place. Once it was established that the Applicant was applying for access as counsel for the two individuals shown being arrested on the videotape, the City no longer considered those particular individuals to be third parties to the request.

We reviewed the videotape and considered it in relation to *The Freedom of Information and Protection of Privacy Act.* Our review indicated that the record contained personal information about third parties, namely the passersby and demonstrators other than the two individuals whom the Applicant represented. Specifically, the videotape contained personal information in that it placed identifiable individuals at a particular time and place.

Section 17 of *The Freedom of Information and Protection of Privacy Act*, cited by the City, is a mandatory exception. Where a mandatory exception applies, a public body is not authorized to release the information. As a result, the City could not disclose much of the record.

Consideration was given by the City to whether the videotape could be reasonably severed. It was noted that severing requires the release of all information in a record that can reasonably be disclosed. The City determined that severing could be conducted in such a way as to provide a copy of the videotape that contained information about the Applicant's two clients only. This involved technology that produced a dark square around the featured individuals, producing a "cameo effect" that obscured others in the same scene.

Although this was a somewhat unusual access request, presenting a challenge to compliance, the City made every effort to meet the rules of access.

ENSURE, OF COURSE, THAT THE ACT APPLIES

As much as *The Freedom of Information and Protection of Privacy Act* is access-oriented, the first question should always be whether a requested record comes under the Act. In very limited circumstances, a record is not subject to the Act, as discussed below.

Even where the Act is applicable, a public body should consider whether use of the Act is necessary. It is good administrative practice for a public body to have determined what records can be routinely disclosed without the need of the access to information procedure. The determination of that initial question saves time and resources for both the public and the public body in the long run.

Section 4 of the Act, with the headnote "*Records to which this Act applies*", actually lists records to which the Act does not apply. This includes certain records in the judicial sphere such as a Court record and a record of a Judge; other records that are not in the sphere of executive government, such as a record of a Member of the Legislature who is not a minister, a personal or constituency record of a minister, and a record made by or for an officer of the Legislative Assembly (this would include the Ombudsman); records the release of which may cause harm such as a question that is to be used on an examination or test; and records relating to a prosecution or inquest if all proceedings have not been completed.

Part 7 of *The Freedom of Information and Protection of Privacy Act* sets out that where a provision in a handful of specified pieces of legislation is inconsistent or in conflict with *The Freedom of Information and Protection of Privacy Act*, the provisions of the other act prevails. This includes *The Child and Family Services Act*, *The Securities Act*, *The Statistics Act*, *The Vital Statistics Act* and *The Workers Compensation Act*.

Sections 5(1) and 5(3) of *The Freedom of Information and Protection of Privacy Act* state that for the first three years after *The Freedom of Information and Protection of Privacy Act* comes into force, the head of a public body shall refuse to give access or disclose information under the Act if the disclosure is prohibited or restricted by another enactment of Manitoba.

An example of such a situation is described in the following case summary, where *The Local Authorities Election Act* was found to be inconsistent with *The Freedom of Information and Protection of Privacy Act*. It should be noted that three years after *The Freedom of Information and Protection of Privacy Act* is effective, it will prevail if there is an inconsistency or conflict with another piece of legislation, unless the other legislation expressly provides that it

applies despite *The Freedom of Information and Protection of Privacy Act*.

◆ 98-104
Another Act Prevails

A request under *The Freedom of Information and Protection of Privacy Act* was made to the City Clerk's Department for access to the following documents from the 1998 Civic Election:

All Statements of Polls
All Poll Books
All Lists of Electors
All Affidavits of Electors

In response, the City of Winnipeg stated that "the requested information does not fall under the purview of FIPPA". In support of this statement, section 5(1) of *The Freedom of Information and Protection of Privacy Act* was cited:

> ***Relationship to other Acts***
> ***5(1)*** *The head of a public body shall refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another enactment of Manitoba*.

A complaint of refused access was made to our office.

The City provided our office with clarification regarding its reliance on section 5(1) of *The Freedom of Information and Protection of Privacy Act.* It took the position that provisions of other Manitoba legislation, *The Local Authorities Election Act,* prohibited and restricted disclosure of the requested records.

In considering *The Local Authorities Election Act*, our review indicated that the disclosure of the requested information was prohibited under that legislation. The disclosure of the requested information was restricted under section 101(7) of *The Local Authorities Election Act* to an inspection of the poll books and statement of votes made "*before five o'clock in the afternoon on the day following the election*". Disclosure of any election documents in the Clerk's possession was further restricted to an Order of the Court of Queen's Bench.

We were therefore of the opinion that the provision, upon which the City relied, applied to the requested records. As section 5(1) of *The Freedom of Information and Protection of Privacy Act* is a mandatory provision, the public body was not authorized to disclose the information. Accordingly, no recommendation could be made by our office in this matter.

As an aside, we were aware that, concurrent to the request made under *The Freedom of Information and Protection of Privacy Act,* applications had been made to the Court of Queen's Bench for a Declaratory Order that citizens named in the Court applications be entitled to inspect, among other records, the statements of polls, poll books, lists of electors and affidavits of electors in relation to the City of Winnipeg election held on October 28, 1998.

We understand that, subsequent to our completion of this file, the Court made a Declaratory Order that, under *The Local Authorities Election Act*, the citizens who were parties to the Court applications were entitled to review the records they requested under their applications to Court, with the exception of ballots. The accessible records included the records that had been requested under *The Freedom of Information and Protection of Privacy Act*.

TRUSTEES

THE PERSONAL HEALTH INFORMATION ACT

DECEMBER 11, 1997 – DECEMBER 31, 1998

INTRODUCTION TO THE PERSONAL HEALTH INFORMATION ACT

WHAT IT IS:

The Personal Health Information Act was proclaimed as law in Manitoba on December 11, 1997. It was unique legislation in Canada, being a distinct Act with provisions for accessing one's own "*personal health information*" from a "*trustee*" holding this information. It articulates provisions for the protection of personal health information, specifically its collection, use, disclosure and security in the custody or under the control of trustees.

"*Personal health information*" is defined under the Act as recorded information about an identifiable individual that relates to the person's health or health care history (including genetic information); the provision of health care to the individual; and payment for health care provided to the individual. The term "*personal health information*" includes the PHIN (Personal Health Identification Number) and any other identifying information assigned to an individual and any identifying information about the individual that is collected in the course of, and incidental to, the provision of health care or payment for health care. The term "*trustee*", which is discussed more fully below, includes government bodies, educational bodies, health care bodies and health care professionals.

The preamble to *The Personal Health Information Act* outlines the following reasons for enacting the legislation:

> *...health information is personal and sensitive and its confidentiality must be protected so that individuals are not afraid to seek health care or to disclose sensitive information to health professionals;*
>
> *...individuals need access to their own health information as a matter of fairness, to enable them to make informed decisions about health care and to correct inaccurate or incomplete information about themselves;*
>
> *...a consistent approach to personal health information is necessary because many persons other than health professionals now obtain, use and disclose personal health information in different contexts and for different purposes;* and
>
> *... clear and certain rules for the collection, use and disclosure of personal health information are an essential support for electronic health information systems that can improve both the quality of patient care and the management of health care resources;*

Essentially, *The Personal Health Information Act* is parallel legislation to *The Freedom of Information and Protection of Privacy Act*. Whereas *The Freedom of Information and Protection of Privacy Act* does not apply to personal health information, *The Personal Health Information Act* relates exclusively to access to and the protection of one's own personal health information.

WHO IT APPLIES TO:

The Personal Health Information Act applies to a "*trustee*" under the Act.

The term "*trustee*" includes public bodies, such as provincial government departments and agencies and the City of Winnipeg (bodies also subject to *The Freedom of*

Information and Protection of Privacy Act); other government bodies, such as municipalities, local government districts, planning districts and conservation districts; educational bodies, such as school divisions and districts, universities and colleges; health care facilities, such as hospitals, personal care homes, psychiatric facilities, medical clinics and laboratories; and health professionals licensed or registered to provide health care under an Act of the Legislature, or who are members of a class of persons designated as health professionals in the Regulations.

Health professionals and health care facilities include private sector entities.

THE ROLE OF THE PROVINCIAL OMBUDSMAN:

As under *The Freedom of Information and Protection of Privacy Act,* a complaint can be made to the Ombudsman under *The Personal Health Information Act* concerning denial of access to records requested under the Act. If, after the Ombudsman's review, a person does not obtain access to all the requested records, he or she can appeal to the Court of Queen's Bench. The Ombudsman may, in the place of the individual, appeal a refusal of access to the Court (with the individual's consent), or may intervene as a party to an appeal.

Under *The Personal Health Information Act*, the Ombudsman shall also investigate complaints that an individual's own personal health information has been collected, used or disclosed by a trustee in violation of the Act.

Similar to *The Freedom of Information and Protection of Privacy Act, The Personal Health Information Act* sets out other powers and duties of the Ombudsman in addition to the investigation of complaints relating to access and privacy. These include the powers and duties to conduct investigations and audits and make recommendations to monitor and ensure compliance with the Act; to inform the public about the Act; to comment on the implications for access to or confidentiality of personal health information of proposed legislative schemes or programs or practices of trustees; and to comment on the implications for the confidentiality of personal health information of using or disclosing personal health information for record linkage or using information technology in the collection, storage, use or transfer of personal information.

In exercising these general powers and duties under the legislation, our office has opened files which we have termed "special investigations". Case numbers referred to in this Annual Report which begin with "S" identify special investigations.

Our office received no complaints under *The Personal Health Act* in December, 1997. In 1998, our office received 10 complaints under the Act. Five of these concerned health care facilities, two concerned provincial government departments, two concerned a health professional and one concerned a health services agency. Five special investigation files were opened in 1998, under *The Personal Health Information Act*.

The following summaries concern some of the more interesting and instructive cases handled by our office in 1998 under *The Personal Health Information Act.* They are organized under headings that describe some of the powers and duties of the Ombudsman's Office.

THE OMBUDSMAN INVESTIGATES COMPLAINTS

The bulk of the Ombudsman's activities under *The Personal Health Information Act* consists of investigations of complaints under Part 5 of the Act.

The Personal Health Information Act sets out the kinds of complaints that can be made to the Ombudsman and which the

Ombudsman shall (subject to a few exceptions) investigate:

> ***Right to make a complaint about access***
> ***39(1)*** *An individual who has made a request to examine or receive a copy of his or her personal health information in accordance with Part 2 may make a complaint to the Ombudsman about any decision, act or failure to act of the trustee that relates to the request, including but not limited to the following:*
>
> *(a) a refusal by the trustee to permit the individual to examine or receive a copy of the information;*
>
> *(b) a refusal by the trustee to correct personal health information;*
>
> *(c) an unreasonable or unauthorized fee charged by the trustee.*
>
> ***Right to make a complaint about privacy***
> ***39(2)*** *An individual may make a complaint to the Ombudsman alleging that a trustee*
>
> *(a) has collected, used or disclosed his or her personal health information contrary to this Act; or*
>
> *(b) has failed to protect his or her personal health information in a secure manner as required by this Act.*

The three cases under this heading are examples of the types of complaints received by the Ombudsman under *The Personal Health Information Act* in 1998.

The first of these cases relates to a complaint made by a former patient of a clinical psychologist (a trustee under the Act) concerning denial of access to the patient's own personal health information.

The case illustrates considerations that must be made by a trustee in deciding whether release could reasonably be expected to endanger the mental health of the patient. Whereas the Trustee is this case apparently relied on the professional standards set out in the Canadian Psychological Association Code of Ethics in making the decision to withhold access, the standard for withholding patient information under *The Personal Health Information Act* is more difficult to meet. *The Personal Health Information Act* requires that there be a reasonable expectation that release could endanger the mental health of the patient (*probability*) as opposed to the *possibility* of harm. As *The Personal Health Information Act* is law, it prevails over a professional code of conduct.

In this case, I retained a psychologist to provide a professional opinion on the matter. Based on all of the information available to me, I was not of the opinion that release could reasonably be expected to harm the patient and a recommendation for release was made. The Trustee followed the recommendation although the Trustee was not in agreement with the view that release of the clinical record did not entail a reasonable expectation of harm.

The second case under this heading is an example of a privacy case under *The Personal Health Information Act*. The Trustee in this case was Manitoba Highways and Transportation, a government body. This case is similar to the one reported under Manitoba Family Services on page 26 of this Annual Report. This case, too, raised concern about the management of mail by a Provincial Government department, an issue we are discussing with the Mail Management Agency in an attempt to address the issue government-wide. This particular case was handled under *The Personal Health Information Act* rather than *The Freedom of Information and Protection of Privacy Act* because it concerned the breach of security of personal health information as opposed to personal information that was not of a medical nature.

The third case relates to a fees complaint under *The Personal Health Information Act*. Barring the existence of a fee regulation under *The Personal Health Information Act* (although one is expected), our office looked

at various criteria in considering the reasonableness of the fees charged in a particular case. We did not find the fees in this case to be unreasonable.

◆ 98-006
Information Released: Professional Ethics and Legal Standards

A request was made for copies of all the Applicant's personal health information in the custody or under the control of the Applicant's former psychologist, a trustee under *The Personal Health Information Act*.

In response to the request, the Trustee advised that the Applicant's chart had been carefully reviewed and that the Trustee had concluded that knowledge of the information contained in the chart could reasonably be expected to endanger the mental health of the Applicant. Consequently, the Trustee advised that the request for a copy of the chart was being declined pursuant to section 11(1)(a) of *The Personal Health Information Act.*

Section 11(1)(a) of *The Personal Health Information Act* sets out:

> ***Reasons for refusing access***
> ***11(1)*** *A trustee is not required to permit an individual to examine or copy his or her personal health information under this Part if*
>
> *(a) knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the individual or another person;*

The Trustee's response letter concluded with the statement that the Trustee was prepared to provide a complete copy of the Applicant's chart to another registered psychologist or psychiatrist, upon written confirmation that the Applicant was under the care of such an individual and if directed in writing to do so by the Applicant.

In response to a further letter by the Applicant, the Trustee advised that there had been careful consideration of the Trustee's obligation under section 11(2) of *The Personal Health Information Act* to sever, to the extent possible, the personal health information that could not be examined or copied and permit the Applicant to examine and receive a copy of the remainder of the information.

The Trustee stated that the requested chart consisted entirely of detailed notes prepared by the Trustee of each session with the Applicant, including the Trustee's thoughts and interpretations of those sessions. Consequently, the Trustee advised that the complete contents of the chart fell within the exception set out in section 11(1)(a) of *The Personal Health Information Act*.

The Applicant wrote a letter to our office about the refused access, which constituted a complaint under *The Personal Health Information Act.*

Further to the complaint, the requested records, termed "process notes" by the trustee, were reviewed by our office and considered in relation to *The Personal Health Information Act*. There were meetings with the Applicant and the Trustee, where release of the records and parts of the records was discussed.

As well, to assist our office in the consideration of this matter, we retained the services of an independent clinical psychologist. This action was taken pursuant to section 44 of *The Personal Health Information Act,*which states:

> ***Obtaining opinion of physician or other expert***
> ***44*** *If a complaint about access relates to a trustee's refusal to permit personal health information to be examined or copied under clause 11(1)(a) (endangering health or safety), the Ombudsman may arrange for a physician or other expert chosen by the*

Ombudsman to provide an opinion on the matter.

The expert retained by our office reviewed the requested process notes and met with the Trustee to understand the Trustee's view of the case. He also met with the Applicant, at our office, for the purpose of explaining his role in the investigation and to understand the Applicant's position. We understand that the expert advised the Applicant that it was not his role to evaluate the Applicant clinically or to give an opinion about the Applicant's mental health. Rather, the role of the independent psychologist was to provide an opinion in this matter to the Ombudsman.

I note that, as a registered psychologist, the Trustee was governed by the Canadian Psychological Association Code of Ethics, which sets out:

...a basic ethical expectation of any discipline is that its activities will benefit members of society, or at least, do no harm. Therefore, psychologists demonstrate an active concern for the welfare of any individual, family, group, or community with whom they relate in their role as psychologists.

The Code further states:

...psychologists define harm and benefit in terms of both physical and psychological dimensions. They are concerned about such factors as feelings of self-worth, fear, humiliation, interpersonal trust, cynicism, self-knowledge and general knowledge, as well as such factors as physical safety, comfort, pain and injury. They are concerned about immediate, short term, and long term effects.

In the course of our review, the Trustee expressed concern about the Applicant's state of health and vulnerability. Based on our review, I was satisfied that the process notes recorded the Trustee's professional opinion that the Applicant was emotionally vulnerable and potentially endangered by upsetting personal information.

I was further satisfied that the Trustee believed the release of the process notes could cause harm to the Applicant and that the Trustee followed the ethical guidelines of the Trustee's profession in refusing access to the notes. The denial of access was based on the Trustee's opinion of the possibility that harm might come to the Applicant, which would seem to be a responsible position in view of the Trustee's understanding of the client and the Trustee's professional and ethical obligations.

Nevertheless, the test legislated under section 11(1)(a) of *The Personal Health Information Act*, which is a high test reflecting the importance of access to one's own personal health information, concerns the *probability*, not the *possibility*, of harm. Section 11(1)(a) refers to whether knowledge of the requested information "*could reasonably be expected*" to endanger the mental or physical health or safety of an individual. Clearly, this is a test which must be applied prudently.

It was noted that the preamble of *The Personal Health Information Act* sets out a very broad right of access, that:

...individuals need access to their own health information as a matter of fairness, to enable them to make informed decisions about health care and to correct inaccurate or incomplete information about themselves;

This right of access is subject to only a few limited and specific exceptions under the Act, one of them being section 11(1)(a). Disclosure is the rule, not the exception, and an application must fall squarely within one of the exceptions for a record to be withheld. To the extent that there are exceptions to release at all under *The Personal Health Information Act*, the exceptions are intended to be read very narrowly.

In my opinion, this case highlighted the potential conflict between a psychologist's responsibility to his or her code of ethics concerning a client's welfare and an individual's right to their own personal health information. It was noted that the decision concerning the release of personal health information hinges on the estimate of harm from such release. I was of the view that, in the absence of established guidelines, such estimates would no doubt vary from person to person, as well as vary in the accuracy of the prediction. Given this uncertainty of prediction, I felt it was likely that a Trustee, whose ethical obligation was to "do no harm", would be especially sensitive to a possibility of harm. Nevertheless, for a trustee under *The Personal Health Information Act* legislation, the test that must be considered and followed is the probability of harm.

While one might accept the argument that release of the requested information could possibly cause harm, based on the information available to me, I was not of the opinion that release could reasonably be expected to cause harm. In my view, the Trustee was professionally responsible and acted in accordance with the Code of Ethics of the Canadian Psychological Association in deciding to deny access; however, given the wording of section 11(1)(a) and the spirit of broad release under *The Personal Health Information Act*, the requested notes did not, in my opinion, meet the test that release would "*reasonably be expected to endanger the mental health or the safety of the individual*". Accordingly, I was of the opinion that the refusal of access to the records in question was not justified.

A recommendation was made in this case that the Trustee provide to the Applicant a copy of all of the personal health information sought in this access request.

In responding to our office, the Trustee expressed disagreement with the Ombudsman's view that the release of the clinical records did not entail a reasonable expectation of harm. The Trustee went on to say that the Applicant would nevertheless receive a copy of the full clinical file. It was further stated that the Trustee felt release was a compromise of the Trustee's clinical judgment and professional ethics.

◆ 98-081
The Fee in PHIA

A complainant wrote a letter to our office under *The Personal Health Information Act* complaining that she was charged $31.75 for 11 pages of her medical record by the Winnipeg Clinic, a health care facility and therefore a trustee under *The Personal Health Information Act*. The complainant expressed the view that the fee was unreasonable. Section 39(1)(d) of *The Personal Health Information Act* provides that a complaint may be made to the Ombudsman relating to *"an unreasonable or unauthorized fee charged by the trustee"*.

Upon receipt of the complaint, enquiries were made with the facility about the fee assessed in this particular case. There were meetings with the Privacy Officer, the records in question were reviewed and the provisions of *The Personal Health Information Act* were considered. At the time of the complaint (and at the time of writing this Annual Report) there was no regulation under *The Personal Health Information Act* authorizing fees, including fees for search, preparation or copying. Nevertheless, different legislative schemes, guidelines and policies were considered in determining whether the fee assessed in this case was unreasonable.

We were advised that the sum of $31.75 was a fee charged for all requests for copies of medical records at the facility, notwithstanding the number of pages copied. We felt that the fee assessment for each access request should be considered individually, based on the size and contents of the record and, so, we considered the reasonableness of the $31.75 in this case.

We were advised that all records provided by the facility to a patient or to a physician outside of the facility are first reviewed by a physician. This is to allow for the severing of any information which would violate a third party's privacy or could reasonably be expected to endanger the patient or another person. We were informed that there is a cost associated with this review. We were advised that the Manitoba Medical Association's suggested rates for a physician to review records for release is $182.90 per hour.

We took into consideration a physician's time spent reviewing the records, even if that consisted of a brief scanning of the pages. We also considered administrative costs. While we noted that, under Manitoba's legislative access schemes, costs are waived for the first two hours of preparation and for some copying, we also recognized that, to date, such schemes have applied to public bodies and not to the private sector.

After carefully considering the relevant factors in this case, our office was unable to conclude that the fee charged was unreasonable. Accordingly, the Ombudsman was unable to make a recommendation concerning this complaint.

◆ 98-087
S99-006
A Reprise – Security Breached: Privacy Sought

Section 18 of *The Personal Health Information Act* sets out, in part:

> ***Duty to adopt security safeguards***
> ***18(1)*** *In accordance with any requirements of the regulations, a trustee shall protect personal health information by adopting reasonable administrative, technical and physical safeguards that ensure the confidentiality, security, accuracy and integrity of the information.*
>
> ***Specific safeguards***
> ***18(2)*** *Without limiting subsection (1), a trustee shall*
> *(a) implement controls that limit the persons who may use personal health information maintained by the trustee to those specifically authorized by the trustee to do so;*
> *(b) implement controls to ensure that personal health information maintained by the trustee cannot be used unless*
> *(i) the identity of the person seeking to use the information is verified as a person the trustee has authorized to use it, and*
> *(ii) the proposed use is verified as being authorized under this Act;*

In this case, the Complainant advised that he had received from Manitoba Highways and Transportation (Driver and Vehicle Licencing Division), by certified mail, a copy of his medical records and that the envelope was unsealed.

In response to the complaint, enquiries were made regarding the Department's mailing procedures. We were advised that the Department places its correspondence in unsealed envelopes and that the correspondence is transported to the province's Mail Management Agency, a special operating agency used by many of the departments and agencies of the Provincial Government. There, we were advised, postage is added, the envelopes are sealed by machine and then sent through Canada Post.

Our office observed that the transfer of personal health information in unsealed envelopes between offices and through the post is not in accordance with *The Personal Health Information Act*. Our office was advised that the concern raised by the Complainant was taken very seriously by the Department and an apology was sent to him. The Department informed us that it would be considering its mailing procedure and would again be in contact with us.

Subsequently, the Department advised us that, having investigated the Complainant's allegation with both Canada Post and the Mail Management Agency, it could not be substantiated that the envelope in this case had been received unsealed. The Department advised, as part of its evidence, that the Mail Management Agency conducted quality checks of all certified mail prior to mailing to ensure that incidents such as the one alleged do not occur.

Our particular concern was that the Department (and no doubt other government departments and agencies) forwards correspondence to an outside entity (the Mail Management Agency) to be sealed or, in some cases, placed in an envelope and then sealed. Personal information, including personal health information, is not secured in the transporting and handling process.

As a result of the issue raised by this case, senior staff from our office met with the Chief Operating Officer of the Mail Management Agency to discuss possibilities of reinforcing good mail management practices among the clients of the Agency in meeting the requirements for protection of personal information under *The Personal Health Information Act* and *The Freedom of Information and Protection of Privacy Act*.

Under *The Personal Health Information Act*, the Mail Management Agency may be an "*information manager*" because it is a person that processes personal health information for a trustee. *The Personal Health Information Act* is absolutely explicit about a trustee not being able to provide personal health information to an information manager in the absence of a written agreement. *The Freedom of Information and Protection of Privacy Act* is less specific in this regard because of the existence of the records management program for the Provincial Government. Nevertheless, we have no doubt that *The Freedom of Information and Protection of Privacy Act* intends the same level of protection for personal information that is not health related as does *The Personal Health Information Act* for personal health information.

At the time of writing this Annual Report, discussions in this area are ongoing.

THE OMBUDSMAN INITIATES HIS OWN INVESTIGATIONS

One of the many tools available to the Ombudsman's Office under *The Personal Health Information Act* is that the Ombudsman can initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate (section 39(4) of the Act). Therefore, the Ombudsman does not have to await a complaint from the public when an issue comes to his attention.

The Ombudsman used this power under *The Personal Health Information Act* for the first time in a case, reported by the media, of patient files left in a dumpster for disposal behind one of the premises of the Manitoba X-Ray Clinic.

This occurred in March 1999. Nevertheless, it is being reported in this Annual Report because of the important provisions of the Act which this issue touched, and as a model of the process under the Act from investigation to recommendation. The incident in question was widely reported in the news. It is therefore important that the outcome be widely made known as well. It is hoped that there will be a positive aspect to the incident in that the publicity generated will help alert other personal health information trustees and information managers about the requirements of *The Personal Health Information Act*. This case was the subject of a news release by our office dated April 21, 1999.

◆ 99-028
No X-Ray Eyes Needed: Security Breached When Records Dumped

Our office learned on March 5, 1999 that personal health information, apparently under the custody and control of the Manitoba X-Ray Clinic, was found in an outdoor dumpster awaiting pick-up for disposal at a local dumpsite. One of our Compliance Investigators immediately contacted the Manager of the Clinic who confirmed that personal health information in the control of the Clinic had been placed in a dumpster and stated that these records had by then been picked up for disposal at a dumpsite.

The Investigator examined the dumpster site and confirmed that records were no longer visible at the site. The Manager provided our office with a statement of the Clinic's existing procedures for disposing of certain records containing health information. It was apparent that the Clinic had neither a written policy on retention and destruction of personal health information nor a record of destruction as required by *The Personal Health Information Act*.

There was further investigation and a meeting was held with the President of the Clinic. I subsequently reported that, while I was satisfied that the Clinic acted with reasonable expedition to ensure that no files were loose at the dumpster and that the bin was emptied on schedule on the evening of March 4, I was of the opinion that the bundling of personal health information and transporting it to a dumpsite did not meet the requirements of the legislation. In reference to provisions of the Act, it was noted that disposing of personal health information in outdoor garbage bins does not provide adequate security for personal information. With reference to provisions of the Act, it is not an appropriate designated area; it does not restrict access to authorized persons; and it is not subject to reasonable precautions to protect the personal health information from theft, foraging, vandalism or other hazards.

It was also my opinion that the disposal of personal health information at a dumpsite neither ensures the destruction of the records nor the disposal of records in a manner that protects the privacy of the persons the information is about. Paper records have been known to remain intact and legible for years even under adverse conditions, and, at a dumpsite, are subject to access by others. There are existing mechanisms and industry standards readily available to ensure the complete destruction of recorded information including paper and other media. Concern was also expressed that the records apparently transported to the dumpsite during the evening of March 4 could still be intact and subject to unauthorized and improper inspection.

In the course of our investigation, it also became apparent that the Clinic was not in substantive compliance with the provisions of *The Personal Health Information Act* Regulation. The Regulation headings themselves indicate the areas which need to be addressed by trustees: *Written security policy and procedures; Access restrictions and other precautions*; *Safeguards for electronic information*; *Authorized access for employees and agents; Orientation and training for employees*; *Pledge of confidentiality for employees*; and, *Audit*.

The Personal Health Information Act sets out reporting mechanisms for the Ombudsman:

> ***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 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 health information contrary to this Act….

Based on the provisions of *The Personal Health Information Act* and the information obtained in our office's review, the Ombudsman's finding was that the Manitoba X-Ray Clinic had failed to comply with section 17(3) of *The Personal Health Information Act* which requires a trustee to "*ensure that personal health information is destroyed in a manner that protects the privacy of the individual the information is about*".

Accordingly, it was recommended:

1. That the Manitoba X-Ray Clinic immediately cease any and all destruction of personal health information contrary to *The Personal Health Information Act*.

2. That the Clinic consider measures to ensure that personal information sent in recent months to any landfill site is not susceptible to unauthorized access and disclosure, and that these measures be reported to the Ombudsman's Office as part of the Clinic's response to the Ombudsman's recommendations.

3. That the Clinic undertake forthwith an audit of its compliance with sections 17, 18, and 19 of *The Personal Health Information Act* and with the Regulation.

4. That the Clinic identify measures to correct the deficiencies identified through this audit on a prioritized and urgent basis.

5. That the Clinic provide a copy to the Office of the Ombudsman of this audit and the proposed timelines for correcting the specific deficiencies identified in relation to sections 17, 18, and 19 of *The Personal Health Information Act* and to the Regulation.

6. That the Clinic take steps to inform its directors and employees about the intent and implications of *The Personal Health Information Act*.

In making these recommendations, it was recognized that the Clinic may feel the need for assistance in ensuring that its policies and practices comply with the Act. It was the Office's impression that Manitoba Health could provide assistance in understanding the meaning and intention of the Act's provisions, but should not be regarded as a source of legal interpretation or counsel. The Clinic was advised that it may wish to consult with its own counsel regarding compliance matters. It was noted that the Ombudsman's Office is an office of independent review, and while it may extend some informal suggestions to the Clinic from time-to-time, these would be without prejudice to any subsequent oversight activity that the Ombudsman's Office may undertake.

I also noted that while the recommendations were directed toward obtaining, in effect, an overall plan of action and a record of compliance measures undertaken immediately by the Clinic, it would be in the best interests of its patients and of the Clinic itself to ensure expeditious action to bring the Clinic's information management policies and practices in line with the requirements of *The Personal Health Information Act*.

Where the Ombudsman makes recommendations relating to a complaint, *The Personal Health Information Act* sets out:

> ***Trustee's response to the report***
> ***48(4)*** *If the report contains recommendations, the trustee shall, within 14 days after receiving it, send the Ombudsman a written response indicating*
> *(a) that the trustee accepts the recommendations and describing any action the trustee has taken or proposes to take to implement them; or*
> *(b) the reasons why the trustee refuses to take action to implement the recommendations.*
>
> **Compliance with recommendations**
> ***48(6)*** *When a trustee accepts the recommendations in a report, the trustee shall comply with the recommendations within 15 days of acceptance, or within such additional period as the Ombudsman considers reasonable.*

The report and recommendations were sent to the Manitoba X-Ray Clinic on March 12, 1999. The Clinic's response was received on March 25, 1999.

The Clinic advised that its audit dealt with seven areas: the policy for retention and destruction of personal information, method of destruction of information to protect privacy of the individual, record of destruction, written security policy and procedures, restrictions to access and other precautions, orientation and training for employees, and pledge of confidentiality. The Clinic advised that corrective actions included:

- A written policy and procedures manual being developed and to be completed by April 30, 1999.
- The Clinic negotiating the purchase of shredders and a contract for shredding services, with no destruction of personal health information being done until these services were available. It was anticipated that the purchases would be completed by April 30, 1999.
- A written policies and procedures dealing with the record of destruction, security policy and procedures, access restrictions and other precautions that would form the basis for employee orientation and training.
- A pledge of confidentiality having been developed and that would be introduced together with the manual.

At the time of writing this Annual Report, our office is following up with the Clinic on the implementation on the recommendations and the compliance measures identified by the Clinic's security audit.

THE OMBUDSMAN MAKES COMMENTS

In addition to the Ombudsman's powers and duties to investigate complaints under Part 5 of *The Personal Health Information Act*, Part 4 of the Act sets out that the Ombudsman may:

> *(a) conduct investigations and audits and make recommendations to monitor and ensure compliance with this Act;*
> *(b) inform the public about this Act;*
> *(c) receive comments from the public about matters concerning the confidentiality of personal health information or access to that information;*
> *(d) comment on the implications for access to or confidentiality of personal health information of proposed legislative schemes or programs or practices of trustees;*
> *(e) comment on the implications for the confidentiality of personal health information of*
> *(i) using or disclosing personal health information for record linkage, or*

(ii) using information technology in the collection, storage, use or transfer of personal health information;

(f) consult with any person with experience or expertise in any matter related to the purposes of this Act; and

(g) engage in or commission research into any matter related to the purposes of this Act.

To date, "*investigations*" under this Part have included our "special investigations", cases opened by our office to address an access or privacy issue separate to but identified in the course of our investigating a Part 5 complaint. Examples of such cases in this Annual Report are identified by a reference number beginning with the letter "S".

The "*comment*" provision under Part 4 is a tool that our office has come to use in 1998. Commenting on an issue gives the Ombudsman's office an opportunity to provide guidance to a public body, without prejudice to future investigations.

The procedure for providing a comment is similar to other Ombudsman investigations. We obtain information and representations from the department, and then prepare a written account of our findings. In circumstances where the office concludes that a practice or procedure does not comply with the legislation, we will provide this opinion in our comment. The public body will be provided with a final opportunity to respond to our position. If, on consideration of the response, our office continues to hold that the public body is not in compliance, we will decide whether a further investigation or recommendation is required.

More information on our use of comments begins on page 10 of this Annual Report.

Below are summaries of two cases where our office commented on privacy issues.

◆ S98-008
Farming Out the PHIN

"*Personal health information*," as defined in the Act, includes "*the PHIN and any other identifying number, symbol or particular assigned to an individual*". The PHIN is explained in the Act's definition section as meaning "*the personal health identification number assigned to an individual by the minister to uniquely identify the individual for health care purposes*".

Our office was contacted in September 1998, by a pharmacist who advised that a practice had been introduced by the Manitoba Pharmaceutical Association a few years before which, the pharmacist felt, was inconsistent with the newly proclaimed *Personal Health Information Act*. The pharmacist sought to generate interest in the matter, feeling that it was a concern to the profession.

A process had been developed to assist patients who wished to have a prescription filled, but who did not have their own PHIN available. In this event, the pharmacist, with the patient's permission, would call the Drug Program Information Network Help Desk and give the patient name. To verify the pharmacist's identity, the Help Desk would ask for the pharmacist's own PHIN.

This process was seen by the pharmacist and our office to be inconsistent with *The Personal Health Information Act* because the PHIN was not being used for its original purpose. In this situation, the pharmacist was not personally having a prescription filled, nor was he or she accessing the health system in general. Rather, the pharmacist's PHIN was being used as an identifier in order that a prescription be filled for a patient.

Our office had discussions with the Manitoba Pharmaceutical Association and Manitoba Health. The Association concluded that the practice of using a

pharmacist's PHIN for patient service was no longer acceptable as a result of the implementation of *The Personal Health Information Act*. We are advised that another process is now being used to identify pharmacists who contact the Help Desk.

◆ S98-004
Comment on the Interim Report From the Advisory Council on Health Info-Structure

In the summer of 1997, the federal Minister of Health established the Advisory Council on Health Info-Structure to provide him with advice on developing a national network of provincial and territorial health information systems.

In September 1998, the Council published an interim report presenting strategic frameworks, "challenges" to achieving the goals in the framework, and strategic issues. Privacy was identified as the "over-arching concern" and the need for action in the area of privacy was described as "urgent". The Council concluded that Canadians are very concerned about losing control over their personal information in the electronic environment, especially personal health information. The Council sought comments on the interim report by November 6, 1998.

Our office responded to the interim report. At the time of our response, Manitoba was the only Canadian jurisdiction to have special legislation dedicated to the protection of personal health information. Since then, Saskatchewan has passed similar legislation. In our response, our office stressed the need for privacy protection to be integrated into the plan.

The final report of the Council was published in February 1999. Some of our suggestions were accepted and highlighted in the final report as follows:

> *The Council is convinced that the electronic health record can be placed within a legislative, institutional and technological framework that will result in improved privacy protection within the health sector. The institution of fair information practices and measures to ensure compliance with them will be critical to this framework. As Manitoba's Ombudsman points out and the Council agrees, these should include: "(1) self-audit procedures for health care providers, institutions and agencies; (2) monitoring and oversight activities by external, independent bodies; and (3) criminal sanctions and civil law remedies for breaches of privacy.*

Our office felt it was important to contribute to an issue which, although extending beyond Manitoba's borders, touches the privacy interests of the people of this province. As well, we hoped that our unique experience in dealing with legislation concerning personal health information might be useful to other Canadians.