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December 2000

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 second Annual Report of the Ombudsman under these new pieces of legislation, covering the calendar year January 1, 1999 to December 31, 1999.

Yours very truly,

Barry E. Tuckett
Provincial Ombudsman

Personnel at December 2000

Access & Privacy Division:

Peter Bower
Executive Director

Gail Perry
Manager,
Compliance & Investigation

Valerie Gural
Compliance Investigator

Nancy Love
Compliance Investigator

Carol Markusoff
Compliance Investigator

Darren Osadchuk
Compliance Investigator

Kim Riddell
Compliance Investigator

Aurèle Teffaine
Compliance Investigator

Ombudsman Division:

Donna M. Drever
Deputy Ombudsman

Corinne Crawford
Senior Investigator

Cheryl Ritlbauer
Senior Investigator

Robert W. Gates
Investigator

Jane McBee
Investigator

Kris Ramchandar
Investigator

Wanda Slomiany
Investigator

Jack Mercredi
Intake Officer/Investigator

Brandon Office:

Janet Wood
Senior Investigator

Mel Holley
Investigator

Sharon Krakowka
Intake Officer/Office Manager

Administration:

Laura Foster
Office Manager

Helen Hicks
Administrative Secretary

Jacquie Laberge
Administrative Secretary

Felicia Palmer
Administrative Secretary

TABLE OF CONTENTS

INTRODUCTION

During the past several years, our Office has been struggling to fulfill its responsibilities under *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act.* As one might expect, our difficulties can be attributed to the level of resources that have not kept up with the expectations and demands created by new legislation or changes to existing legislation.

The mandate of the Office of the Ombudsman has expanded very significantly in recent years. Some of the important overall changes were:

- The extension of the Ombudsman's jurisdiction under *The Ombudsman Act* to all municipalities with the exception of the City of Winnipeg effective January 1, 1997.
- The expansion of the Ombudsman's jurisdiction to include responding to complaints relating to hospital administration as a result of the reorganization of the operation and administration of Manitoba's health care service and the creation of Regional Health Authorities in 1997.
- The proclamation of *The Personal Health Information Act* in December 1997 and of *The Freedom of Information and Protection of Privacy Act* in May 1998 that provided an independent oversight role to review decisions made by public bodies and trustees of personal health information through the Office of the Ombudsman.

In particular, Manitoba's access and privacy legislation has extensively broadened the mandate of the Office. The scope of the legislation significantly extended the right of access to records in the custody or control of public bodies, and further, introduced a new privacy regime that, in essence, controls the manner in which public bodies and trustees of personal health information collect, use, disclose, retain, and protect personal information.

As an oversight agency, the Office of the Ombudsman was given the mandatory duty to investigate access and privacy complaints. In addition, the legislation included powers and duties to:

- Conduct investigations and audits and make recommendations to monitor and ensure compliance with the legislation.
- Inform the public about this legislation.
- Receive comments from the public about the administration of this legislation.
- Comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies.
- Comment on the implications for protection of privacy.
- Recommend to a public body, after giving the head an opportunity to make representations, that the public body cease or modify a specified practice of collecting, using or disclosing information that contravenes the legislation, or destroy a collection of personal information that was not collected in accordance with the legislation.
- Make recommendations to the head of a public body or the responsible minister about the administration of the legislation.
- Consult with any person with experience or expertise in any matter related to the purposes of the legislation.
- Engage in or commission research into anything affecting the achievement of the purposes of the legislation.

The access and privacy legislation maintained a non-adversarial complaint resolution process consistent with traditional Ombudsman functions, and added important roles equipping the Office to assist public bodies and trustees of personal health information to understand and comply with the letter and spirit of the legislation. The role requires focussed and comprehensive reviews of practices, policies and

legislation, and strives to ensure compliance through informal and preferably non-legalistic processes. It emphasizes the power of persuasion rather than the power to compel and the accountability of public offices and health information trustees. The role involves fact finding, forming opinion, reporting with recommendations where appropriate and commenting, sometimes publicly, when we believe it is in the public interest.

Most importantly, this Office is obliged to play an integral and beneficial role in terms of ensuring compliance with the privacy principles embodied in the legislation. There are serious privacy implications in the way that one manages the collection, use and disclosure of personal information in this ever-changing electronic age. There is a need for and an obligation on this Office to undertake timely reviews of privacy practices and policies of public bodies and trustees of personal health information, and to provide comments. I believe, in many cases, public bodies and trustees welcome our reviews and comments to assist their compliance with the legislation.

Unfortunately, we do not have the resources at this point to meet the needs and obligations on a timely basis. We have seen the effect of delays in the frustration and aggravation of complainants, government departments and MLAs at times due to our inability to conclude timely reviews in some of our case investigations. Even our *Annual Report* is subject to delays due to the inability to assign staff resources to its production.

The insufficiency of resources, which until resolved, is placing a greater need to review and restructure priorities frequently. We are looking at the way we do things to identify any efficiencies in our processes that can be implemented while still meeting our overall responsibilities, objectives and effectiveness including our reporting to the Legislature. We are reviewing what is working, what is not, and what can be done to minimize delays. By these means and by constantly restructuring our priorities, which will not in itself eliminate delays, we hope to minimize the negative impact that may occur as a result of delays.

As noted in previous annual reports, it is the commitment and hard work of staff that plays the largest part in the success we have had in delivering important services to the public, the legislature and public bodies. As Ombudsman, I am fortunate to work with a team of dedicated professionals who continue to demonstrate energy and enthusiasm in carrying out their duties and responsibilities under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act.*

YEAR IN REVIEW

♦ ACTIVITIES IN 1999

Manitoba's access and privacy statutes, *The Personal Health Information Act* (PHIA) and *The Freedom of Information and Protection of Privacy Act* (FIPPA), were proclaimed in December 1997 and May 1998 respectively. These Acts expanded considerably the jurisdiction, duties and powers of the Ombudsman's Office especially in the area of personal information privacy. While several other provincial jurisdictions are either contemplating, drafting or introducing separate personal health information protection legislation, Manitoba remained the only province with such legislation in force. No provincial access and privacy reviewing office in Canada has a more wide-ranging jurisdiction – other than Québec, where personal information privacy protection extends further into the private sector. The same is true of the federal reviewing offices, but it is important to note that Canada has enacted the *Personal Information Protection and Electronic Documents Act.* This Act will apply on proclamation initially to federally regulated organizations in the private sector and, after three years, to the collection, use or disclosure of personal information during any commercial activity within a province unless the province has enacted substantially similar legislation.

Our Office received 159 access and privacy complaints in 1999, the first full year of operation for FIPPA. Of these, nearly 20% were made under PHIA or more than double the number received under that legislation in 1998, its first full year of operation. The 118 complaints received in 1999 under FIPPA alone equaled the total number of access and privacy complaints received in 1998, which was then by far the highest annual number ever received by our Office. An additional 13 access or privacy complaints were reviewed under *The Ombudsman Act* because they fell outside the jurisdiction of PHIA or FIPPA. Our Office also opened 28 special investigations under PHIA and FIPPA pursuant to the general powers and duties provision of Part 4 of the Acts. Our early experience with PHIA and FIPPA is confirming that of other similar jurisdictions across the country. In general:

- privacy cases are significantly more labour and time intensive than access cases, and
- access-to-information applicants appear to be more demanding and sophisticated than in the past with respect to their complaints.

In addition to complaint investigations, the Office has the new duties outlined in the Introduction to this report. The Ombudsman may also appeal certain decisions of a public body or trustee to Court or intervene as a party to an appeal. The Ombudsman submits an annual report to the Legislature and may publish a special report on any matter in the public interest within the scope of the powers and duties of the Office, including any particular matter investigated by the Ombudsman.

In view of Manitoba's new privacy legislation and the unprecedented information dynamics associated with today's rapidly changing electronic and communication technologies, the Office submitted a *Special Report* to the Legislature entitled *A Privacy Snapshot.* The report was intended to provide a sense of the current privacy environment and of some of the numerous provincial, national and international issues and challenges arising in this context. News releases during the year included matters relating to the protection and security of records and of personal health information. Presentations on the role and function of the Ombudsman were made to health care professionals, administrators, health information managers and others in the private sector, and to provincial government departments, agencies, and school and university classes. The Office designed its web site and prepared content including "Frequently Asked Questions" about

PHIA and FIPPA, explanatory summaries of the Acts, a "What's New" feature, various reports and publications, and recent Manitoba Court decisions on appeals from the Ombudsman's findings under the legislation. [The Ombudsman's web site went on-line in August 2000 at: www.ombudsman.mb.ca].

♦ PRIVACY MATTERS

Privacy issues are forming an increasingly large proportion of our complaints and are proving generally to be the most difficult and time-consuming cases to investigate because of their very intimate, usually intricate, and individualistic nature.

Overall, about 25% of the complaints received during the year were of a privacy nature. Seven of these were either declined or discontinued as being non-jurisdictional. It is our sense that this rather high number of complaints made outside of the legislation reflects in part a need for greater public education, awareness, and understanding of PHIA and FIPPA. Of the 40 privacy complaints, eight cases were closed within the year in addition to the seven declined or discontinued files. Twenty-five were carried over to the next year. The complexity of these privacy cases required significant investigation time to conduct thorough reviews of the issues raised.

Other factors have contributed to the less-than-timely completion of privacy complaints in particular. The personnel of provincial government bodies and agencies have amassed substantial experience and expertise in access principles and practices since the proclamation of *The Freedom of Information Act* in 1988. Notwithstanding a human sensitivity for treating the personal information of other people with care, the standards and requirements for managing personal information -- from collection to disposal -- under contemporary information privacy legislation in a technologically modern environment are not nearly so familiar. Moreover, while provincial departments and agencies have had nearly 30 years' experience dealing with the Ombudsman's Office, health care professionals and most organizations in the private sector covered by PHIA are unaccustomed to oversight activity by an independent office. As a result, 1999 was marked by a significant effort, not infrequently in the course of an investigation, to inform public bodies and health information trustees about the legislation and our own role and functions.

Consideration of individual consent as an integral part of personal information management practices in organizations surfaced in 1999 as a pressing and apparently systemic matter being encountered repeatedly by health information trustees and public bodies. The issues brought to our attention implicated basic privacy principles of notice, collection, use, disclosure and security. The varied expressions to us of profound concerns by members of the public underlined that these matters involve qualities of basic human dignity and respect.

Neither FIPPA nor PHIA elaborates the specific characteristics of meaningful consent involved in obtaining and managing personal information. It became clear to us that numerous public bodies and trustees were looking for guidance in the day-to-day practices of handling personal information beyond that provided by legislation, but necessary to meet the spirit and intention of the statutes, particularly in the area of individual consent. Therefore, our Office began preparing what we now call the "Elements of Consent" for personal and personal health information based on our understanding of FIPPA, PHIA and fair information practices. The Elements of Consent were finalized and made available for the consideration of trustees and public bodies in early 2000 as a representation of our understanding of informed consent and as a practice guide when issuing or responding to consent forms.

Our Office also prepared for the full proclamation of FIPPA expected in the year 2000, which would then encompass more than 350 additional public bodies such as municipal governments, universities and school divisions, and health authorities including hospitals and personal care

homes. Specific privacy issues that we monitored in 1999 included e-commerce and privacy protection, health research in Manitoba, proposed collection by federal agencies and proposed sharing of personal and personal health information by public bodies in Manitoba, access to public registries, various requests for volume or bulk disclosures of personal information, and proposals for the use or disclosure of personal information for data-matching or linking. In addition, we began to inform ourselves about the federal bill that has now evolved into the *Personal Information Protection and Electronic Documents Act* and about the Canada Health ***Info****way,* which seems to be an initiative to connect health information networks across the country in some fashion for optimal public health care.

♦ ACCESS MATTERS

While much of the Office's emphasis in 1999 was on privacy issues and education, most of the complaints received nevertheless related to access. Of the 119 new access cases, 38 were declined or discontinued when it was determined they did not fall within the jurisdiction of the Office, were premature, or did not warrant further investigation. Various individual access complaints are reported in some detail later in our 1999 *Annual Report*, but no single type or cause of complaint was identified that could be characterized by our Office as a prevailing theme. All the same, we did note a dip to 55% in the number of access applications granted in full or in part by provincial government bodies in 1999 from the 74% or better in the preceding five years. It is probably premature to call this a trend, but it bears monitoring. We also noted that about 90% of the overall response times of both departments and government agencies was within the 30-day statutory requirement. This maintained a response standard rivaled by very few other Canadian jurisdictions as noted in an independent 1998 examination of the performance of governments with freedom of information laws.

Obtaining access to information covered by FIPPA is supported in public bodies by access and privacy coordinators appointed under the Act to receive applications and provide day-to-day administration of the legislation. Certain general administrative responsibilities rest with Manitoba Culture, Heritage and Tourism, which disseminates information concerning the workings of FIPPA through the Government Records Office of the Provincial Archives of Manitoba. This office has prepared an extensive guide to the records of government and its agencies entitled the *Access and Privacy Directory.* It also maintains a detailed and updateable handbook of basic procedures and interpretation of FIPPA for provincial government public bodies: the *Manitoba Freedom of Information and Protection of Privacy Resource Manual.* These and other resources are or will be available on the Manitoba Government Freedom of Information and Protection of Privacy Act web site [www.gov.mb.ca/chc/fippa/index.html]. The department additionally provides training and educational sessions to access and privacy personnel who work most directly with FIPPA in public bodies.

Also assisting in the understanding of access legislation, in particular, is the City Clerk's Office for Winnipeg, the one local public body in 1999 to come under FIPPA (all local public bodies come under PHIA). The Archives and Records Control Centre, City Clerk's Office, has distributed a resource manual and is updating its guide to the records of Winnipeg.

Access to one's own personal health information is covered by PHIA. Health care facilities and health services agencies designate privacy officers whose responsibilities include dealing with requests from individuals wishing to examine and copy or to correct personal health information under this Act, and to facilitate compliance with the Act. As part of the process of implementing PHIA, Manitoba Health has published a number of booklets generically entitled *Brief Summaries…* for Health Professionals, Health Researchers, Health Services Agencies, Information Managers, Public Bodies and Health

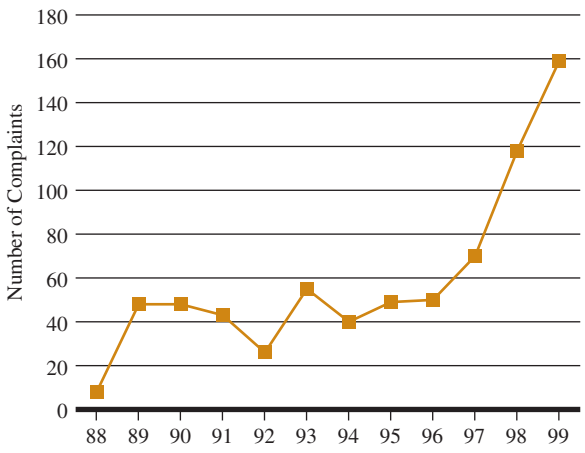
Care Facilities. In addition, Manitoba Health offers non-legal assistance about the workings of PHIA through its Legislative Unit and has conducted wide-ranging training and educational sessions on a regional and professional basis concerning PHIA. Our Office has had the opportunity to participate in some of these sessions.

The normally routine success of access to information and protection of privacy activities in Manitoba is attributable largely to the commitment of access and privacy coordinators and officers in their daily work on the front lines, and to the support provided to them by the public bodies and trustees responsible for the administration of FIPPA and PHIA.

COMPLAINT INVESTIGATIONS

FIPPA imposes a 90-day time limit on our Office for completing complaint investigations. PHIA asserts 90 days for privacy and 45 days for access complaints. An extension of these requirements to a specific date is available to the Office.

Complaints by Calendar Year



Beginning in 1996-97, statistical indicators for complaints to our Office show the beginning of a trend to a greater annual volume of complaints (see chart). By the end of 1999, there was three times the annual number of complaints received in 1996. While a record number of cases (151) were closed in 1999, the number carried over to the following year more than doubled the 25 which were still pending at the beginning of the year. Of the closed files, 51% were concluded within the required time limits. Of the files still open at the end of 1999, 53% had been extended by our Office. These files were then running about three months beyond the statutory standard on average.

COMPLIANCE REVIEWS

Partly because of the very large numbers of health information trustees and public bodies within the scope of the Acts, the Office feels compelled to develop, introduce, and monitor compliance processes that can be applied meaningfully on a wide-scale and self-reliant basis. Preparations of draft self-assessment and investigative instruments were well underway in early 1999 including *Privacy Impact Assessment* and *Access Practices Assessment* processes for public bodies and trustees. Work on these systemic tools became significantly constrained as the year progressed in order to concentrate more resources on the growing volume and complexity of privacy and access complaints.

The 1998 *Annual Report* of the Ombudsman highlighted a number of privacy concerns that need to be addressed, particularly in the current environment of rapidly evolving information and communications technologies. More have been added since that report partly as a result of the Office's work with public bodies and trustees in relation to their handling of personal information. Broad issues include:

- ***Serious concerns about the personal information practices of a number of public bodies and personal health information trustees:*** in the course of complaint and other investigations, the Office has come to the opinion that a considerable number may not be operating in compliance with the legislation;
- ***Increasing federal-provincial activities on the creation of a national electronic health information infrastructure:*** this complex initiative must balance the requirements of such a system with the protection of personal

health information and take account of Manitoba's vanguard legislation in this area;

- ***Data and information sharing practices among public bodies and with outside organizations both in and beyond provincial borders:*** our concerns within Manitoba are reflected by all other Privacy Commissioners and Ombudsmen in Canada in relation to their own jurisdictions. Particularly worrisome are personal information practices of public bodies involving data matching or linking, and bulk or volume disclosures. Incentive to review data-sharing practices thoroughly was heightened with the development of Canada's *Personal Information Protection and Electronic Documents Act.* Provinces may be faced with a decision to challenge the federal law, or to harmonize provincial privacy legislation with the federal Act within three years or let the federal law apply with respect to the collection, use, and disclosure of personal information in the course of commercial activity in the provincially regulated sector.
- ***Informing not only the public, but also public bodies and personal health information trustees, of rights and obligations under FIPPA and PHIA:*** from the Office's work with the legislation during the past few years, it has become apparent that the public needs to be better informed and that many trustees and some public bodies know very little about the statutes either in terms of access or privacy obligations. Sustained educational work with trustees and public bodies should increase systemic compliance with the laws and reduce complaints.

These are time-sensitive issues. A proactive and preventive approach to many privacy issues is important to avoid privacy breaches in the first instance. Simply speaking, information privacy lost is privacy lost. Notwithstanding significant accomplishments in starting up the Access and Privacy Division since 1998 within the Office, the volume of complaint work is seriously undermining the discharge of major compliance duties to investigate, audit, and monitor public bodies and trustees, and to inform the public about *The Personal Health Information Act* and *The Freedom of Information and Protection of Privacy Act.*

The Office needs to be in a better position to work with entities covered by the Acts to assist them in complying with the legislation to protect personal information, to prevent breaches of individual privacy, to avoid embarrassment for and lack of confidence in public bodies and health information trustees, and to minimize possible litigation.

NEWS RELEASES AND SPECIAL REPORTS BY THE OFFICE OF THE OMBUDSMAN CONCERNING *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT* AND *THE PERSONAL HEALTH INFORMATION ACT*

The following published items, released by the Ombudsman's Office under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act,* concern some of the work handled by our office in 1999. The news releases include background papers. These published items are available in English and French from the Office of the Ombudsman.

June 29, 2000 News Release
Five Winnipeg Chiropractors Follow Ombudsman's Recommendations

An investigation under *The Personal Health Information Act* was launched on the Ombudsman's own initiative when, in April 1999, the media reported that certain Winnipeg chiropractors had used patients' personal information to send a letter seeking support for a political nominee.

The Ombudsman found that five chiropractors used and disclosed personal health information for a mailing and telephone solicitation not directly related to the purpose for which the information was collected, without the patients' consent or as otherwise authorized under *The Personal Health Information Act.* Additionally, the Ombudsman found that the five chiropractors were not in substantive compliance with security safeguard provisions of the Act.

Four recommendations were made to the chiropractors.

February 22, 2000 News Release
Manitoba Division of Driver and Vehicle Licensing Follows Ombudsman's Office Recommendations

An investigation under *The Freedom of Information and Protection of Privacy Act* was initiated by the Ombudsman in March 1999. The office had received information that a large amount of personal information had vanished when a computer tape, a searchable database held by Driver and Vehicle Licensing (a Division of Manitoba Highways and Government Services), was transferred to Elections Canada.

Although the investigation by the Ombudsman's Office was unable to determine whether the information had been inadvertently lost or deliberately stolen, the Ombudsman found that the disappearance of the computer tape was solely the responsibility of Elections Canada. He also found that personal information collected and disclosed by Driver and Vehicle Licensing had not been protected in the manner required under legislation.

The Ombudsman made ten recommendations to Manitoba Highways and Government Services.

December 8, 1999 Special Report
A Privacy Snapshot Taken September 1999

The Ombudsman may, in the public interest, publish special reports relating to matters within the scope of the powers and duties of the Ombudsman under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act.* This "snapshot" was intended to contribute to the general awareness and public discussion of the many recent, unprecedented, complex and dynamic privacy issues that now confront the public, the Government and the Manitoba Ombudsman's Office.

July 16, 1999 **News Release**

Manitoba Natural Resources Follows Ombudsman's Office Recommendations

An investigation was undertaken by the Ombudsman in March 1999, after an applicant under *The Freedom of Information and Protection of Privacy Act* was informed by Manitoba Natural Resources that audiotape recordings of presentations made to the Manitoba Water Commission had been destroyed.

The investigation confirmed that the tapes no longer existed. The Ombudsman found that this was an unauthorized destruction of records that contravened *The Legislative Library Act,* which sets out procedure for authorizing the retention and destruction of records of government departments and agencies.

The Ombudsman made three recommendations to Manitoba Natural Resources.

April 21, 1999 **News Release**

Manitoba X-Ray Clinic Undertakes Security Audit Following Ombudsman's Office Recommendations

An investigation under *The Personal Health Information Act* was launched on the Ombudsman's own initiative in March 1999, when the media reported that patient files were found exposed, in a dumpster, behind one of the premises of the Manitoba X-Ray Clinic.

The investigation confirmed that the files were left in a dumpster for disposal by the Clinic.

The Ombudsman made six recommendations to the Manitoba X-Ray Clinic.

SPECIAL INVESTIGATIONS OPENED IN 1999

In 1999, our office opened 26 "*special investigations*" under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* to address access and privacy issues. Jurisdiction for these investigations was derived from the general powers and duties of the Ombudsman under Part 4 of the Acts. These special investigations were in addition to the 159 complaints received from individuals or initiated by the Ombudsman under Part 5 of the Acts and listed in the "*Statistical Information*" section of this Annual Report.

In some cases, these special investigations involved issues identified in the course of investigating Part 5 complaints. Sometimes the issues came to our attention from the local and national communities, touching on access or privacy rights of Manitobans which could not be brought forward as complaints under the legislation. Special investigations may include follow-up monitoring on recommendations made by our office, background papers prepared for our office or "*comments*" that we provide to others.

Commenting on an issue gives the Ombudsman's Office an opportunity to provide assistance without prejudice to future investigations. Comments may be more or less formal, very focussed and brief, or may involve long-term monitoring.

Examples of special investigations opened in 1999 include the following:

S1999-012 Follow-up
Recommendations to Manitoba Natural Resources on the destruction of records by the Manitoba Water Commission

S1999-015 Comment
Use of social insurance number as an employee identifier by the City of Winnipeg

S1999-017 Comment
Survey of financial security by Statistics Canada

S1999-025 Comment
Canadian Police Information Centre (CPIC) Renewal Project

RECENT COURT DECISION

To date, Manitoba's Court of Queen's Bench has delivered two judgments under *The Freedom of Information and Protection of Privacy Act:* Jaslowski v. The Minister of Justice (August 20, 1999) and Kattenburg v. The Minister of Industry, Trade and Tourism (November 19, 1999).

Where an access complaint under *The Freedom of Information and Protection of Privacy Act* is not supported by the Ombudsman, or a public body does not act on a recommendation to release by the Ombudsman, an applicant can proceed to Court to seek release. The Ombudsman may also appeal a refusal of access to the Court, in place of the applicant, if the Ombudsman is of the opinion that the decision raises a significant issue of statutory interpretation or an appeal is otherwise clearly in the public interest (this requires the applicant's consent). The Ombudsman may also intervene as a party to an appeal.

The following is a summary of the Kattenburg decision. In this particular matter, handled by our office in 1998, the Applicant's complaint of refused access was found to be not supported. Consideration was given as to whether the record could reasonably be severed; however, based on our review, our office was of the opinion that severing could not reasonably be conducted. The Applicant appealed to Court.

The complete case and the severed document in question are on our website at www.ombudsman.mb.ca.

Kattenburg v. The Minister of Industry, Trade and Tourism
(Suit #CI 98-01-08704)

The Applicant was refused access by the public body to the Memorandum of Understanding (MOU) entered into by the Province of Manitoba and Maple Leaf Meats Inc. regarding the establishment of a hog processing plant in the City of Brandon.

In this case, the Court considered sections 18(1)(b) and (c)(ii) and 28(l)(c)(ii) and (iii) of *The Freedom of Information and Protection of Privacy Act*, which were the basis for the public body's refusal of access and are discussed below.

In the judgment, Madam Justice Steel observed that *The Freedom of Information and Protection of Privacy Act* attempts to balance the competing objectives of access and privacy:

> *The applicant has argued generally that the democratic process would be furthered by disclosure. I do not dispute that in most cases this is true. Hence, the general thrust of this* ***Act*** *is to make disclosure the rule rather than the exception and to place the burden of proof on those wishing to prevent disclosure.*
>
> *However, it is insufficient to argue that the public interest always requires disclosure.*
>
> *Inevitably, there will be situations where equally valuable goals in a free and democratic society will collide. Thus, the right to individual privacy must be balanced against the public's right to disclosure. As well, there will be situations where a public body will find it necessary to refuse to disclose a document where the result would be to prejudice the competitive position of, or interfere with or prejudice contractual or other negotiations of either the third party or the public body. The* ***Act*** *is an attempt to balance those competing objectives.*

At the outset of the judgment, the Court noted certain principles of *The Freedom of Information and Protection of Privacy Act*:

> *The* ***Act*** *promotes the general principle that information held by government should be available to the public, except where other considerations legitimately require denial of such access. Disclosure is the rule rather than the exception …. Thus, upon application, there is a right to access any record in the cus-*

*tody or under the control of a public body, subject to the exemptions outlined in the **Act.***

… the [applicant's] motive is irrelevant. There is no need to justify a request for information. A citizen is prima facie entitled to access information from his government unless there are sufficiently compelling reasons to exempt the information from disclosure. Those reasons are identified in the legislation and constitute exemptions to the general principle of disclosure. The refusal to disclose is mandatory with respect to some of the exceptions while others are only discretionary.

The Court considered the application of section 18(1)(b), a mandatory exception used by the public body in this matter. It sets out:

Disclosure harmful to a third party's business interests
18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*
(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party;

It was noted that there was no dispute that the information was supplied to the public body by a third party, Maple Leaf Meats. The Court found that the information in question was financial and commercial information, based on a dictionary meaning of those terms.

The next issue was whether the information was "supplied…explicitly or implicitly, on a confidential basis". The Court considered tests for determining this and found that the phrase "should be interpreted in a subjective manner." The Court articulated the question as being: Did the third party supply the information to the Government on the understanding that it would be treated in a confidential manner?

The Court found, on the facts, that the information in this case was supplied to the Government by Maple Leaf Meats with a reasonable expectation that it would not be disclosed. Facts noted included that the MOU contained several confirmations that Maple Leaf Meats considered the information confidential; the document was marked as being "confidential"; and the MOU contained a clause in which the parties agreed not to disclose any of the terms and agreements of the record without prior consent of the other party.

The Applicant argued that the information was not "treated consistently as confidential by the third party" as Maple Leaf Meats disclosed information contained in the MOU and allowed the Government to treat the MOU as not being confidential. This included the position that the press had reported comments made by the Government about the letter of agreement as did Maple Leaf Meats, at a public meeting. The Court stated:

It is the treatment by the third party that must be confidential. The comments reported by the media are generic and do not delineate precisely what the parameters of the agreement are, or the specific responsibilities or contributions of Maple Leaf….

Even if some of the information was disclosed, that does not automatically mean that everything in the MOU loses its claim to confidentiality. It would be a question of degree…. I find that the degree of disclosure is limited and does not remove the mantle of confidentiality from the whole document. Disclosure of general information or information required to obtain the necessary permits and licenses does not amount to conduct inconsistent with a desire to maintain confidentiality with respect to specific information.

However, the fact that <u>some</u> of the information is both publicly available and contains specific detail should be taken into account when the decision is made with respect to severance later in this judgment.

The Court also considered sections 18(1)(c)(ii) and 28(1)(c)(ii) and (iii) of the Act, which provide:

> ***Disclosure harmful to a third party's business interests***
> ***18(1)*** *The head of a public body shall refuse to disclose to an applicant information that would reveal*
> *(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
> *(ii) interfere with contractual or other negotiations of a third party,*
>
> ***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:*
> *(c) information the disclosure of which could reasonably be expected 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;*

The Judge identified the issue in dispute with respect to these provisions as being the degree of proof required to satisfy the Court that there is a "reasonable expectation of harm". Upon examining the law and the evidence in this case, the Court stated:

> *The reasonable expectation of an injury is a future event and therefore need not be proven by means of direct evidence. A court is familiar with the determination of the likelihood of occurrence of future events. Traditionally, that likelihood must be proven on the balance of probabilities to be a reasonable expectation of probable prejudice or interference as opposed to a possible likelihood. In this regard, "possible" is equated with speculative or "fanciful". There will always be some possibility of an adverse impact when negotiating positions are released, but here the drafters have included the word "reasonable" expectation, thus adding the objective and qualitative elements.*

The Court went on to note, apparently with respect to section 18(1)(c)(ii), that essentially the only evidence adduced by the public body was that competition for the plant had been quite stiff among a large number of competing communities. The Court also noted that although, with reference to section 28, reasons were provided as to why release of the type of information in question may be prejudicial to the Government's interests in a general way, no reasons were provided why the release of the MOU, in particular, would be prejudicial to its interests. Based on the evidence, the Court stated:

> *…the bald assertion that release of information may affect ongoing negotiations or may affect future negotiations with other parties does not meet the high standard of the test established in the case law.*

The Court found that the Government of Manitoba had not satisfied its onus of proof on the balance of probabilities to entitle it to an exemption under section 18(1)(c)(ii) or 28(1)(c)(ii) and (iii).

The Court found that section 18(1)(b) applied to those parts of the MOU containing information which was not publicly available. The Court noted that the detail that was publicly disclosed and was also contained in the MOU was minimal; however, given that section 18(3) specifically states that the exemption does not apply to information that is publicly available, the Court provided that information in a severed copy of the MOU. This was attached to the judgment as "Appendix 'A' " and it is reproduced on the following pages.

CONFIDENTIAL

MAPLE LEAF MEATS INC.
30 St. Clair Avenue West
Toronto, Ontario M4V 3A2

Private and Confidential

December 3, 1997

Hon. James Downey
Deputy Premier & Minister of Industry, Trade and Tourism,
Government of Manitoba,
Legislative Building,
Winnipeg, Manitoba R3C 0V8

Dear Mr. Minister:

[redacted]

1. MAPLE LEAF MEATS' OBLIGATIONS

a) New Plant
Maple Leaf Meats will construct a new world class hog slaughter facility in Brandon, Manitoba. The approximate specifications of the new Plant are:

i)	Construction capital	$112 million
ii)	Plant Area	475,000 square feet
iii)	Plant capacity/Line speed	Over 1,200 hogs per hour
iv)	Processes	Hog Kill & Cut

[redacted]

d) **Expected Employment Levels**

The expectation is for employment levels at the Plant to be 1150 [redacted] nd to grow to 2250 [redacted]

[redacted]

[redacted]

iii) **Secondary Waste Treatment**

The Province and/or the City shall be responsible for the cost of construction and start-up of a secondary waste water treatment facility on the Maple Leaf Meats sit[redacted]

Following its start-up, Maple Leaf Meats shall be responsible for the cost of operating the treatment facility [redacted]

Effluent volume	5,200 m³/day
Biological oxygen demand (BOD)	1,900 mg/L
Total Kjeldahl nitrogen	197 mg/L
Oil and Grease	188 mg/L

The resulting treated water shall be of a standard allowing for discharge into the Assiniboine River [redacted] The estimated cost of the treatment facility is $6,900,000 [redacted]

iv) **Potable Water Supply**

The Province and/or City will be responsible for the cost of supplying to the Plant building sufficient potable wate[redacted]

[redacted]

c) **Education and Training**
The Province will provide funding of up to $3.0 million to Maple Leaf Meats as a contribution toward the cost of educating and training employees generally [redacted]

[redacted]

Confidentiality

This letter, its terms and agreements specified under section 4 above shall remain confidential and shall not be disclosed by either party without the prior written consent of the other party.

Yours very truly,

Maple Leaf Meats Inc.

12/2/97

By: _____
Michael H. McCain, President

The terms herein are acknowledged and accepted by, for and on behalf of the Government of Manitoba

At Brandon, Manitoba on this 3rd day of December, 1997

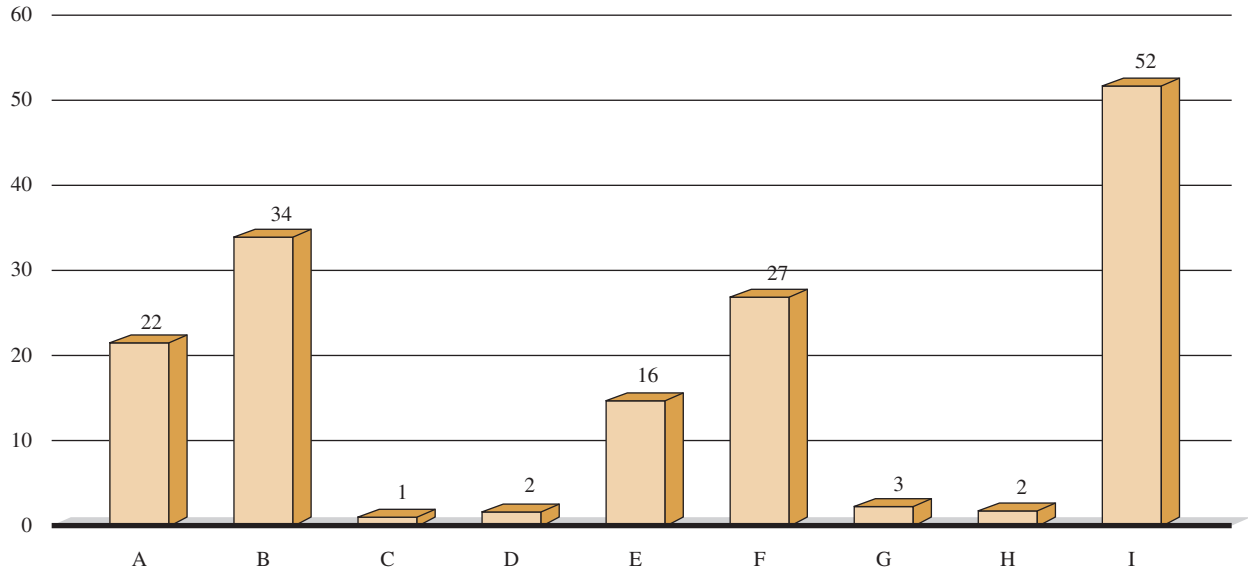
_____
Authorized Official

STATISTICAL INFORMATION

COMPLAINTS AND DISPOSITIONS IN 1999

One hundred fifty-nine access and privacy complaints were received by our office in 1999. Of these, 107 were closed and 52 were carried forward to 2000. Our office also closed two cases carried over from 1997 and forty-two carried over from 1998. In total, 151 complaint cases were closed in 1999.

The disposition of the 159 access and privacy complaints received in 1999 is shown below. The categories of disposition, labeled A to I on the bar graph and used throughout this Annual Report, are also explained below.



A = Supported or Partially Supported
Complaint fully/partially supported and, in the case of access complaints, access 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
Upon making enquiries, complaint not accepted for investigation by Ombudsman, usually for reason of non-jurisdiction or premature complaint.

G = Assistance Rendered
Cases conducted under *The Ombudsman Act* which resulted in assistance being provided.

H = Information Supplied
Cases conducted under *The Ombudsman Act* which resulted in information (not requested records) being provided.

I = Pending
Complaint still under investigation as of January 1, 2000.

COMPLAINTS RECEIVED IN 1999 BY CATEGORY AND DISPOSITION UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

Department or Category	Total	Declined	Discont. (Client)	Discont. (Omb.)	Not Supported	Supported or Part. Supported	Recomm.	Pending
Public Body								
Agriculture	**1**	-	-	-	1	-	-	-
Civil Service Commission	**1**	-	-	-	-	1	-	-
Consumer and Corporate Affairs	**1**	-	-	-	-	-	-	1
Education and Training	**1**	-	-	-	-	1	-	-
Environment	**2**	-	-	-	1	-	-	1
Family Services	**4**	-	-	-	1	-	-	3
Finance	**8**	2	-	-	3	2	-	1
Government Services	**6**	-	-	-	3	1	-	2
Health	**3**	-	-	-	3	-	-	-
Highways and Transportation	**2**	-	-	-	1	-	-	1
Justice	**7**	-	-	-	1	2	-	4
Manitoba Public Insurance	**6**	-	-	1	3	-	-	2
Natural Resources	**8**	1	-	-	3	1	-	3
Rural Development	**1**	-	-	-	-	-	-	1
Workers Compensation Board*	**37**	13	6	-	-	7	-	11
Local Public Body								
City of Winnipeg**	**28**	2	7	1	11	5	-	2
Not a Public Body	**2**	2	-	-	-	-	-	-
Total	**118**	**20**	**13**	**2**	**31**	**20**	**-**	**32**

Note:
*The 37 complaints were received from two individuals, one who submitted 29 complaints and another who submitted 8.
**Of the 28 complaints received, 21 were filed by two individuals, one who submitted 12 complaints and the other who submitted 9.

COMPLAINTS RECEIVED IN 1999 BY CATEGORY AND DISPOSITION UNDER *THE PERSONAL HEALTH INFORMATION ACT*

Trustee	Total	Declined	Discont. (Client)	Discont. (Omb.)	Not Supported	Supported or Part. Supported	Recomm.	Pending
Public Body								
Addictions Foundation of Manitoba	**1**	-	-	-	-	-	-	1
Highways and Transportation	**1**	1	-	-	-	-	-	-
Manitoba Public Insurance	**4**	1	2	-	-	-	-	1
Winnipeg Community and Long Term Care Authority Inc.	**1**	-	-	-	1	-	-	-
Workers Compensation Board	**1**	-	-	-	-	-	-	1
Local Government Body								
City of Winnipeg	**1**	-	-	-	-	-	-	1
Health Care Facility								
Assiniboine Clinic	**1**	-	-	-	-	-	-	1
DeSalaberry District Health Centre	**1**	1	-	-	-	-	-	-
Grace General Hospital	**1**	1	-	-	-	-	-	-
Health Sciences Centre	**4**	-	-	-	1	-	-	3
Klinic Community Health Centre	**1**	-	-	-	1	-	-	-
Manitoba X-Ray Clinic	**1**	-	-	-	-	-	1	-
Middlechurch Home	**1**	-	-	-	-	-	-	1
St. Boniface General Hospital	**1**	-	1	-	-	-	-	-
Health Professional*								
Bohemier, Gerald, D.C.	**1**	-	-	-	-	-	-	1
Bohemier, Gilbert, D.C.	**1**	-	-	-	-	-	-	1
Daien, Alan, D.C.	**1**	-	-	-	-	-	-	1
Mestdagh, Brian, D.C.	**1**	-	-	-	-	-	-	1
Pops, Henry, D.C.	**1**	-	-	-	-	-	-	1
Not a Trustee	**3**	3	-	-	-	-	-	-
Total	**28**	**7**	**3**	**-**	**3**	**-**	**1**	**14**

Note:
*By the publishing date of this Annual Report, the names of these health professionals had been publicized by our office in a news release.

COMPLAINTS HANDLED BY THE ACCESS AND PRIVACY DIVISION IN 1999 BY CATEGORY AND DISPOSITION UNDER *THE OMBUDSMAN ACT*

Department or Category	Total	Assist. Rendered	Declined	Discont. (Client)	Discont. (Omb.)	Info. Supplied	Not Supported	Supported or Part. Supported	Recomm.	Pending
Eden Mental Health Centre	**1**	-	-	-	-	-	-	-	-	1
Finance	**1**	-	-	-	-	1	-	-	-	-
Health Sciences Centre	**2**	1	-	-	-	-	-	1	-	-
Highways and Transportation	**1**	-	-	-	-	-	-	1	-	-
Justice	**1**	-	-	-	-	-	-	-	-	1
Labour	**1**	-	-	-	-	-	-	-	-	1
Legislative Assembly	**2**	2	-	-	-	-	-	-	-	-
Manitoba Public Insurance	**1**	-	-	-	-	-	-	-	-	1
Rural Development	**1**	-	-	-	-	-	-	-	-	1
Workers Compensation Board	**2**	-	-	-	-	1	-	-	-	1
Total	**13**	**3**	**-**	**-**	**-**	**2**	**-**	**2**	**-**	**6**

COMPLAINTS CARRIED OVER FROM PREVIOUS YEARS BY CATEGORY AND DISPOSITION

There were fifty-two access and privacy complaints carried over to 1999 from 1998 and five from 1997.
Of these fifty-seven complaints, thirteen were carried over to 2000 and forty-four were concluded as follows:

Department or Category	Total	Declined	Discont. (Client)	Discont. (Omb.)	Not Supported	Supported or Part. Supported	Recomm.	Pending
The Freedom of Information and Protection of Privacy Act								
Public Body								
Civil Service Commission	**2**	-	-	-	-	-	-	2
Consumer and Corporate Affairs*	**1**	-	-	-	-	-	-	1
Family Services	**3**	-	-	-	1	2	-	-
Finance	**2**	-	-	-	-	-	-	2
Government Services**	**1**	-	-	-	-	1	-	-
Health***	**11**	-	-	-	10	1	-	-
Highways and Transportation	**2**	-	1	-	-	1	-	-
Justice	**5**	-	-	-	-	1	-	4
(1997)	**4**	-	-	-	-	1	-	3
Manitoba Public Insurance	**7**	-	1	-	1	3	2	-
Natural Resources	**7**	-	-	-	2	5	-	-
Rural Development (1997)	**1**	-	-	-	-	-	1	-
Workers Compensation Board	**1**	-	-	-	-	1	-	-
Local Public Body								
City of Winnipeg	**6**	-	-	-	1	4	-	1
The Personal Health Information Act								
Health Care Facility								
St. Boniface General Hospital	**1**	-	-	-	1	-	-	-
Klinic Community Health Centre	**1**	-	-	-	1	-	-	-
Health Professional								
Anonymized	**2**	-	-	-	1	-	1	-
Total	**57**	**-**	**2**	**-**	**18**	**20**	**4**	**13**

Note:
*In our 1998 Annual Report, this case was recorded under Manitoba Securities Commission, which is a division of Consumer & Corporate Affairs.
**In our 1998 Annual Report, there were two cases recorded under Government Services; in fact one of these complaints was with Natural Resources.
***Queries contained on one complaint form received from a single Applicant were identified by Health as 11 applications and were handled as 11 complaints.

SOURCE OF COMPLAINTS

Community	Number
Brandon	2
Dugald	1
Headingley	1
Lorette	3
Otterburne	1
Pinawa	1
St. Norbert	6
Ste. Rose du Lac	1
Steinbach	1
Winnipeg	137
Edmonton, AB	1
Keewatin, ON	1
Toronto, ON	2
Taft, CA, U.S.A.	1
TOTAL	**159**

PART 1

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

PUBLIC BODIES

INTRODUCTION TO *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT:* PUBLIC BODIES

MANITOBA'S FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

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.

The Freedom of Information and Protection of Privacy Act gives an individual a legal right of access to records held by Manitoba public bodies, subject to specific and limited exceptions. The Act also requires that public bodies protect the privacy of an individual's personal information existing in records held by them.

Section 2 of *The Freedom of Information and Protection of Privacy Act* sets out the following:

Purposes of this Act
2 *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.*

PUBLIC BODIES

The Freedom of Information and Protection of Privacy Act applies, in part, to "*public bodies*" which include provincial government departments, government agencies and local public bodies. *"Local public bodies"*, which include such diverse entities as educational bodies, health care bodies and local government bodies, are discussed in a separate section of this Annual Report.

Provincial public bodies come under the executive branch of the Manitoba Government. They include government departments, offices of the Ministers of Government and the Executive Council Office (Cabinet). *The Freedom of Information and Protection of Privacy Act* also applies to Manitoba government agencies including boards, commissions, agencies, or other bodies whose members or whose board members are all appointed by a Manitoba statute or by order of the Lieutenant Governor in Council.

The *Freedom of Information and Protection of Privacy Act* does not apply to the legislative or judicial branches of the Government. These bodies have their own legislation or rules respecting access to records and protection of privacy.

Additionally, section 4 of *The Freedom of Information and Protection of Privacy Act* sets out certain records to which the Act does not apply, even when these records are held by public bodies. These include information in a Court record, 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, such as the Manitoba Ombudsman. The following Manitoba statutes prevail in the event there is an inconsistency or conflict between the provisions of these statutes and *The Freedom of Information and Protection of Privacy Act: The Adoption Act, The*

Child and Family Services Act, The Securities Act, The Statistics Act, The Vital Statistics Act, and *The Workers Compensation Act.*

ROLE OF THE MANITOBA OMBUDSMAN

The Freedom of Information and Protection of Privacy Act provides for an independent review of the decisions of public bodies under the Act. The Ombudsman is an independent Officer of the Legislature with broad investigative powers. The responsibilities of the Ombudsman under *The Freedom of Information and Protection of Privacy Act* include the investigation of complaints respecting access to information and protection of personal information, as well as other general powers and duties.

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. If the Ombudsman 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, he may 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.

The Ombudsman shall also investigate privacy complaints that an individual's own personal information has been collected, used, disclosed or improperly safeguarded by a public body in violation of *The Freedom of Information and Protection of Privacy Act.*

The 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 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 exercising some of these general powers and duties under the legislation, our office has opened files which we have termed "*special investigations*". These often relate to broader or systemic issues arising from a complaint or concern which has come to our attention. Case numbers referred to in this Annual Report which begin with "S" identify special investigations.

In 1999, our office received 118 complaints under *The Freedom of Information and Protection of Privacy Act,* 88 of these against provincial government departments and agencies. The following selected case summaries, organized by public body, are representative and instructive cases relating to provincial government departments and agencies that were handled by our office under the Act in 1999. The final summary under *"Manitoba Highways and Transportation"* has direct application to all trustees.

Case summaries from some of the 28 complaints received in 1999 relating to local public bodies and *The Freedom of Information and Protection of Privacy Act* are discussed in a separate section of this Annual Report. Our comments on the principles, provisions and spirit of *The Freedom of Information and Protection of Privacy Act* apply equally to public bodies and local public bodies.

Summaries of some of the 41 additional complaints received in 1999, under *The Personal Health Information Act* and *The Ombudsman Act,* are also discussed in separate sections of this Annual Report.

MANITOBA CIVIL SERVICE COMMISSION

In 1999, one complaint under *The Freedom of Information and Protection of Privacy Act* was received by our office against the Manitoba Civil Service Commission. The complaint was made by a researcher who had concerns about a proposed research agreement which the Commission was requiring he sign, before disclosing personal information to him under *The Freedom of Information and Protection of Privacy Act*.

After determining that *The Freedom of Information and Protection of Privacy Act* applied to the matter, which began before the current legislation was proclaimed, our office considered the Complainant's concerns about the research agreement and commented on the reasonableness of the agreement.

This case provides a sense of the balancing concepts of access and privacy. It underscores the important responsibility of protecting the privacy of identifiable individuals placed by the Act on both researchers who, as the Act recognizes, require access to personalized records for their work, and on the public bodies that control and must safeguard sensitive records as custodians.

It would be wrong to think of this case as a bargaining of rights. Legislated rights to access and privacy cannot be negotiated. Rather, this case is an example of how the Act has carved out an exception to the usual non-disclosure of personal third party information, permitting access for the purpose of bona fide research. This is access with very clear conditions. Under the legislation, the conditions must be approved and be in the form of a written agreement. The case indicates that, with the careful application of the access and privacy legislation and its underlying principles, everyone's interests can be served.

◆ 99-018
Signed Sealed and Delivered

Section 7 of *The Freedom of Information and Protection of Privacy Act* sets out that an applicant has a right of access to any record in the custody or under the control of a public body subject to exceptions from disclosure contained in the Act. If the excepted information can be reasonably severed from the record, the applicant has a right of access to the remainder of the record.

"Personal information", which the Act defines as *"recorded information about an identifiable individual"*, is normally not releasable without the individual's consent; but, section 47 of the Act, which concerns *"Disclosure for research purposes"*, provides:

> ***Conditions of disclosure***
> ***47(4)*** *The head of the public body may disclose personal information for a research purpose only if*
> *(a) the head is satisfied that*
> *(i) the personal information is requested for a bona fide research purpose,*
> *(ii) the research purposes cannot reasonably be accomplished unless the personal information is provided in a form that identifies individuals,*
> *(iii) it is unreasonable or impractical for the person proposing the research to obtain consent from the individuals the personal information is about, and*
> *(iv) disclosure of the personal information, and any information linkage, is not likely to harm the individuals the information is about and the benefits to be derived from the research and any information linkage are clearly in the public interest;*
> *(b) the head of the public body has approved conditions relating to*

(i) the protection of the personal information including use, security and confidentiality,

(ii) the removal or destruction of individual identifiers at the earliest reasonable time, and

(iii) the prohibition of any subsequent use or disclosure of the personal information in a form that identifies individuals without the express written authorization of the public body; and

(d) the person to whom the personal information is disclosed has entered into a written agreement to comply with the approved conditions.

The Applicant, who was completing his Master of Arts thesis, requested access to personal information about provincial government employees contained in records under the control of the Civil Service Commission. The Commission was willing to provide him with the information concerning approximately 80 individuals in a table format without linkage to the names and birthdates of the individuals, but including: date of application for employment with the public body in question, place of birth, ethnicity, community of residence at the time of application for employment, education, military service, marital status and occupation prior to employment with the public body.

Although it was the Commission's proposal to provide the information without linkage to names and birthdates, it was the opinion of the Commission that the Applicant's request concerned personal information as the data related to identifiable individuals. In support of its opinion, the Commission noted the relatively small number of individuals the request concerned, the recent nature of much of the information requested and the fact that many of the individuals might be known to the Applicant.

To permit release of the requested personal information, the Commission provided the Applicant with a written agreement, for his signature, respecting disclosure of information for research purposes under section 47 of *The Freedom of Information and Protection of Privacy Act.* After first arguing that *The Freedom of Information Act,* not *The Freedom of Information and Protection of Privacy Act* applied, the Applicant expressed three concerns about the Agreement which he asked our office to review.

The Applicant's first concern was that the Agreement set out that he was to provide a copy of his thesis to "Manitoba" (the Commission) upon completion of his research and prior to publication of the thesis. Further, he was to comply with any request of the Commission to remove from the thesis any information which, in the opinion of the Commission (acting reasonably), could identify any individual. The Applicant was of the position that the Agreement was designed to make punishment possible if the Agreement were breached. He felt that this was not necessary, was potentially censorial and therefore, should be removed.

The Access and Privacy Officer for the Commission provided our office with the Commission's position. We were advised that the Commission would review the Applicant's thesis as quickly as possible once his thesis advisor was satisfied it was completed, and before it was made public through the Applicant's defence. We were advised that the Commission's review would be directed to ensuring that the personal privacy of individuals was not potentially breached. In response to our questions, the Commission advised that it would not be reviewing the analysis or conclusions in the thesis and, therefore, would not be exercising a censoring function.

Our office noted that the purpose for the Agreement was the protection of personal information in the context of controlled disclosure. The section of the Agreement about which the Applicant complained was consistent with that purpose. It seemed to our office that a review function by the Commission would be necessary to ensure that the protection provisions in the Agreement concerning the personal information were met. A logistic concern that came to our mind was the likelihood that, after the defence of

the thesis, some changes would be made to it. We stated that to meet the requirements of *The Freedom of Information and Protection of Privacy Act* and the Agreement, the final text of the thesis would also apparently have to be reviewed by the Commission.

We had no indication to support that the Commission was seeking to censor the Applicant's work. Rather, it was evident that the Commission was seeking to meet the legislative obligations to protect third parties' personal information while also choosing to release the information for research purposes.

The Applicant's second concern related to another section of the Agreement which provided that the thesis or any related presentation or publication not contain any information, including personal information which, either by itself or when combined with other information, could identify an individual. The Applicant suggested that persons unknown to him might be able to identify themselves or someone else, based on information which they independently held or assumed. As he felt that the provision was very onerous, he stated it should be removed.

We agreed with the Applicant that there may be situations where, without his knowledge and outside his control, the information that he presented might, when combined with other information known by someone else, identify an individual. Therefore, in our opinion, it seemed that the letter and spirit of the legislation would be met if the section in the Agreement were to include reference to actions that could "reasonably be expected" to identify individuals.

We felt that such additional wording would not make the provision impossible to meet, but would impose an obligation of high standard on the Applicant to protect the personal information consistent with the legislation and in relation to reasonably foreseeable breaches.

The Applicant's third concern related to another section of the Agreement which he stated did not set out a form and place for the arbitration of alleged differences, including an appeal of any decision that the Commission might "arbitrarily" make.

The phrase from the Agreement that the Applicant cited, that "**Manitoba** may terminate this Agreement at any time by providing notice in writing, effective immediately or as of the date set out in the notice" did not stand in isolation. Rather, we noted, the full section of the Agreement provided a context with stated circumstances related to a breach of the legislation or the Agreement.

We noted that the Commission might terminate the Agreement "[w]here **Manitoba** is of the opinion" that certain circumstances for doing so exist. The provision was therefore subjective, given to the Commission's "opinion." We stated that if the Applicant were to feel this provision was exercised arbitrarily, without reasonable basis, there would be recourse under *The Freedom of Information and Protection of Privacy Act* to have the matter reviewed by the Ombudsman. We also advised the Applicant that the Commission informed our office that it was seeking to work with him to facilitate his purpose, while ensuring that both he and the Commission met their obligations under *The Freedom of Information and Protection of Privacy Act.*

We drew to the Applicant's attention that, under section 47(4) of *The Freedom of Information and Protection of Privacy Act*, the head of a public body may disclose personal information for research purposes if, among other criteria, the head has approved conditions relating to the protection of personal information. The decision to release the personal information and the conditions for release are, by law, at the discretion of the public body.

Having said this, we had one concern with the section giving rise to the termination of the Agreement, in the event Manitoba was of the opinion that the Applicant was about to fail to comply with the Agreement.

We suggested that the inclusion of wording about "reasonable expectation" of such a breach would require grounds for holding such opinion. We felt such additional wording would make the section consistent with the other circumstances set out for terminating the Agreement, which provided a contextual basis for holding the opinion to terminate the Agreement.

In that another section of the Agreement contained similar wording, we stated that it would also seem fair to incorporate reference to "reasonable expectation" in that provision.

Our office spoke with the Commission, which agreed to add the suggested phrases to the Agreement. We felt that these additions addressed some of the Applicant's concerns and, with their inclusion, our office was satisfied that the Agreement complied with *The Freedom of Information and Protection of Privacy Act*, including the spirit of the legislation.

MANITOBA CONSUMER AND CORPORATE AFFAIRS

There was one complaint received against Manitoba Consumer and Corporate Affairs in 1999 concerning refusal of access under *The Freedom of Information and Protection of Privacy Act.* Our office was not of the view that the discretionary exception cited by the public body applied. Nevertheless, the evidence in this case did satisfy our office that a mandatory exception covered the record such that it could not be released. Accordingly, the complaint was not supported.

Our office cannot choose exceptions for public bodies and thereby assume their accountabilities. At the same time, we will not recommend release where, as in the case of a mandatory exception applying, the law proscribes disclosure. There are instances, however, where the non-applicability (in our opinion) of a cited exception would cause us to suggest and, if necessary, recommend release. Examples are where, in our view, no exceptions apply, or where a discretionary exception applies, but was not cited by the public body when it responded to the applicant.

◆ 99-140
Enforcing the Law

The Applicant, who had complained to the Manitoba Securities Commission (Commission) about a real estate agent, requested access to the Commission's file on the case.

In response, the public body advised:

> *…This information cannot be released under section 25(1)(c) of* The Freedom of Information and Protection of Privacy Act *on the basis that access would weaken the Commission's ability to carry out investigations and obtain confidential material in the course of an investigation.*

Section 25(1)(c) of *The Freedom of Information and Protection of Privacy Act* provides:

> ***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*
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;*

Further to the complaint, enquiries were made with the public body. At a meeting with the Access and Privacy Officer for the public body, the withheld records were reviewed and considered in relation to the provisions of *The Freedom of Information and Protection of Privacy Act.* We were advised that the requested information had been obtained by the Commission in the course of its investigation under *The Securities Act.*

Our review indicated that the requested records would relate to law enforcement, as defined in section 1 of *The Freedom of Information and Protection of Privacy Act:*

> *"**law enforcement**" means any action taken for the purpose of enforcing an enactment, including*
> *(b) investigations or inspections that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment, and*
> *(c) proceedings that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment;*

Section 25(1) of the Act provides exceptions to disclosure of information relating to law enforcement which protect the law enforcement process. The Act allows a public body the discretion to

refuse to disclose information where disclosure could reasonably be expected to harm the effectiveness of investigative techniques and procedures used in law enforcement.

The public body advised our office that it relies on voluntary compliance in obtaining confidential material in the course of conducting investigations. We were advised by the public body that a disclosure of confidential material obtained during an investigation would reasonably be expected to weaken the Commission's ability to conduct investigations because people would be less likely to voluntarily provide this information.

Our review of the complaint in relation to the provisions of *The Freedom of Information and Protection of Privacy Act* indicated that the records in question clearly contained information about another person, a third party. The fact that this information was compiled by the Commission in the course of an investigation into a possible violation by an individual of Manitoba legislation was also considered. In accordance with *The Freedom of Information and Protection of Privacy Act,* the requested information was personal information concerning that third party.

In our opinion, the requested records were subject to the following mandatory provisions of *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.*

Disclosure 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;

Based on our review of the complaint, we were of the opinion that section 17(2) applied to information coming under the request and we considered all relevant issues related to this exception.

Section 17(2)(b) is a mandatory exception to disclosure and, where this provision applies, the law states that the public body must not disclose the information in question. Therefore, we advised the Applicant that there was no recommendation that could be made in this matter. The Applicant was advised of the right to appeal to the Court of Queen's Bench within 30 days of receiving our report.

MANITOBA FINANCE

There were eight complaints under *The Freedom of Information and Protection of Privacy Act* received against Manitoba Finance in 1999. Two were declined, two were supported, three were not supported and one was carried into the year 2000. Two of these cases are discussed below, one relating to access and the other to privacy.

The access case, concerning records related to a third party, is an example where every page of a large file was maintained to be the subject of a mandatory exception under the Act. In our experience, the assertion of, in effect, a blanket refusal of access is rarely appropriate, especially in a heterogeneous group of records such as those requested in this case.

The presumption of *The Freedom of Information and Protection of Privacy Act* is that records in the custody or under the control of a public body are accessible, subject to reasonable severing based on limited and specific exceptions under the Act. Determination of whether all elements of an exception apply to each specific record may require consultation by the public body with a third party involved. Ultimately, however, the decision to release or withhold requested records rests with the public body. In this particular case, the matter was informally resolved with the public body releasing most of the records to the Applicant.

The second case, concerning an allegation of breach of privacy against the Better Methods project of Manitoba Finance, is an example of over-collection of personal information. Whenever a breach of privacy has occurred, the deed has been committed and, for the complainant, cannot be ameliorated. Once the breach in this case was identified, the public body responded responsibly, doing all that it could in the circumstances – changing its procedure and apologizing to the Complainant.

◆ 99-069
Let the Games Conclude

The Applicant requested access under *The Freedom of Information and Protection of Privacy Act* to:

> *…any and all records of the Pan Am Games Society Executive Committee and Board of Directors, including but not limited to agendas and minutes of meetings, for the period February 1, 1999 to the present ….*

The public body responded that the identified records fell within section 18(1) of *The Freedom of Information and Protection of Privacy Act,* specifically:

> ***Disclosure harmful to a third party's business***
> ***18(1)*** *The head of a public body shall refuse to disclose to an applicant information that would reveal*
> *(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party; or*
> *(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
> *(i) harm the competitive position of a third party,*
> *(ii) interfere with contractual or other negotiations of a third party,*
> *(iii) result in significant financial loss or gain to a third party,*
> *(iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied.*

We understand that the public body enquired with the third party, the Pan American Games Society (Winnipeg 1999) Inc., (PAGS) about consent for release, but consent was not provided.

Upon receiving the complaint, enquiries were made with the public body. The withheld records, numbering 397 pages, were reviewed and the relevant provisions of *The Freedom of Information and Protection of Privacy Act* were considered.

Our review suggested that some of the records did not seem to be commercial or financial and would not come under the cited exceptions. Therefore, examples of the records that, in our opinion, appeared to be releasable were sent to the public body so that all of the requested records could be reconsidered in light of the examples. In addition, the public body was reminded that where part of a requested record falls within an exception to disclosure, but other information does not, as much of the record as can be provided without disclosing excepted information must be provided to the applicant. Section 7(2) of the Act 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.*

By this time, the 1999 Pan American Games had been completed, and it was our understanding that PAGS was being disbanded. It was our view that sections 18(1)(c)(i), (ii), (iii) and (iv) would no longer apply to the withheld information. Additionally, PAGS advised our Compliance Investigator that its position on release would be different than what it was originally. Furthermore, we were advised by the City of Winnipeg and by PAGS that all of the records of the PAGS would be transferred to the City of Winnipeg Archives in the near future and that some of these records would be accessible to the public.

In view of these new circumstances, it was suggested that the public body seek clarification from PAGS as to which records it would now be prepared to release. PAGS consented to the release of 354 of the 397 pages, which the public body forwarded to the Applicant without any fee.

Our office reviewed the remaining 43 withheld pages and did not find the public body's reliance on section 18 to be wrong. Section 18 is a mandatory exception under *The Freedom of Information and Protection of Privacy Act* where, if the section applies, the public body is required to withhold the information.

It was our opinion that 10 of the remaining 43 withheld pages might be releasable with severing, but the unsevered information would consist of headings without substance, and disclosure of the information would not be meaningful. When the situation was discussed with the Applicant, she concurred with this opinion and the file was closed.

◆ 99-114
How Old Do You Think I Am?

This complaint, under *The Freedom of Information and Protection of Privacy Act,* concerned the disclosure of personal information (age of employee) in a computer-generated report, by the Better Methods project of Manitoba Finance to Budget Officers of Manitoba Justice.

The Complainant advised our office that he did not believe the age of an employee was required by budget staff. Although names of employees were not displayed on the report containing the ages, the information could easily be matched with another report provided at the same time to the budget staff, showing employee names.

Upon receipt of this complaint, enquiries were made with the public body and the relevant provisions of *The Freedom of Information and Protection of Privacy Act* were reviewed. *The Freedom of Information and Protection of*

Privacy Act limits the disclosure of personal information as follows:

> ***Limit on amount of information used or disclosed***
> ***42(2)*** *Every use and disclosure by a public body of personal information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.*

The Access and Privacy Officer for the Office of Information Technology advised us that this matter was reviewed with staff of the Better Methods project. Apparently, project staff had been of the view that including age data in a report would be useful in the preparation of expenditure estimates that included severance costs of potential retirements. The sample report that was prepared by project staff for discussion purposes included age data; however, employee names were severed. Nevertheless, this report could be cross-referenced with another report showing employee names.

Our office was advised that Better Methods staff realized the initial severing approach was inadequate and took steps to ensure that age data was severed from sample reports to be used in future discussions.

Our review indicated that this disclosure of employee age data was not in compliance with section 42(2) *The Freedom of Information and Protection of Privacy Act.* The Access and Privacy Officer for the Office of Information Technology advised our office that the Better Methods project would be implementing procedures aimed at ensuring that an incident of this nature does not recur. In particular, we were informed that reports which might potentially reveal personal information contrary to the legislation would be reviewed prior to distribution, with due regard to *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act.*

The Access and Privacy Officer also advised our office that he would be sending a letter to the Complainant apologizing for this incident.

MANITOBA HIGHWAYS AND TRANSPORTATION

In 1999, there were two complaints under *The Freedom of Information and Protection of Privacy Act* received against Manitoba Highways and Transportation. One of these was not supported and the other was pending at the end of the year.

Most of our interaction with the public body in the realm of access and privacy involved the issue reported in our 1998 Annual Report (page 30) – disclosure of personal information by Manitoba's Division of Driver and Vehicle Licencing to Elections Canada for record linkage. This involved significant time and effort in 1999 and is summarized in the following case summaries.

The last of these summaries reproduces a comment prepared by our office on personal information and elements of consent. While this comment was prompted by the record linkage case involving Manitoba Highways and Transportation, it is applicable to all public bodies. It represents the position of the Office of the Manitoba Ombudsman on active and informed consent. A similar comment on elements of consent and personal health information, is reproduced in the section of this Annual Report concerning *The Personal Health Information Act,* under the heading *"Health Care Facilities"*.

◆ S99-013
◆ S00-005
Follow-up on the Disclosure of Personal Information for Record Linkage

We noted in our last Annual Report that the Division of Driver and Vehicle Licencing (DDVL) had requested that our office comment on a one-year interim Agreement on data-sharing that the public body had entered into with Elections Canada in 1998. Among the 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"*.

The matter arose when Elections Canada developed the National Register of Electors, a "permanent" electoral list that no longer used periodic door-to-door enumeration to obtain information about voters. Elections Canada requested access to personal information collected and stored in a computer database maintained by DDVL. Under the Agreement, DDVL concurred to provide quarterly, for one year, personal information for every driver listed in the Division's database, unless a motorist had specifically requested that his or her personal information not be shared.

As we reported last year, 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 provided DDVL with a detailed account of our opinion. Our office advised DDVL that the disclosures of personal information to Elections Canada were not authorized under *The Freedom of Information and Protection of Privacy Act.* Because the disclosures were not authorized, our office indicated that the legislation intends that personal information shall not be disclosed without the direct consent of the individuals the information is about, in this case Manitoba drivers. We concluded that active and informed consent should be obtained from individual drivers before personal information is disclosed to Elections Canada under a new agreement.

After providing DDVL with our opinion of the appropriateness of the disclosure to Elections Canada under the interim agreement, our office learned of the disappearance at Elections Canada

of a computer tape – a searchable database – which had been transferred by DDVL, containing personal information about approximately 675,000 Manitobans. Upon receiving notice of the loss, DDVL acted quickly to suspend further transfers of personal information under the Agreement. Transfers have not resumed since then.

The disappearance of the personal information of Manitobans prompted our office to initiate our own investigation into whether the personal information had been protected by DDVL in the manner required by *The Freedom of Information and Protection of Privacy Act.* Because the Ombudsman's jurisdiction does not extend beyond Manitoba's borders, the office was unable to investigate the disappearance of the records at Elections Canada.

A news release and background paper on our investigation into the security of DDVL records is available in English and French from the Ombudsman's Office and is also on our website. Essentially, however, the Ombudsman found that the disappearance of the computer tape was solely the responsibility of Elections Canada and that personal information collected and disclosed by DDVL had not been protected in a manner required under *The Freedom of Information and Protection of Privacy Act.* The Ombudsman made ten recommendations which the public body substantively accepted, agreeing to:

- conduct a comprehensive audit of its security arrangements for personal information;
- develop reasonable criteria for public notification regarding breaches of security;
- notify Manitoba drivers of the uses and disclosures of their personal information; and
- follow the principle of transparency by providing information to the public, including the seeking of active and informed consent for the disclosure of personal information in any future transfers of such information to Elections Canada.

Our office continues to work with DDVL on this issue, monitoring the implementation of the recommendations concerning the security of DDVL records. The public body has hired an analyst to conduct an independent audit of the DDVL system and of the security procedures surrounding the transfer of data. Most recently, DDVL provided our office with a Statement of Work that has been prepared concerning the nature and scope of the security audit that is being undertaken.

An outcome of this matter is that various instances of non-compliance under *The Freedom of Information and Protection of Privacy Act* were discovered and are now being ameliorated. The issue has reminded all public bodies under *The Freedom of Information and Protection of Privacy Act* of the importance of reviewing their security arrangements for personal information. Additionally, the matter presented our office with the need to consider and refine, more clearly than ever before, the nature of consent.

After our comment on the transfer Agreement was provided to DDVL, we sought to formally articulate our interpretation of the elements of fair and informed consent in the context of internationally accepted fair information practices. These practices, we noted, form part of the principles underlying Manitoba's access and privacy legislation. The resulting elements of consent that our office prepared were the basis of the Ombudsman's eighth recommendation to the public body in our investigation. The elements were also framed as a comment by our office for all public bodies, titled *"Personal Information, Elements of Consent"*.

The elements of consent for personal information, as developed by our office, are reproduced below. A similar version of elements of consent relating to personal health information is reproduced in the section of this Annual Report concerning *The Personal Health Information Act.*

◆ S99-023
Personal Information, Elements of Consent

The following is a comment prepared by the Ombudsman's Office, applicable to all public bodies and to the issue of consent and *The Freedom of Information and Protection of Privacy Act:*

PERSONAL INFORMATION ELEMENTS OF CONSENT

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

Consent may be required whenever personal information is collected from, used by or disclosed to someone other than the individual the information is about. It is the duty of public bodies to ensure that consent is obtained in a manner that is consistent with legislative provisions under *The Freedom of Information and Protection of Privacy Act.* We have put forward generic elements that could, in our opinion, be addressed in a flexible, reasonable, and effective manner so long as the process follows the law and the result is meaningful consent where it is required or sought. Addressing each of the elements of consent can contribute to ensuring that the public body is providing the minimum amount of information through clear, specific and informed consent.

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

(a) the specific personal information to be collected, used or disclosed;

(b) the identity of the person, organization or public body that the personal information may be collected from, used by, or disclosed to;

(c) all the purposes for the collection, use or disclosure;

(d) a statement from the public body:
- affirming that a third party recipient will be instructed not to use or disclose the personal information provided by the public body, except for a purpose specified in the consent, and
- specifying the subsequent disclosures, if any, that a third party recipient will be instructed it is permitted to make;

(e) an acknowledgement that the consenting individual has been made aware of:
- why the personal information is needed, and
- the risks and benefits to the individual of consenting or refusing to consent to the collection, use or disclosure;

(f) the date the consent is effective, and the date the consent expires;

(g) a statement that the consent may be revoked or amended at any time.

To make our suggestion clear, we reiterate our opinion that a consent form need not articulate every one of these elements under all circumstances, but each of the components should have been carefully considered in the process of preparing such a form.

MANITOBA PUBLIC INSURANCE

Six complaints were received under *The Freedom of Information and Protection of Privacy Act* against Manitoba Public Insurance in 1999. Five concerned access and one concerned privacy. One of these cases was discontinued by the Ombudsman, three were not supported and two were pending into the year 2000.

A complaint from 1998, completed in 1999, is summarized below. It is an example of where section 5, the sunset provision of *The Freedom of Information and Protection of Privacy Act,* applied. Section 5(1) will cease to be in force as of May 4, 2001 (three years after the Act was proclaimed) and will be replaced by section 5(2). Both subsections concern the disclosure provisions of *The Freedom of Information and Protection of Privacy Act* in relation to other provincial legislation:

> ***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.*
>
> ***Conflict with another Act***
> ***5(2)*** *If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless the other enactment expressly provides that the other enactment applies despite this Act.*

Until May 4, 2001, section 5(1) is a provision which public bodies and our office must consider. After that date, where disclosure provisions in other legislation are in existence, the question of whether *The Freedom of Information and Protection of Privacy Act* or other legislation will apply is expected to be less clear than it is now and more interpretative, unless it is proclaimed that other legislation prevails.

◆ 98-028
Sunset over FIPPA

The Applicant sought access to records concerning a Manitoba Public Insurance motor vehicle accident claim. He was granted partial access to the records. He complained to our office about the denial of access to the balance.

The application for access and the Corporation's response were made under *The Freedom of Information Act.* The complaint, made after the proclamation of the new legislation, was under *The Freedom of Information and Protection of Privacy Act*. With the exceptions for denial and the principles governing them being similar under both Acts, the matter was considered under *The Freedom of Information and Protection of Privacy Act*.

The Applicant, who was involved in the motor vehicle accident, was the driver of a vehicle registered to another individual. The withheld records concerned the damage and repairs to the registered owner's vehicle and a statement and diagram of the other driver to the accident. Both the registered owner of the vehicle driven by the Applicant and the other driver to the accident were third parties to this access request. The exception provisions cited by the Corporation in denying access to selected records concerned third party personal privacy, solicitor-client privilege and expectation of injury to the conduct of existing or anticipated legal proceedings.

In reviewing this complaint, our office noted that section 5(1) of *The Freedom of Information and Protection of Privacy Act* sets out that the head of a public body shall refuse to give access to or disclose information under *The Freedom of Information and Protection of Privacy Act* if the disclosure is prohibited or restricted by another enactment of Manitoba.

We observed that section 24 of *The Manitoba Public Insurance Corporation Act*, another enactment of Manitoba, provides the following:

> ***Certain reports not available to public***
> ***24*** *Statements, information and reports made or given to the corporation pursuant to subsection 6(4) to (6), sections 51 and 52 shall be the property of the corporation and shall not be made public for any purpose whatsoever, except in an action or proceeding in court to which the corporation is a party, or with the written consent of the person making the statement or report or giving the information.*

Section 6(5) of *The Manitoba Public Insurance Corporation Act* provides:

> ***Accident information***
> ***6(5)*** *The corporation may require every driver or owner of a motor vehicle required to be registered and licenced in Manitoba that is involved in an accident out of which arises injury or death to a person or damage to property to furnish such information relating thereto to the corporation as may be set out in the regulations.*

We noted that the third-party driver's statement and diagram, requested by the Applicant, constituted accident information under *The Manitoba Public Insurance Corporation Act.* Section 24 of that Act restricts the disclosure of this information except in a Court action or with the written consent of the person providing the information.

Further to our discussions, Manitoba Public Insurance asked the third-party driver about whether he would consent to release of the requested records. We were advised that the third party did not provide consent.

The records concerning the third-party registered vehicle owner were the subject of further discussions with our office and Manitoba Public Insurance. We were advised by the Corporation that, under the circumstances, because the Applicant was operating the vehicle with the consent of the registered owner at the time of the accident, the Applicant acquired the status of an unnamed insured under the terms of the Manitoba Public Insurance policy. This being the case, we were informed that the Applicant was entitled to the information concerning the third-party registered vehicle owner to which he had not originally been provided access.

We understand that copies of the records relating to the registered vehicle owner were provided to the Applicant by Manitoba Public Insurance. We advised the Applicant that the Ombudsman could not recommend release of the records concerning the other driver but that he could, if he wished, appeal the withholding of these records to Court.

MANITOBA RURAL DEVELOPMENT

One complaint under *The Freedom of Information and Protection of Privacy Act* was made against Manitoba Rural Development in 1999. It is an interesting case because it concerns "third party intervention", which includes the right to contest to the Ombudsman a public body's intention to release certain records under the Act. In this case, as well, the Ombudsman considered the differing application of sections 17 and 18 relating, respectively, to third party privacy and third party business interests. It is summarized below.

Whereas our office normally investigates complaints that a public body has withheld a requested record contrary to the Act, this was a case with a twist; under section 34 of *The Freedom of Information and Protection of Privacy Act*, a third party to an access request can complain to the Ombudsman that the public body has decided to release a record. The public body must have first considered release to be potentially harmful to the third party's privacy or business interests.

Sections 33 and 34 of *The Freedom of Information and Protection of Privacy Act* set out procedures, with timeframes, to be taken before the intended release occurs. These essentially provide for the public body to advise the third party that harm as anticipated under section 17 or 18 might result from release of a record; allow the third party to make representations to the public body about the release; require the public body to decide whether to release the record and to inform the third party and applicant of the decision; and provide for the third party or the applicant to file a complaint to Ombudsman about the public body's decision to release or not release the record, as the case may be.

Sections 17 and 18, concerning third party privacy and third party business interests, are commonly used exceptions. It is therefore curious that this is the only case of third party intervention that our office has received since *The Freedom of Information and Protection of Privacy Act* was proclaimed on May 4, 1998. Perhaps this is because public bodies are releasing records without considering third party intervention or with the view that release might not harm third parties' interests; or public bodies may simply be withholding records on the basis of sections 17 and 18 without contacting third parties or on the acceptance alone of third parties not consenting to release. Then again, perhaps section 33 is being applied to the satisfaction of all parties without the need for investigation by our office. No doubt, to some extent one, some or all of these reasons, or more, come into play.

◆ 99-103
Third Party Intervention

The Complainant was a third party to an access request made to Manitoba Rural Development under *The Freedom of Information and Protection of Privacy Act* for a letter the Complainant had prepared on behalf of a public interest group. The Complainant contested the public body's decision to give access to the Applicant. The letter was not released pending our review.

As background, the relevant sections of *The Freedom of Information and Protection of Privacy Act* were as follows:

> ***Notice to third party***
> ***33(1)*** *When the head of a public body is considering giving access to a record the disclosure of which might*
>
> *(a) result in an unreasonable invasion of a third party's privacy under section 17; or*
>
> *(b) affect a third party's interests described in subsection 18(1) or (2); the head shall, where practicable and as soon as practicable, give written notice to the third party ….*

Decision within 30 days
34(1) *Within 30 days after notice is given under subsection 33(1), the head of the public body shall decide whether or not to give access to the record or to part of the record ….*

Notice of decision
34(2) *On reaching a decision under subsection (1), the head of the public body shall give written notice of the decision, including reasons for the decision, to the applicant and the third party.*

Complaint about decision to give access
34(4) *If the head of the public body decides to give access to the record or part of the record, the notice under subsection (2) must state that the applicant will be given access unless the third party makes a complaint to the Ombudsman under Part 5 within 21 days after the notice is given.*

In this case, the procedures in sections 33 and 34 of *The Freedom of Information and Protection of Privacy Act* were followed.

Upon receipt of this complaint, enquiries were made with the Complainant and the public body. The record and relevant legislation were also reviewed and considered.

The record in question was a letter to the public body signed by the Complainant on behalf of a public interest group. The letter related to the group's concerns about funding requests by a municipality for a local project.

The Access and Privacy Officer for the public body wrote to the Complainant, advising that a request had been made for access to the letter under *The Freedom of Information and Protection of Privacy Act.* The Access and Privacy Officer stated, in part:

Under Part 2 of FIPPA, I must provide the applicant with access to the letter unless the information contained within the letter falls within the scope of one of the exceptions to disclosure contained in sections 17 to 32 of FIPPA. In this respect I note that section 17 ('disclosure harmful to a third party's privacy') may be relevant….

As I am considering disclosing the letter and such disclosure may constitute an invasion [of] your privacy, I am providing you with notice under subsection 33(1) of FIPPA… .

My initial assessment is that the exception to disclosure provision in section 17 does not apply to the information in the letter. In this respect I note that, as the letter was signed on behalf of the [group], the information in the letter does not appear to be your 'personal information' nor does it appear that the disclosure of the letter would be an unreasonable invasion of your privacy (as required for the exception to disclosure contained in section 17 to apply). However, you may have specific information indicating that section 17 … applies. Information as to the circumstances around the drafting of the letter may be of assistance to us in making our determination (for example, did your Association decide during a meeting that you should write the letter? If not, who decided that the letter should be written?)….

In a letter of response, the Complainant advised the public body, on behalf of the group, that "the Board of Directors … would prefer that the letter not be released at least not yet, for two reasons." The Complainant stated that the public body had not responded to many of the issues addressed in the letter and that release of the letter at that time might prejudice the group's legal position.

By a further letter, the Access and Privacy Officer for the public body advised the Complainant that he had decided to grant the Applicant's request for access to the letter. The Reasons for Decision included the following comments:

The Act indicates that you have a right of access to the information in the letter unless all or part of the information falls within one of the exceptions to disclosure contained in

sections 17 to 32 of the Act. Of these exceptions to disclosure, I considered whether section 17(1) applies to your request. It 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.*

Subsection 17(1) only applies to the information in the letter if that information is 'personal information' and the disclosure of the information would be an unreasonable invasion of a third party's privacy.

'Personal information' is defined in section 1 of the Act. It states:

*'**Personal information**' means recorded information about an identifiable individual, including*

(l) the individual's own personal views or opinions, except if they are about another person.

It is my view that the letter does not contain information about an 'individual' and that the letter does not express the personal views or opinions of the 'individual' as the letter was written on behalf of the [group]. Accordingly, it is my view that the letter does not contain 'personal information' and therefore, subsection 17(1) does not apply to the information contained in the letter.

It is also my view that the disclosure of the letter would not unreasonably invade the privacy of a third party even if the letter contained 'personal information'. To make this determination, I have considered subsections 17(2), (3) and (4) of the Act. It is my position that the disclosure of the letter would not unreasonably invade the third party's privacy as the letter was written on behalf of the [group]. As the letter forms the views of the [group], it is my view that the disclosure of the letter would not invade the third party's privacy.

In the course of the review by our office, the Complainant confirmed that the letter was written on behalf of the group and said that the group was a non-profit corporation.

In reporting to the Complainant and the public body, our office noted that the provision under *The Freedom of Information and Protection of Privacy Act* concerning third party notice of a possible record disclosure relates to only sections 17 and 18 concerning, respectively, the privacy of a third party and the business interests of a third party. The concerns about release expressed by the Complainant were not relevant, in our opinion, to the consideration of section 33(1) of *The Freedom of Information and Protection of Privacy Act.*

We noted that section 17, concerning disclosure of a third party's privacy, provides that 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.

Additionally, we noted that *The Freedom of Information and Protection of Privacy Act* defines personal information as "recorded information about an identifiable individual", including:

(a) the individual's name,
(b) the individual's home address, or home telephone, 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, association or activity,
(f) 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;

It was our view that the definition of "*personal information*" as recorded information about "*an identifiable individual*", together with the examples of such information in (a) to (n), indicate that the term relates to the privacy of a natural person, a human being. In the context of this definition, corporations, organizations, businesses or public bodies are not natural persons and information about them as third parties is not protected by the use of sections 17(1) and 17(2).

We noted that business interests of third parties which are corporations, organizations, businesses or public bodies fall under section 18 of *The Freedom of Information and Protection of Privacy Act,* concerning disclosure harmful to a third party's business interests. While sections 17(1) and 17(2) refer to the disclosure of "personal information", section 18(1) makes reference to the disclosure of "information" only. It states:

Disclosure harmful to a third party's business interests
18(1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*
(a) a trade secret of a third party;
(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party; or
(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to
(i) harm the competitive position of a third party,
(ii) interfere with contractual or other negotiations of a third party,
(iii) result in significant financial loss or gain to a third party,
(iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or
(v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

It was our view that the contents of the letter in question did not constitute the type of information included in section 18 of *The Freedom of Information and Protection of Privacy Act.*

Based on our review of the relevant information, we advised the Complainant of our opinion that none of the exception to disclosure provisions in section 17 or 18 of *The Freedom of Information and Protection of Privacy Act* applied to the information in the requested letter. Accordingly, we were unable to advise that the public body's decision to grant the Applicant's request for access to the letter was wrong.

As the appeal provision under *The Freedom of Information and Protection of Privacy Act* applies to this type of complaint, our office advised the Complainant of the right to appeal to the Court of Queen's Bench.

THE FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT

LOCAL PUBLIC BODIES

INTRODUCTION TO *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT:* LOCAL PUBLIC BODIES

MANITOBA'S FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

When it was proclaimed on May 4, 1998, *The Freedom of Information and Protection of Privacy Act* applied to provincial government departments and agencies, and provided for the inclusion of other public bodies within its scope on proclamation of enabling provisions of the Act.

At the request of the City of Winnipeg, *The Freedom of Information and Protection of Privacy Act* was amended to allow proclamation for the City on August 31, 1998. On April 3, 2000, the Act was extended to *"local public bodies"*, as defined under the Act.

The Freedom of Information and Protection of Privacy Act gives an individual a legal right of access to records held by Manitoba local public bodies, subject to specific and limited exceptions. The Act also requires that local public bodies protect the privacy of an individual's personal information existing in records held by them.

The purposes of the Act and the role of the Manitoba Ombudsman, as they relate to local public bodies, are the same as described under the section of this Annual Report headed *"Introduction to* The Freedom of Information and Protection of Privacy Act *and Public Bodies"*.

LOCAL PUBLIC BODIES

Under *The Freedom of Information and Protection of Privacy Act* a *"local public body"* means an "*educational body"*, *"health care body"* or *"local government body"*.

"Educational body" means:

- *a school division or school district established under* The Public Schools Act,
- *The University of Manitoba,*
- *a university established under* The Universities Establishment Act,
- *a college established under* The Colleges Act, *and*
- *any other body designated as an educational body in the regulations.*

"Health care body" means:

- *a hospital designated under* The Health Services Insurance Act,
- *a regional health authority established under* The Regional Health Authorities Act,
- *the board of a health and social services district established under* The District Health and Social Services Act,
- *the board of a hospital district established under* The Health Services Act, *and*
- *any other body designated as a health care body in the regulations.*

"Local government body" means:

- *The City of Winnipeg,*
- *a municipality,*
- *a local government district,*
- *a local committee, community council or incorporated community council under* The Northern Affairs Act,
- *a planning district established under* The Planning Act,
- *a conservation district established under* The Conservation Districts Act, *and*
- *any other body designated as a local government body in the regulations.*

Whenever possible, our office discharges an educational role when dealing with local public bodies in early cases under the new legislation. Upon contacting a local public body for the first time about an access or privacy complaint, senior staff of our Access and Privacy Division prefers to meet with the access personnel involved to discuss the legislation and the role and function of the Manitoba Ombudsman. We have found the personnel with whom we have met to be

receptive to the principles of the legislation.

In 1999, the only local public body to come under *The Freedom of Information and Protection of Privacy Act* was the City of Winnipeg, about which we received 28 complaints, although 10 of these were either declined or discontinued. Selected case summaries relating to the City of Winnipeg are included below.

While no other local public bodies came under *The Freedom of Information and Protection of Privacy Act* in 1999, we are including in this Annual Report case summaries on our first and very recent experience in the year 2000 with other local public bodies, specifically another local government body and an educational body.

Manitoba's companion access and privacy enactment, *The Personal Health Information Act,* has applied to all local public bodies, specifically educational bodies, health care bodies, and local government bodies since that Act's proclamation on December 11, 1997. Local government bodies are also mentioned in the introductory section of this Annual Report relating to *The Personal Health Information Act.*

Summaries of some of the other 131 access and privacy complaints received by our office in 1999 under *The Freedom of Information and Protection of Privacy Act* (relating to public bodies), *The Personal Health Information Act* and *The Ombudsman Act* are discussed in other sections of this Annual Report.

CITY OF WINNIPEG

Of 28 complaints received against the City of Winnipeg in 1999, ten were declined or discontinued, 11 were not supported by the Ombudsman, five were supported and two were pending at the end of the year. Throughout 1999, our experience with the City of Winnipeg was very positive.

Below are summaries of two City matters handled recently, the second having been opened and concluded by our office in the year 2000, although it related to an incident that occurred in November 1999. It will be noted that both summaries involve multiple complaints. Several of the complaints received by the Ombudsman concerning the City of Winnipeg in 1999 were from the same individuals – 12 from one person and nine from another.

The first summary concerns the Winnipeg Police Service which, from our experience, has been a very open and cooperative entity within the City of Winnipeg. The case involves the section of *The Freedom of Information and Protection of Privacy Act* relating to a public body's right to refuse to confirm or deny the existence of a requested record. It is also an example of the provincial access legislation interacting with the *Criminal Code of Canada.* Unlike the case summary in our Annual Report under "Consumer and Corporate Affairs", this is a matter where the Ombudsman agreed with the exception cited concerning reasonable expectation of harm to law enforcement proceedings.

The second matter relates to an important detail of practice, namely the need for a public body to accurately mark the date an application for access is received in order to respond to the applicant within the timeframe required by *The Freedom of Information and Protection of Privacy Act*. This particular case involved a misunderstanding of the date a set of applications were received; however, our office continues to encounter instances where public bodies within Government are not date-stamping applications or dating their letters of response.

◆ 99-111, 99-122 and 99-123 Refusal to Confirm or Deny Existence of Record

The Applicant requested from the City of Winnipeg (Winnipeg Police Service) access to audio recordings, video recordings and/or printed documents for specified periods and relating to a particular address.

In its response, the public body refused to confirm or deny the existence of the requested records. The provision of *The Freedom of Information and Protection of Privacy Act* relating to the public body's response was as follows:

> ***Refusal to confirm or deny existence of record***
> ***12(2)*** *… the head of a public body may, in a response, refuse to confirm or deny the existence of*
> *(a) a record containing information described in section 24 or 25;*

The public body cited the following exceptions to disclosure under section 25 of the Act:

> ***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*
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement;*
> *(d) interfere with the gathering of, or reveal criminal intelligence that has a reasonable connection with, the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities;*
> *(e) endanger the life or safety of a law enforcement officer or any other person;*

No disclosure if offence
25(2) *The head of a public body shall refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure is prohibited under an enactment of Canada.*

Upon receipt of these complaints, enquiries were made with the public body and the provisions of *The Freedom of Information and Protection of Privacy Act* were considered.

We noted that section 25(2) of the Act, cited by the public body, is a mandatory exception. It requires the head of a public body to refuse to disclose information if the information is a law enforcement record and the disclosure of the information is prohibited under an enactment of Canada.

In our review, the public body advised that the types of records requested, audio and video tape recordings and printed documents relating to any audio recordings, would be considered law enforcement records. A law enforcement record is any recorded information relating to law enforcement as defined in section 1 of the Act:

"law enforcement" *means any action taken for the purpose of enforcing an enactment, including*
(a) policing,
(b) investigations or inspections that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment, and
(c) proceedings that lead or could lead to a penalty or sanction being imposed, or that are otherwise conducted for the purpose of enforcing an enactment;

In citing section 25(2), the public body referred to Part VI of the *Criminal Code*, an enactment of Canada. The public body advised our office that the *Criminal Code* prohibits the disclosure of any records containing information of the type that was requested. We were advised that any information of the type that was requested, if it exists, would relate to intercepted communications.

Part VI of the *Criminal Code* sets out the process of authorizing an interception of communications and provides the following:

187. (1) All documents relating to an application made pursuant to any provision of this Part are confidential and… shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such a place as the judge may authorize ….

The public body advised our office that the *Criminal Code* requires that applications and authorizations for interception of communications be kept confidential. The *Criminal Code* prohibits the public body from disclosing whether any such applications or authorizations exist. Our office was advised that, as the *Criminal Code* prohibits the disclosure of whether any such authorizations exist, it would also prohibit the disclosure of whether any records of intercepted communications made pursuant to a sealed authorization exist. The public body advised that disclosure of information of the type that was requested is prohibited under the *Criminal Code* and, therefore, disclosure would be prohibited under *The Freedom of Information and Protection of Privacy Act*, as provided in section 25(2) of the Act.

In withholding access to the requested records, the public body also cited section 25(1) of *The Freedom of Information and Protection of Privacy Act*. The public body advised our office that the requested records, if they exist, would be expected to reveal criminal intelligence. We understand that criminal intelligence is information gathered by a law enforcement agency in a covert manner with respect to detection of crime or the prevention of possible violations of law. The type of information requested, video and audio recordings of intercepted communications and/or printed documents, would come under the description of criminal intelligence and we were

advised that the disclosure of the requested records, if they exist, would therefore reveal criminal intelligence. The public body also advised that the requested records, if they exist, would contain information that would reveal investigative techniques and procedures and disclosure of such records would reasonably be expected to harm the effectiveness of such investigative techniques and procedures.

The public body advised our office that, if such records existed, they could reveal the identity of a law enforcement officer and other individuals. We were advised that a disclosure of such information, if it existed, could reasonably be expected to threaten the life, safety or well being of a law enforcement officer or other persons.

Section 25(1) of *The Freedom of Information and Protection of Privacy Act* provides exceptions to disclosure for records relating to law enforcement which protect the law enforcement process. The Act allows a public body to refuse to disclose information where disclosure could reasonably be expected to reveal or interfere with the gathering of criminal intelligence; and/or disclosure could reasonably be expected to harm the effectiveness of investigative techniques and procedures used in law enforcement; and/or disclosure could reasonably be expected to endanger the life or safety of a law enforcement officer or any other person. Our review indicated that, if any records coming under these requests did exist, they would be excepted from disclosure under section 25(1) of *The Freedom of Information and Protection of Privacy Act*.

Additionally, section 25(2) requires the head of a public body to refuse to disclose information in a law enforcement record and the disclosure of information is prohibited under an enactment of Canada. Our office was of the view that if the requested records did exist, their disclosure would be prohibited under the *Criminal Code of Canada,* an enactment of Canada. Accordingly, we advised that, in our opinion, section 25(2) would also apply in these three cases.

Based on the legislation and our review, it was our view that the requested records, if they exist, would be subject to section 25(2) of *The Freedom of Information and Protection of Privacy Act*, a mandatory exception. Our office was also of the view that the requested records, if they exist, would be subject to section 25(1), a discretionary exception of *The Freedom of Information and Protection of Privacy Act*. Having found that section 25 applied, we noted section 12(2)(a) would then also apply in these cases. We were satisfied that the public body's exercise of discretion in this regard was not unreasonable. For these reasons, our office was unable to make a recommendation in these three matters and the Applicant was advised of the right to appeal to Court.

◆ 2000-037 to 2000-041 Received At Port of Entry

A person filed five complaints under *The Freedom of Information and Protection of Privacy Act* alleging that he received late responses to applications submitted to the City of Winnipeg (Community Services Department).

The Complainant received five letters from the City, all dated December 15, 1999. The letters referred to the public body receiving his applications on November 15, 1999.

The Complainant clarified with our office that he personally delivered the applications to an employee of the public body on November 12, 1999. He also advised that the response letters received from the public body were delivered to his home on December 15, 1999.

We understood that the City of Winnipeg receives applications for access under *The Freedom of Information and Protection of Privacy Act* through the City Clerk's Department. In the event that an application is submitted to another location within the public body, the application is forwarded to the City Clerk's Department. Our office made enquiries with the City Clerk's Department.

In reviewing the handling of these applications, the City Clerk confirmed that the application forms had been received by another department of the City, on Friday, November 12, 1999. We were advised that the applications were forwarded to the City Clerk's Department the next working day, Monday, November 15, 1999.

In the course of our review, we discussed the legislation with the public body, including the following provision:

> ***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; or*
>
> *(b) the request has been transferred under section 16 to another public body.*

The City Clerk advised our office that it had been the public body's understanding that, at the time it was responding to these requests, the responses were being made within the time limit. This was based on the belief that the applications had been received by the public body on November 15, 1999.

In this instance, as the five applications were received on November 12, 1999 and the response letters were dated December 15, 1999, the public body's responses did not meet the 30-day time limit under *The Freedom of Information and Protection of Privacy Act*.

EVERGREEN SCHOOL DIVISION

It is timely and instructive to examine another recent experience that our office has had with a local public body, even though our involvement took place in early 2000. Two complaints, concerning an educational body, were received by our office in April 2000, just weeks after jurisdiction of *The Freedom of Information and Protection of Privacy Act* was proclaimed over all local public bodies in Manitoba.

In these first cases with the Evergreen School Division (for that matter our first complaint under the Act about any educational body), our office was asked to review the reasonableness of two Estimates of Costs assessed by the public body. In these cases we fittingly found a textbook example of how public bodies should calculate fee estimates.

As explanation, Regulation 64/98 under *The Freedom of Information and Protection of Privacy Act* provides that the right of access to a record is subject to the payment of fees required by the regulations. Essentially, the fee is for *"search"* and *"preparation"* in excess of two hours, any computer programming or data processing and any copying.

The Regulation sets out what tasks are ***not*** chargeable:

- making an application for access to a record,
- reviewing a record used by a public body to identify, locate or describe records,
- transferring an application to another public body,
- preparing an estimate of fees,
- reviewing any relevant record to determine whether any of the exceptions to disclosure apply, prior to any severing of the record;
- preparing an explanation of the record(s),
- time for copying a record supplied to the applicant (other than the regulated copying fee per page, which is chargeable),
- regular mailing costs, other than special courier delivery,
- photocopying if it is the applicant's own personal information and the total copying fee is less than $10.

Manitoba Culture, Heritage and Tourism, the public body responsible for the administration of *The Freedom of Information and Protection of Privacy Act,* produces a *Resource Manual, Provincial Government.* We would agree with the opinion set out in the *Resource Manual* that the following task also is not chargeable:

- consulting within the public body, with other public bodies, with third parties and with legal counsel.

The *Resource Manual,* clarifies what ***is*** chargeable:

- reviewing current file documentation and Records Transfer Box Lists to locate the records,
- retrieving records from the Manitoba Government Records Centre or arranging to view the records at the Provincial Archives,
- examining file(s) to locate particular correspondence, reports, or other requested records,
- severing of the record(s).

Our office offers the additional interpretation of what, in our opinion, ***is*** chargeable:

- time for copying original record(s) – depending on circumstances, at least three copies will probably need to be made to serve as:
  (a) the public body's unsevered copy of the original,
  (b) the public body's "working copy" for considering severing, and
  (c) the public body's actual severed copy, should there ultimately be severing

Here, as throughout the process, "reasonableness" should prevail. It would seem reasonable to charge for personnel time involved to make first copy, e.g. loading photocopier and removing and adding staples, but not charge for the time the

photocopier is running. Preparing the first copy may be difficult or cumbersome because of the paper size, quality, or the use of staples, posts, etc. on the originals. Preparing this copy may involve substantive staff time. As a rule, personnel should use the least time-consuming approach commensurate with prudent handling and management of the originals.

- severing the record(s)

"Severing" means the actual act of obscuring passages as per the "working copy", using a black marker or white tape and placing marginal notations of exception(s) used. Sometimes for severing to be fully effective, the blackened or whitened version must be re-photocopied. This will be the public body's severed version and is reviewable by the requester.

◆ 2000-099 and 2000-100 An A+ for these Fee Calculations

An individual complained to our office that two Estimates of Costs, received under *The Freedom of Information and Protection of Privacy Act* from the Evergreen School Division, were too high. As the facts and issues in the two cases are similar, only one of the cases is summarized here. The outcome of the cases was the same with the two complaints being unsupported.

The first fee estimate related to an application for access to:

> *Statistical records on enrollment of Gimli Early Middle Years School. Please include*
> - *number of students in 97-98, 98-99, 99-00*
> - *student days absent in these years*
> - *students early leaving in these years*
> - *number of students not in the school but in the system ie: home schooling*

In its letter of response, the public body noted that this request had been subsequently clarified to mean "all absences and possible attendance or absentee rate", and that "leaving early" meant students leaving at noon. We understand the Applicant advised the Access and Privacy Coordinator that she would like the statistical enrollment information to be provided in percentages, that is, the percentage of days attended in relation to the school year.

The public body notified the Applicant that fees applied to the request and provided an Estimate of Costs form showing the total fee estimate of $245, as follows:

- **Search and Preparation Fee:**
  - time in excess of 2 hours ..... 6.5 hours
  - estimated costs (at $15 each half hour) $195

- **Computer Programming and Data Processing Fee:**
  - internal work: time estimate ..... 75 minutes
  - estimated cost (at $10 each 15 minutes)..... $50

The Freedom of Information and Protection of Privacy Act requires a public body to issue an Estimate of Costs when it reasonably considers that search and preparation time in responding to a request will likely exceed two hours. The Act sets out the following provisions relating to fees:

> ***Fee***
> ***7(3)*** *The right of access to a record is subject to the payment of any fee required by the regulations.*
>
> ***Fees***
> ***82(1)*** *The head of a public body may require an applicant to pay to the public body fees for making an application, and for search, preparation, copying and delivery services as provided for in the regulations.*

The Access and Privacy Regulation 64/98 under the Act sets out the following with respect to search and preparation fees:

> ***Search and preparation fee***
> ***4(1)*** *An applicant shall pay a search and preparation fee to the public body whenever*

the public body estimates that search and preparation related to the application will take more than two hours.

4(2) *The fee payable for search and preparation is $15.00 for each half-hour in excess of two hours.*

4(3) *When calculating search and preparation time, a public body shall include time spent in severing any relevant record under subsection 7(2) of the Act, but shall not include time spent*

(a) in connection with transferring an application to another public body under section 16 of the Act;

(b) preparing an estimate of fees under section 7;

(c) reviewing any relevant record to determine whether any of the exceptions to disclosure apply, prior to any severing of the record;

(d) copying a record supplied to the applicant; or

(e) preparing an explanation of a record under subsection 14(2) of the Act.

Computer programming and data processing fees

6 *When a public body needs to use computer programming or incurs data processing costs in responding to an application, the applicant shall pay to the public body*

(a) $10 for each fifteen minutes of internal programming or data processing; or

(b) the actual cost of external programming or data processing incurred by the public body.

Estimate of fees

8(1) *In accordance with subsection 82(2) of the Act, a public body shall give an applicant an estimate of fees in Form 2 of Schedule A when it reasonably considers that, in responding to the request,*

(a) search and preparation is likely to take longer than two hours; or

(b) computer programming or data processing fees will be incurred.

We noted that it is important to bear in mind that an Estimate of Costs is intended to be a calculation of the search and preparation time reasonably expected for responding to an access request. We also noted that the Act states that an Estimate is binding on the public body and an applicant cannot be charged an additional search and preparation fee in the event that the actual time is greater than the estimated time. Additionally, should the actual search and preparation time be less than what is estimated, a public body is required to refund the difference to an applicant in accordance with the following provisions of the Act and Regulation:

Fee not to exceed actual cost

82(6) *The search, preparation, copying and delivery fees referred to in subsection (1) must not exceed the actual costs of the services.*

8(3) *The estimate of fees is binding on the public body, and if the actual cost of search and preparation or computer programming or data processing is less than the estimate, the public body shall refund the difference to the applicant.*

Further to the complaint, enquiries were made with the public body concerning the fee estimate. At a meeting with the public body, the calculation of the Estimate of Costs was reviewed and considered in relation to the provisions of *The Freedom of Information and Protection of Privacy Act* and its Regulation.

The public body provided our office with a detailed cost breakdown of the search and preparation time on which the Estimate of Costs had been based.

The public body stated that the information concerning the "number of students in 97-98, 98-99, 99-00" would be readily available and accordingly, no cost was estimated for this.

We were advised by the public body that a record of the "student days absent in these years" would have to be created. The public body indicated that the majority of the search and preparation

time required related to this portion of the request.

The public body informed our office that this information is contained in the School Attendance Registers for each class. The register lists each student in the class and there are columns for noting each student's attendance, including a summary of attendance for each month, both school terms and a summary for the year.

The public body stated that the preparation time would involve going through the registers to compile the information relating to the attendance summary for the year. For each register, this would require adding up the columns of "total" days attended in the school year and the "possible" days, in order to calculate the percentages.

We were advised that the public body estimated three minutes per register to prepare this information. The public body stated that this estimate was arrived at by conducting a timed exercise in totaling the numbers in a register. The time of three minutes was then multiplied by the number of registers for the 1997-1998 and the 1998-1999 school years to determine the amount of time required to calculate this information.

The public body advised that for the third school year requested, namely the current school year, the registers had not been balanced for the second term and for the school year, as the school year had not been concluded at the time of the request. We were informed that additional calculations would be required, including the extra steps of adding up the days attended for each student in each month of the second term and then adding this number to the total for the first term in order to arrive at the totals for each student. The public body could then proceed as it had with the completed registers by totaling the columns. We were advised that the time estimated for each of the registers for the current school year was 20 minutes per register. The public body indicated that this estimate was arrived at by conducting a timed exercise in totaling the numbers in a current register.

The public body's cost breakdown detailing the time estimate for search and preparation totalled 8.8 hours and this was rounded down to 8.5 hours. Under *The Freedom of Information and Protection of Privacy Act*, search and preparation time in excess of two free hours is charged to an applicant. The public body's Estimate of Costs was based on 6.5 hours in excess of two hours.

The Estimate of Costs also included 75 minutes for computer or data processing time. The public body advised our office that this time was estimated for inputting the data in order to create a record containing the information requested.

Our investigation considered whether the time charged in the Estimate of Costs was in accordance with the legislation and whether the estimate was reasonable in the circumstances of the particular request. We noted that the public body provided our office with a well-explained and documented cost breakdown on which the Estimate of Costs had been based. We also noted that the public body had conducted some representative sampling in order to provide a basis for projecting the preparation time required for responding to the request.

Additionally, we observed that the public body did not have records in the form requested. Nevertheless, it did have information in its records that would be responsive to the request. The Act allows a public body to create a record for an applicant as follows:

> ***Creating a record in the form requested***
> ***10(2)*** *If a record exists but is not in the form requested by the applicant, the head of the public body may create a record in the form requested if the head is of the opinion that it would be simpler or less costly for the public body to do so.*

This was the context in which data processing was considered by the public body and an estimated cost for such work was reached.

Based on our review of the calculation of the estimate and the information provided by the public body concerning the search and prepara-

tion time involved in responding to the request, we were of the opinion that the Estimate of Costs was reasonable. Accordingly, we could not support the complaint and there was no recommendation our office could make in this matter.

PART 2

THE PERSONAL HEALTH INFORMATION ACT

TRUSTEES

INTRODUCTION TO *THE PERSONAL HEALTH INFORMATION ACT:* TRUSTEES

MANITOBA'S PERSONAL HEALTH INFORMATION ACT

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 Personal Health Identification Number (PHIN) 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 professionals.

The preamble to *The Personal Health Information Act* outlines the following considerations 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 complementary 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.

TRUSTEES

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; 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 encompass private sector entities.

ROLE OF THE MANTIOBA OMBUDSMAN

As with *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 and to receive comments from the public about matters concerning the confidentiality of personal health information or access to that information;*
- *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 applications for the confidentiality of personal health information of using or disclosing personal health linkage or using information technology in the collection, storage, use or transfer of personal health information.*

In exercising some of these general powers and duties under the legislation, our office has opened files which we have termed *"special investigations"*. These often relate to broader or systemic issues arising from a complaint or concern which has come to our attention. Case numbers referred to in this Annual Report which begin with "S" identify special investigations.

In 1999, our office received 28 complaints under *The Personal Health Information Act.* Eight of these concerned provincial government departments or agencies, one concerned a local public body, eleven concerned health care facilities and five concerned health care professionals. Three were out of jurisdiction and so the Ombudsman had to decline them.

Curiously, since December 11, 1997 when the Act was proclaimed, there have been no complaints made against educational bodies and only one has been made against a local government body. Given this situation, and the relatively small number of complaints received by our office under *The Personal Health Information Act* in general, it strikes us that people may not be fully aware of the access and privacy rights and obligations under this legislation. An alternate explanation is that the exercise of these rights and obligations, either informally or formally under the Act, has been particularly healthy.

Our experience to date, however, indicates that trustees are not fully aware of their obligations. Well into the year 2000, two years after the proclamation of the Act, there are health professionals who have told us that they do not know of the existence of the legislation. One even submitted a bill to a Compliance Officer for his time in responding to our enquiry related to a complaint made against him! The annotated listing of our news releases earlier in this Annual Report provides an indication of a number of trustees being in non-compliance with the security safeguard provisions of the Act concerning patients' personal health information in their custody or control.

Health care users may not be aware of their rights or the proper application of the Act. Of the 28 complaints received by our office under *The Personal Health Information Act* in 1999, seven were declined by the Ombudsman because the complaints were not of the type that could be lodged under the legislation, or did not apply to an entity defined as a trustee under the Act or the complainant was not a person who, under the Act, could make a complaint.

Despite the relatively few number of complaints received by our office under *The Personal Health Information Act,* privacy complaints under the legislation have commonly proved to be very time consuming. In addition to these cases often being complicated, we have found that we must provide considerable information about the Act to the individuals involved, particularly trustees.

The following case summaries are organized by trustee and highlight some important principles addressed by our office in 1999 under *The Personal Health Information Act.* The first summary is a comment made by our office in connection with two complaints that we are reviewing relating to a health care facility and has direct application for all trustees.

Summaries of some of the 131 additional access and privacy complaints received by our office in 1999 under *The Freedom of Information and Protection of Privacy Act* and *The Ombudsman Act* are discussed in separate sections of this Annual Report.

HEALTH CARE FACILITIES

Of the 28 complaints received in 1999 under *The Personal Health Information Act,* 11 were made against health care facilities. Three of these were declined or discontinued, one was supported with recommendations, two were not supported and five were pending at the end of the year. Most of these cases concerned privacy, where meaningful consent is often at issue.

Certain investigations under *The Personal Health Information Act,* begun in 1999, prompted our office to formally articulate our interpretation of the elements of fair and informed consent in the context of internationally accepted fair information practices. These practices, we noted, form part of the principles underlying Manitoba's access and privacy legislation. The elements of consent that our office considered and refined to the best of our abilities were framed as a comment for all public bodies, titled *"Personal Health Information, Elements of Consent"*. It is reproduced below.

This comment is applicable to all trustees and represents the position of the Office of the Manitoba Ombudsman on active and informed consent. A similar version of elements of consent, related to personal information, is set out in the section of this Annual Report concerning *The Freedom of Information and Protection of Privacy Act,* under the heading *"Manitoba Highways and Transportation"*.

◆ S1999-023 Personal Health Information, Elements of Consent

The following is a comment prepared by the Ombudsman's Office, applicable to the issue of consent and *The Personal Health Information Act:*

Personal Health Information Elements of Consent

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

Consent may be required whenever personal health information is collected from, used by or disclosed to someone other than the individual the information is about. It is the duty of public bodies to ensure that consent is obtained in a manner that is consistent with legislative provisions under *The Personal Health Information Act.* We have put forward generic elements that could, in our opinion, be addressed in a flexible, reasonable, and effective manner so long as the process follows the law and the result is meaningful consent where it is required or sought. Addressing each of the elements of consent can contribute to ensuring that the trustee is providing the minimum amount of information through clear, specific and informed consent.

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

(a) the specific personal health information to be collected, used or disclosed;

(b) the identity of the person, organization or trustee that the personal health information may be collected from, used by, or disclosed to;

(c) all the purposes for the collection, use or disclosure;

(d) a statement from the trustee:
- affirming that a third party recipient will be instructed not to use or disclose the personal health information provided by the trustee, except for a purpose specified in the consent, and
- specifying the subsequent disclosures, if any, that a third party recipient will be instructed it is permitted to make;

(e) an acknowledgement that the consenting individual has been made aware of:
- why the personal health information is needed, and
- the risks and benefits to the individual of consenting or refusing to consent to the collection, use or disclosure;

(f) the date the consent is effective, and the date the consent expires;

(g) a statement that the consent may be revoked or amended at any time.

To make our suggestion clear, we reiterate our opinion that a consent form need not articulate every one of these elements under all circumstances, but each of the components should have been carefully considered in the process of preparing such a form.

HEALTH PROFESSIONALS

Five complaints were received by our office in 1999 against health professionals, all concerning chiropractors who used and disclosed patients' personal health information to seek support for a political nominee. These cases were supported by the Ombudsman, with recommendations. As the cases were the subject of a news release and background paper available at our office and on our website, they are not summarized here.

As another example of both our involvement with a health professional and the issue of consent, we highlight a complaint against a psychiatrist received in the first days of the year 2000. The case relates to a situation where disclosure of personal health information was legislatively authorized without the need for consent from the individual the information concerned. Accordingly, the complaint of breach of privacy was not supported.

◆ 2000-054 An Authorized Disclosure

The Complainant expressed concern under *The Personal Health Information Act* that her personal health information had been disclosed to Winnipeg Child and Family Services (CFS), without her consent. Her complaint was against a psychiatrist, a trustee under the Act.

Upon receipt of the concern, enquiries were made with the Complainant and the Trustee. The Complainant provided copies of two medical reports from the Trustee concerning her mental health status. The Complainant indicated that these reports were provided to CFS without her consent, resulting in the apprehension of her child.

In discussion with our Compliance Investigator, the Trustee confirmed that the two reports were disclosed to CFS. He indicated that the reason for providing the reports was his concern regarding the Complainant's ability to properly care for her child. He further noted that he has a statutory duty to report such concerns to CFS under *The Child and Family Services Act.*

According to *The Personal Health Information Act,* a Trustee must obtain an individual's consent before personal health information is disclosed, except under specific and limited circumstances such as where the health or safety of an individual may be at risk or the disclosure is required by another law:

> ***Individual's consent to disclosure***
> ***22(1)*** *Except as permitted by subsection (2), a trustee may disclose personal health information only if*
> *(a) the disclosure is to the individual the personal health information is about or his or her representative; or*
> *(b) the individual the information is about has consented to the disclosure.*
>
> ***Disclosure without individual's consent***
> ***22(2)*** *A trustee may disclose personal health information without the consent of the individual the information is about if the disclosure is*
> *(b) to any person if the trustee reasonably believes that the disclosure is necessary to prevent or lessen a serious and immediate threat to*
> *(i) the mental or physical health or the safety of the individual the information is about or another individual, or*
> *(o) authorized or required by an enactment of Manitoba or Canada.*

We noted that *The Child and Family Services Act,* an enactment of Manitoba, requires any person who reasonably believes that a child is or might be in need of protection, to disclose information to CFS:

> ***Child in need of protection***
> ***17(1)*** *For the purposes of this Act, a child is in need of protection where the life, health or*

emotional well-being of the child is endangered by the act or omission of a person.

Reporting a child in need of protection
18(1) *Subject to subsection (1.1), where a person has information that leads the person reasonably to believe that a child is or might be in need of protection as provided in section 17, the person shall forthwith report the information to an agency or to a parent or guardian of the child.*

Reporting to agency only
18(1.1) *Where a person under subsection (1)*
(b) has information that leads the person reasonably to believe that the parent or guardian
(i) is responsible for causing the child to be in need of protection, or
(ii) is unable or unwilling to provide adequate protection to the child in the circumstances…
subsection (1) does not apply and the person shall forthwith report the information to an agency.

Duty to report
18(2) *Notwithstanding the provisions of any other Act, subsection (1) applies even where the person has acquired information through the discharge of professional duties or within a confidential relationship, but nothing in this subsection abrogates any privilege that may exist because of the relationship between a solicitor and the solicitor's client.*

We noted that when CFS receives a report that a child is, or might be, in need of protection, the agency must conduct an investigation and make a determination:

Agency to investigate
18.4(1) *Where an agency receives information that causes the agency to suspect that a child is in need of protection, the agency shall immediately investigate the matter and where upon investigation, the agency concludes that the child is in need of protection, the agency shall take such further steps as are required by this Act or are prescribed by regulation or as the agency considers necessary for protection of the child.*

It was our understanding that, according to the provisions of *The Child and Family Services Act,* where the Trustee had concerns for the well-being of the Complainant's child, there was a statutory duty that he report this belief to CFS. It is important to note that while it would be the Trustee's duty under *The Child and Family Services Act* to provide the initial information, it remained the responsibility of CFS to investigate the report and make the final determination regarding the need for protection.

Based on our review, we advised the Complainant that our office was of the opinion that the provisions of *The Personal Health Information Act* authorized the Trustee to disclose her personal health information to CFS without her consent.

PART 3

THE OMBUDSMAN ACT

PROVINCIAL GOVERNMENT DEPARTMENTS, AGENCIES AND MUNICIPALITIES (EXCLUDING THE CITY OF WINNIPEG)

INTRODUCTION TO *THE OMBUDSMAN ACT* AND DEPARTMENTS, AGENCIES AND MUNICIPALITIES (EXCLUDING WINNIPEG)

MANITOBA'S OMBUDSMAN ACT

Since 1970, the Manitoba Ombudsman has derived duties and powers from *The Ombudsman Act*, which enables the Ombudsman to investigate complaints about the administration by provincial government departments and agencies where a person alleges he or she has been aggrieved. Since 1997, *The Ombudsman Act* has applied to all municipalities with the exception of the City of Winnipeg. Access and privacy complaints that, for a jurisdictional reason, do not fall under *The Freedom of Information and Protection of Privacy Act* or *The Personal Health Information Act,* but otherwise fall under the jurisdiction of *The Ombudsman Act*, are reviewed by our office under that legislation. Situations giving rise to our use of *The Ombudsman Act* in access and privacy matters have included instances where the complainant, the entity complained about or the records in question do not come within the access and privacy legislation.

As under Manitoba's access and privacy legislation, the Ombudsman under *The Ombudsman Act* receives complaints and can initiate investigations upon his own initiative. As with the access and privacy legislation, the Ombudsman acts independently and has broad powers to investigate, report publicly and make recommendations where a complaint is supported and in the event that informal resolution is not successful. Decisions of the Ombudsman under *The Ombudsman Act,* unlike those under the access and privacy legislation, cannot be appealed to Court.

In 1999, 13 complaints were handled by the Access and Privacy Division under *The Ombudsman Act.* Three cases were concluded with assistance rendered, two with information supplied, two were supported or partly supported and six were pending at the end of the year.

Below are two examples of cases handled by the Access and Privacy Division under *The Ombudsman Act* in 1999, one concerning access and the other concerning privacy.

These are in addition to the 146 other complaints handled by the Access and Privacy Division of our office in 1999 under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act,* some of which are summarized in other sections of this Annual Report. It should also be noted that the bulk of complaints handled under *The Ombudsman Act* are conducted by the Ombudsman Division of our office. Statistics and case summaries with respect to those cases, not related to access and privacy, are the subject of another Annual Report.

AGASSIZ WEED CONTROL DISTRICT

A complaint was made to our office that an application for access under *The Freedom of Information and Protection of Privacy Act* had been inadequately responded to with the result that access to the requested information was not provided. In first looking into the matter, we noted the body complained about, the Agassiz Weed Control District, was an entity established by a municipality (in this case the Rural Municipality of Lac du Bonnet), acting with other municipalities under *The Noxious Weeds Act.* The Weed Control District is accountable to the Rural Municipality.

At the time the complaint was lodged with our office under *The Freedom of Information and Protection of Privacy Act,* local public bodies such as rural municipalities did not come under the jurisdiction of that legislation. Even if the Act had applied at the time of application and complaint, boards of weed control districts do not appear to meet the definition of "government agency" that would bring them under the Act. Nevertheless, with the Weed Control District being accountable to the Rural Municipality and with rural municipalities coming under the jurisdiction of *The Ombudsman Act,* our office considered the complaint under *The Ombudsman Act.*

◆ 2000-059X
Sowing the Seeds of Access

The Complainant wrote to our office about a response she had received to a request for information she understood she had made under *The Freedom of Information and Protection of Privacy Act.*

The request was in the form of a letter rather than on the application for access required by the Act. The individual asked for a copy of the file(s) compiled by the Agassiz Weed Control District Board and a Weed Supervisor concerning the Complainant and her husband. The response, from a representative of the Weed Control District, stated:

> *Neither the Agassiz Weed Control District nor myself can supply you with the information in the manner that it has been requested. I am not sure of the proper channel you must take. Your lawyer could best assist you in this regard.*

While it appeared to our office that *The Freedom of Information and Protection of Privacy Act* did not apply to the Weed Control District, we investigated the matter under *The Ombudsman Act.* The Ombudsman may review complaints about administration of municipalities where a person alleges he or she has been aggrieved. We noted that under *The Noxious Weeds Act*, municipalities may create, through a by-law, a Weed Control District and make arrangements with other municipalities to establish and appoint members to a Board. With responsibility of a weed control district vesting in municipalities, the Ombudsman has jurisdiction to consider a complaint about the actions and decision of such a body.

Compliance Investigators from the Access and Privacy Division of our office met with representatives from the Agassiz Weed Control District. At that time, we noted that our office was reviewing this matter under *The Ombudsman Act* and considering it on the basis of internationally recognized fair information practices. These principles of administration include the responsibility of an administrative body to have open and transparent operations and the right of an individual to gain access to information about himself or herself held by an administrative body.

Further to our discussion with the representatives of the Agassiz Weed Control District, we were advised that the majority of the requested records would be released to the Complainant. Subsequently, the Weed Control District released

to the Complainant 162 pages in full and 13 pages with severing. The Complainant advised our office that she was not interested in our considering the severed records as she received the information that she wanted.

This was an example of where information on access and privacy principles and procedures was provided to both the requestor and the administrative body. The Complainant was advised of the limitations of the access and privacy legislation, but made aware of the principles of administrative fairness that are the foundation of that legislation and which should guide all government bodies. Once the administrative body was made aware of the relevant fair information practices, it acted appropriately and in a timely manner with the openness and transparency that are the cornerstone of these practices.

SOCIETY FOR MANITOBANS WITH DISABILITIES INC.

A complaint received in 1999, pertaining to a breach of privacy, related to personal health information as defined under *The Personal Health Information Act* but was handled under *The Ombudsman Act.* The matter could not be considered under *The Personal Health Information Act* because the entity the complaint concerned, the Society for Manitobans with Disabilities Inc., neither came within the definition of a "trustee" nor was it designated as one by a regulation of the Act. The complaint could not be considered under *The Freedom of Information and Protection of Privacy Act* either, as the privacy protections under that legislation do not apply to personal health information to which *The Personal Health Information Act* applies.

The complaint concerned the Parking Permit Program for People with Physical Disabilities which is administered by the Society for Manitobans with Disabilities on behalf of the Province of Manitoba. As the program is administered on behalf of the Province, the Society is accountable to the Minister of Highways and Transportation. This being the case, our office had jurisdiction over the Society under *The Ombudsman Act* and the Access and Privacy Division relied on that legislation to look into the matter.

◆ 99-036X
Not Permitted to Disclose

A complaint was made to the Manitoba Ombudsman regarding the Parking Permit Program administered by the Society for Manitobans with Disabilities Inc. (SMDI) on behalf of the Province of Manitoba (Manitoba Highways and Transportation).

The concern was that an employee of the Program disclosed information about the Complainant to the Workers Compensation Board without the Complainant's consent. The Complainant provided our office with a copy of a fax transmission sheet that indicated a staff member of the Parking Permit Program had faxed copies of the Complainant's medical certification to a physician of the Workers Compensation Board.

Upon receipt of the complaint, enquiries were made with the Program and with the Complainant. The Complainant clarified that he wished to know the policy or procedure of the Program with respect to file confidentiality and the release of information to a third party, and whether this policy was breached in this case.

The Director of the Program advised our office that a disclosure of client information to a third party requires the written consent of the client. We were advised that the policy concerning "Confidentiality and Release of Information" of the SMDI applies to the Parking Permit Program.

Section 5 of this policy provides for "The Release of Client File Information to Third Parties." Specifically, Part II, subsection 5.1 states:

> *5.1 No information will be released from the client file to a third party without the receipt by S.M.D.I., of an appropriate Release of Information form duly signed by the client or parent/guardian and that specifically states the documents requested.*

As written consent for the disclosure was not obtained from the Complainant, this disclosure would have breached the "Confidentiality and Release of Information" policy. We were informed that there was no documentation to indicate why this disclosure was made and that the staff member involved was no longer employed with the Parking Permit Program.

The Director of the Program said that he would be sending the Complainant a letter of apology concerning this incident. Our office was also advised that Program staff were reminded of the importance of client confidentiality and of the policy concerning the disclosure of client information.

LEGISLATION

The purpose of the Ombudsman's Office is to promote fairness, equity and administrative accountability through independent and impartial investigation of complaints and legislative compliance reviews. The basic structure reflects the two operational divisions of the Office:

- Access and Privacy Division, which investigates complaints and reviews compliance under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act.*

- Ombudsman Division, which investigates complaints under *The Ombudsman Act* concerning any act, decision, recommendation or omission related to a matter of administration, by any department or agency of the provincial government or a municipal government.

A copy of the Acts mentioned above can be found on our web site at www.ombudsman.mb.ca