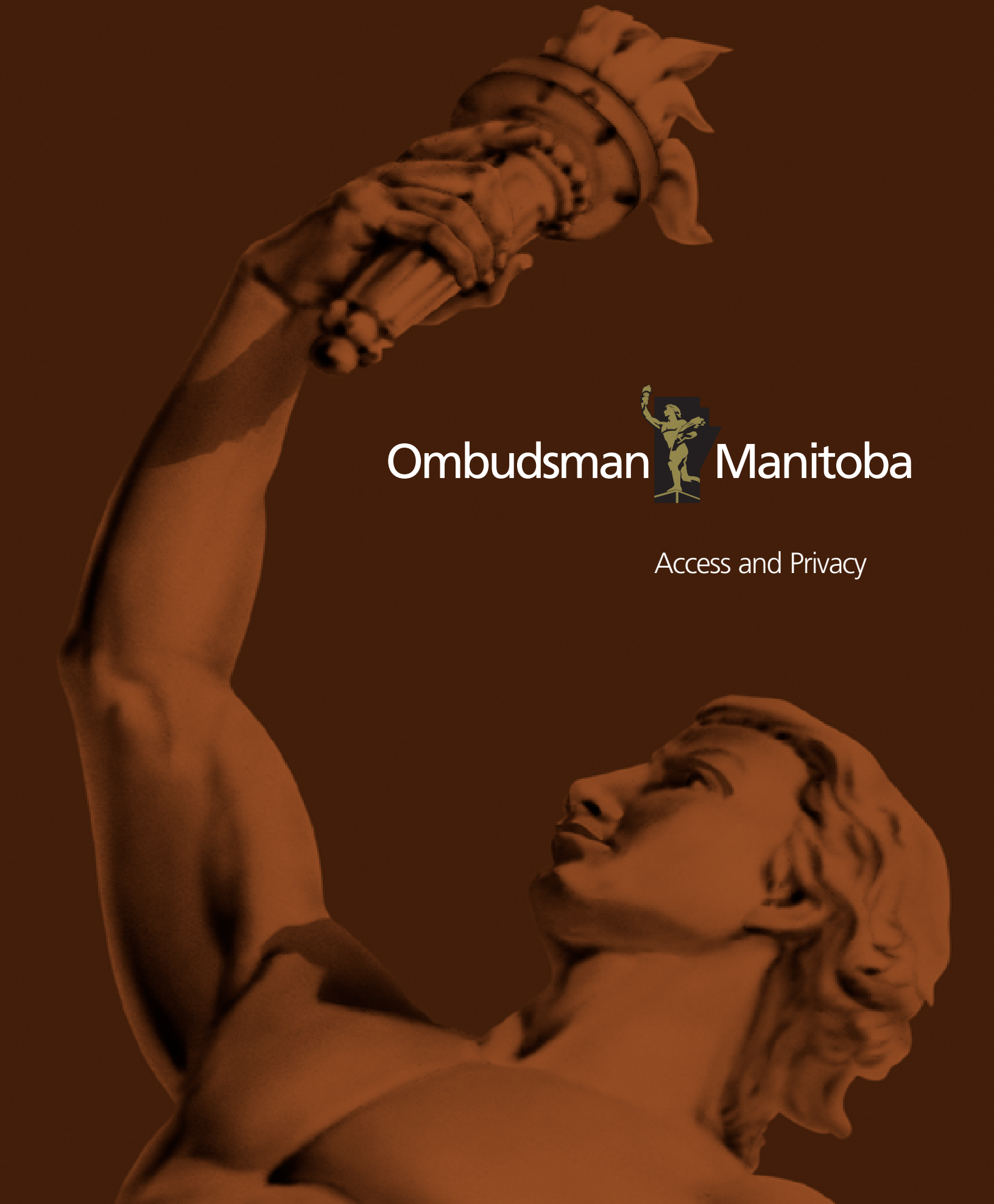
2000 Annual Report



Ombudsman Manitoba

Access and Privacy

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March 2002

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

Dear 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 third Annual Report of the Manitoba Ombudsman under these new statutes, covering the calendar year January 1, 2000 to December 31, 2000.

Yours very truly,

Original signed by

Barry E. Tuckett
Manitoba Ombudsman

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Personnel at December 2000

Access & Privacy Division:

Peter Bower
Executive Director

Gail Perry
Manager, Compliance Investigation

Val Gural
Compliance Investigator

Nancy Love
Compliance Investigator

Carol Markusoff
Compliance Investigator

Darren Osadchuk
Compliance Investigator

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Senior Investigator

Mel Holley
Investigator

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Administration:

Laura Foster
Office Manager

Helen Hicks
Administrative Secretary

Jacquie Laberge
Administrative Secretary

Felicia Palmer
Administrative Secretary

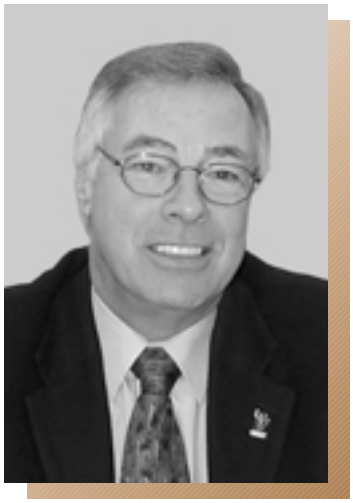
PART 2: *THE PERSONAL HEALTH INFORMATION ACT*

PART 3: *THE OMBUDSMAN ACT*

A Message from the Manitoba Ombudsman

Under Freedom of Information and Privacy Legislation, Canadians are given legal rights that strengthen the fabric of our democratic society. The growth of activity in the enactment and administration of access and privacy legislation across Canada, demonstrates the importance placed on these rights by legislators, government and the public.

During the last two decades, most jurisdictions in Canada have enacted or are in the process of enacting legislation relating to the rights of access to information and to the protection of personal privacy. Most jurisdictions now have or will be undertaking comprehensive public reviews of their access and privacy legislation. To me, this signifies a recognition that such legislation is of important public interest.



Barry E. Tuckett
Manitoba Ombudsman

To respect the principles incorporated under access and privacy legislation, one must recognize that the legislation is not about the provision of a government program or the delivery of a public service. Rather, it is about protecting the rights we enjoy as Canadians, to an open and accountable government, which respects our fundamental right to personal privacy.

At times I believe there is a feeling that the public is apathetic about their access and privacy rights. There is a perception among some that the public doesn't place a great deal of value on those rights when compared to the value of health care, education and some other government services. I suggest that one should not be lulled into a false perception. I have found over the years that when the public feels that rights to access to information or their rights to personal privacy have been violated, people do rise to the occasion and demonstrate the importance they place on these rights.

This point is underscored by the fact that complaints to my office involving access and privacy continue to rise each year. In dealing with these complaints, I have found that government has generally responded well to access and privacy requests and has maintained a commendable standard of compliance. However, there were a few exceptions where complaints were delayed by numerous requests for time extensions, where process was changed for coordinating access requests, and where government responses to requests for information generated an unprecedented volume of complaints to my office.

The Ombudsman's ability to investigate, audit, monitor and publicly report on complaints involving access and privacy rights plays an important role in building public confidence that access and privacy rights are being respected and that the decisions and actions of public bodies and trustees covered under Manitoba's access and privacy legislation are open and accountable.

Protecting and enhancing these rights is especially important at this point in time.

Manitoba proclaimed its first access legislation, *The Freedom of Information Act* in 1988, followed in 1997 by *The Personal Health Information Act* (PHIA), which was the first legislation of its kind in Canada that focused on privacy protection of personal health information. Expanded and enhanced information rights were encorporated into a new Freedom of Information and Protection of Privacy Act (FIPPA), which replaced *The Freedom of Information Act* in 1998. Comprehensive reviews of the legislation must be undertaken by December 11, 2002, respecting PHIA and May 4, 2003, respecting FIPPA. Hopefully these reviews will not only identify and strengthen the public's right of access to information and protection of personal privacy, but will also serve to demonstrate commitment to these rights.

Sincerely

Original signed by

Barry E. Tuckett

2000

Year In Review

ACCESS AND PRIVACY RIGHTS IN THE SPOTLIGHT

The fundamentals of the public's legal access and privacy rights should be on the minds of Manitoba legislators for the next four or five years as several events occur and "deadlines" rise over the horizon:

- **January 1, 2001** – the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) comes into effect to protect the collection, use, and disclosure of personal information by private sector organizations in the course of commercial activities and sold across provincial and territorial boundaries;
- **January 1, 2002** – personal health information is to be drawn within the scope of PIPE DA where applicable;
- **December 11, 2002** – the statutory deadline for Manitoba to undertake a comprehensive review of *The Personal Health Information Act* (PHIA), including public consultations;
- **May 4, 2003** – the statutory deadline for Manitoba to undertake a comprehensive review of *The Freedom of Information and Protection of Privacy Act* (FIPPA); and,
- **January 1, 2004** – PIPEDA will cover the collection, use or disclosure of personal infor mation in the course of any commercial activity in Manitoba, including the provincially regulated sector unless the province passes substantially similar legislation.

ANNOUNCEMENT OF REVIEW

The Government of Manitoba declared its intention on May 19, 2000, to review FIPPA. The Act requires that the process involve public representations and that a report be submitted within a year of the review being initiated or within such further time as the Legislative Assembly may allow. A similar provision in FIPPA's companion legislation, *The Personal Health Information Act* (PHIA), requires a review by December 11, 2002.

Several areas of focus were identified by the news release announcing the review of FIPPA:

- greater enforcement provisions to protect personal information;
- clarified rules of access to confidential advice provided to government versus appropriate research on government policy;
- public access under FIPPA balanced with limited government resources to comply; and,
- consideration of the establishment of a privacy and access commissioner.

Paramount emphasis will be on "enhancement of the ability to enforce personal privacy… to address Manitobans' legitimate concerns about information on citizens held by various provincial government bodies and agencies."

The news release reported that the Minister then responsible for administration of the Act was concerned about an "exceptional level of labour-intensive requests" for information under FIPPA that strained government departments during the months preceding the announcement of the review. The Minister is reported to have stated:

> Hundreds of hours of staff time has gone into attempting to fulfil these requests and even with this effort there have been instances where departments have not been able to comply in a timely manner. This strongly suggests a poor fit between the goals of the law and a reasonable level of dedicated taxpayers' resources.

Eleven months later, the government further announced that a public discussion paper would be issued in 2001. There has been no announcement of a review of PHIA at the time of writing this report.

What are the Purposes of Information Access and Privacy Rights?

Considering the prospect and implications of major legislative activities and decisions involving access and privacy rights in the immediate future, it is opportune to remind ourselves of some of the basic purposes underlying these legal rights in Manitoba.

Access Purposes

FIPPA lays out two express access purposes of FIPPA in section 2. These 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; and,
- 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.

PHIA declares a similar right of access to one's own personal health information in its section 2:

- to provide individuals with a right to examine and receive a copy of personal health information about themselves maintained by a personal health information trustee, subject to the limited and specific exceptions set out in this Act.

Privacy Purposes

Basic privacy purposes of FIPPA include:

- to control the manner in which public bodies may collect personal information from individuals,
- to protect individuals against unauthorized use or disclosure of personal information by public bodies, and
- 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.

PHIA's counterparts are:

- to control the manner in which trustees may collect personal health information;
- to protect individuals against the unauthorized use, disclosure or destruction of per sonal health information by trustees;
- to control the collection, use and disclosure of an individual's PHIN; and,
- to provide individuals with a right to request corrections to personal health information about themselves maintained by a trustee.

Meeting the Purposes

Following from their notable symmetry of purpose, FIPPA and PHIA employ generally parallel wording to provide for independent oversight of compliance with the Acts by the Manitoba Ombudsman. The office investigates complaints and reviews the access and privacy decisions by and the practices of public bodies or trustees.

Broadly speaking, there are two models for compliance oversight of access and privacy rights in Canada. The purposes, methods, and investigative powers are essentially the same, but one has the power to order compliance in certain situations and the other has authority to make recommendations. The first is sometimes called the commissioner or regulatory model; the second is a specialized ombudsman model. Both approaches have ardent advocates and both probably have their greatest strength in the power to bring public scrutiny to bear on issues, practices, and decisions when deemed necessary.

ACCESS MATTERS

The year 2000 was perplexing for our office in relation to provincial government public bodies. On the one hand, various statistical indicators showed many of these public bodies were generally maintaining a commendable standard of compliance with access legislation. On the other hand, at the beginning and end of the year, the government's responses to applications for access by two separate news organizations left us seriously questioning high-level commitment to FIPPA.

The FIPPA Annual Report for the year 2000 by Manitoba Culture, Heritage and Tourism (CHT) is particularly helpful because it provides a number of statistical indicators over a span of time enabling the identification of some trends.[1] Part of this data can also be placed in a national context as a result of an unprecedented study of Canadian access laws that was released in 1998 – *Limited Access: assessing the health of Canada's freedom of information laws*.[2]

The study observed that governments in Canada are more inclined to secrecy than openness despite the spirit and intent of access laws. Specific concern was expressed for Manitoba's then new access and privacy legislation, which "gives institutions more discretion [than the old Freedom of Information Act] to withhold records that relate to Cabinet deliberations and policy advice that is generated by or given to public bodies."[3]

The Good News

The report's statistical information supports a generally positive image of the overall performance of Manitoba's departments and agencies by comparison with those of other jurisdictions in the country. For example, based on data obtained in 1996, Manitoba ranked second at 76% in jurisdictions across the country for full and partial release of information in compliance with the law.[4] Nevertheless, while no later compendium of information for Canada exists, recent statistics for the province show a very notable drop in Manitoba's performance in 1999 with respect to this indicator. In this one year, the percentage of decisions granting access to information in full or in part fell from a ten-year average of 75% to an all-time low of 55%. The figure recovered to 68% in 2000 possibly heralding an upward trend.[5]

Processing time for Applications

Manitoba led the country in terms of meeting statutory time requirements for responding to access requests according to the 1998 report on the health of Canada's freedom of information laws. Data was available for the following six jurisdictions:

Table 1 – Comparative Response Times

JURISDICTION	0-30 DAYS	31-60 DAYS	61+ DAYS
Manitoba	90%	9%	1%
Ontario (Municipal)	90%	7%	3%
Saskatchewan	86%	13%	1%
Alberta	74%	18%	8%
Canada	48%	19%	33%
Ontario (Provincial)	39%	24%	37%
British Columbia	32%	19%	49%

[1] Manitoba Culture, Heritage and Tourism has central administrative responsibilities for FIPPA. The *Annual Report* may be found at http://www.gov.mb.ca/chc/fippa/annualreports/index.html.
[2] Alasdair Roberts, *Limited Access: assessing the health of Canada's Freedom of Information Laws*, Kingston, Queen's University School of Policy Studies, 1998. The report is available at http://faculty.maxwell.syr.edu/asroberts/documents/limitedaccess.pdf.
[3] Roberts, *Limited Access*, p. 9.
[4] Roberts, *Limited Access*, p. 70.
[5] See Chart 1 at the end of this section. It is very important to understand that the partial granting of access does not necessarily indicate substandard performance by public bodies. In fact, it can be an indicator of diligence in the application of legal exceptions to disclosure.

Again, while more recent interjurisdictional information is not readily available, the CHT annual reports show Manitoba's provincial public bodies have consistently maintained a high standard of responding to requests within the statutory time frames.[6]

In the year 2000, the figures for local public bodies (educational, health care, and local government) are also of a high standard: almost 92% responded within the 30-day period, nearly 8% within 60 days, and less than half a percent exceeded the time allowed under FIPPA. This speaks very well of the work of access and privacy personnel within the public bodies.

The Bad News

From an access-to-information perspective, 1999 ended with a crunch and 2000 began on the wrong foot.

A "blanket request"[7] from a member of the broadcast news media for ministerial briefing notes dating from October 6th to October 15th, 1999, was received by several departments less than a month after the provincial election of September 21st. The new Cabinet had been sworn in on October 5th. Between December 8th and 14th, a blanket request from a print journalist was received by most departments for "…a copy of all the briefing notes or similar material supplied to the minister for question period between October 5, 1999 and the date that this request is granted." This, and a blanket request from the same reporter for travel costs and related information for Ministers and the Premier, generated an unprecedented series of complaints to the Ombudsman's Office.

Subsequent investigation of the complaints and our persistent efforts to negotiate resolutions in compliance with the law at high levels of the bureaucracy left us with a very negative impression of the year that overshadowed the generally good work being done by the government's access and privacy coordinators.

The access complaints that started arriving in January 2000 included 28 relating to ministerial briefing notes and eight from a blanket request for costs and other information concerning the travel of various Ministers and the Premier. From these, five complaints were lodged about failure to respond within the 30 days allowed by legislation, 18 for the time extensions taken, two for deemed refusals of access after extensions of 30 days, eight about the calculations of fees, and two for refused access. The Ombudsman supported all but four of these complaints and the complainant discontinued the two about refused access.

In the end, very little was released beyond some travel information, partly because the complainant moved to another continent. This departure interrupted the process before the final question of what information would be released was clearly addressed and resolved. Nevertheless, major effort was expended on a range of issues from the somewhat technical to fundamental matters of principle.

Taking Charge

In the course of our review of the complaints, we learned that the Executive Council Office (ECO) had quickly assumed coordination of the responses from all the public bodies. This supplanted the usual process led by Culture, Heritage and Tourism, the department responsible for central administration of the Act. Thirteen time extensions relating to the request for briefing notes were taken by the ECO. We were told that the reasons for these actions included the need for consultations to ensure consistency of responses, the substantial amount of information implicated, the challenges of transition and pressing priorities for a newly formed administration, and the need to consider the "fundamental questions of principle" raised by the journalist's applications. Details about these cases are provided elsewhere in our *Annual Report*, but some of the issues raised warrant comment here.

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[6] See Chart 2 at the end of this section.

[7] A "blanket request" is a term commonly used to identify one or more applications for access to information that implicate several or all government departments.

We found that the involvement of the ECO impeded the initiative and, in effect, undercut the responsibility of the public bodies to respond to their own requests under the law. Departments began to await and even seek further instructions from ECO. The process of preparing material for release according to the law was undertaken fitfully, if at all. More than a dozen years of accumulated experience with access legislation in the government seemed to have been suspended even though the law is clear and is supported by numerous independent interpretations of its letter and spirit: information is accessible to the public unless it is specifically exempted. Exceptions to access are to be strictly interpreted and applied in the context of access to information being a fundamental public right in support of open and accountable government and of democratic society. Disclosure is the rule, not the exception.

We eventually determined that too little attention was paid to identifying, reviewing and preparing records for release by severing information subject to either mandatory or discretionary exemptions. In fact, it seemed to us that the blanket requests for access were being treated as if exceptions to access could be applied on a blanket basis.

Fundamental Questions of Principle Part I

We were told by the ECO that the requests for access to Ministerial briefing notes raised new and fundamental questions of principle and interpretation that required time to address. In particular, we were informed the concerns involved "…the Cabinet Confidences exception to disclosure [which] incorporates into FIPPA a basic principle and convention of the British Parliamentary system." Without discounting the importance of the concerns about fundamental principles, we simply did not see their relevance under FIPPA as reasons for taking time extensions. We noted our perception that the coordination of the responses to the requests seemed to disrupt an existing process rather than improve it, with the result that we received an unprecedented number of complaints. It also entangled and prolonged the process for reviewing the responses of public bodies and resolving the complaints. Nevertheless, in supporting the thirteen complaints against the public bodies, we expressed the view that those making the decisions in these matters did so believing they were acting appropriately.

Even as we were reporting to the complainant on these time extensions in early October, a request was being received by Manitoba Finance for access to "Attendance records of members of Treasury Board at Treasury Board meetings since October 5, 1999." The access request was denied on the grounds that FIPPA "…establishes mandatory exceptions to disclosure for matters involving Cabinet or committees thereof, such as Treasury Board. Subsection 19(1) of the Act requires the department to refuse access to information that would reveal a cabinet confidence." According to the public body, the requested records fell under the exception "as they are a record of Cabinet which reveal [its] deliberations…[and] as they reflect communications among ministers" relating directly to the making of a government decision or the formulation of government policy. The applicant, a member of the broadcast news media, complained to our office and wrote: "I fail to see how attendance records would reveal 'the deliberations of cabinet….'"

The subsections of the Cabinet confidences exception stem from the opening statement of the section that the "The head of public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet…." As with the complainant, it was not immediately obvious to us how the requested information provided in a severed record or another means would reveal information protected by a mandatory exception. Consequently, we asked the public body to explain further and to provide us with a sample of the records involved, which were Treasury Board Minutes. An 11-page legal background analysis and opinion was provided, most of which offered a "brief history of the concept of 'cabinet confidence'…." An Access and Privacy Officer of Manitoba Finance also urged us to discuss the matter with the ECO in our review of the complaint.

Fundamental Questions of Principle Part II

Subsequent discussions suggested to us that we were, in effect, revisiting the "fundamental questions of principle" apparently raised by the earlier news media request for access to Ministerial

briefing notes. In a nutshell, the applications for access seemed to be regarded as challenges to the parliamentary tradition or concept of Cabinet confidentiality.

It is our opinion that FIPPA quite clearly respects parliamentary conventions or principles such as the collective responsibility of Cabinet, Cabinet solidarity, and Cabinet confidentiality allowing for free and frank discussion of matters. Toward the end of our effort to resolve the complaint informally, the Ombudsman told the public body that he was going to recommend release of the information by severing or by creating a record.

The government responded by creating a record summarizing attendance at regular meetings of Treasury Board by its members. The information was released by a decision of Cabinet under section 19(2)(a), which enables a Cabinet to release a record or information prepared specifically for it. The applicant was informed emphatically in April 2001 that release of the information under this section did not alter the government's conclusion that the information sought comes within section 19(1), the mandatory exception to disclosure.

We have not changed our opinions that the information requested would not and did not reveal a confidence of Cabinet and that FIPPA respects basic parliamentary conventions and principles.

In our view, the positions of the public body and the government on these media requests were not well-founded. However, when assessing the overall performance of provincial departments and agencies in the year 2000, it is important to remember that these situations bracketed many hundreds of applications for access and complaints during the year that were well handled by public bodies.

"Early Alert" Reporting System – Coordination or Control?

On April 6, 2000, it came to our attention that a new form was to be used by all government departments as an "early alert" for reporting the receipt of all FIPPA access requests, whether for general or personal information. Copies of the new form were sent to all Deputy Ministers.

The form was to be completed within 24 hours of receipt of a new FIPPA access request and dispatched to the Government Records Office in Culture, Heritage and Tourism – the department with central administrative responsibilities for the legislation. This office was to fax a copy immediately to ECO.

In addition to tracking data (date, time, departmental contact), the questions posed or information sought through the form included:

a) Applicant's organization and type of applicant (private citizen, media, political party, other)
b) Is the applicant requesting general or personal information?
c) What was requested in the application? Please give exact wording.
d) To your knowledge, did other departments receive this request? If so, which departments?
e) How soon do you expect to respond to this application?
f) Will this be transferred to another department? If so, which department?
g) What is your anticipated approach to responding to this request? (grant access, partial access, deny access, does not exist)
h) Is this the first time your department has received this type of request? If not, give the name of the organization that submitted a similar request in the past.

Apparently the form is not intended to obtain information that would identify an applicant. Indeed, it would be quite inappropriate to identify someone except on a need-to-know and confidential basis. Nevertheless, there is clearly some possibility of inferentially identifying an individual from the other information sought by the form.

Bearing in mind that the form is to be completed within 24 hours of receiving an access request, we wonder about the message being given to access and privacy coordinators through question "g"

above concerning the "anticipated approach to responding to this request." We do not see how an acceptably thoughtful response or opinion could be provided to this question in many situations unless there had been a sufficient review of the records involved, particularly for more complex requests. We are concerned that the question has a bias to become a self-fulfilling prophesy and lends itself to access being directed rather than considered.

In addition, why does every access request have to go through this complete process, especially since response time is often at a premium? We see little virtue, and, in fact, have concerns about including requests for access to one's own personal information unless every care is taken to prevent the disclosure of personal information on the form. We have yet to be convinced that there is a legitimate need for such access requests to be reported routinely in detail on the form except in an aggregate way for statistical reporting purposes. The fact is that public bodies have experience and individual accountability under the legislation for responding to applications.

We presume that the questions on this new form are primarily for the purposes of ensuring timely, complete, and compliant responses, especially for blanket requests. This would be commendable, but we are concerned that the information requirements of the form are excessive and go beyond what is required to administer the legislation. To the best of our knowledge, during the preceding four or five years, the government had handled at least a dozen blanket requests without a barrage of complaints being laid on our office. From this perspective at least, coordination did not seem to have been a significant problem until it was assumed by ECO in December 1999 when the blanket requests for access to Ministerial briefing notes arrived.

From the results of ECO's involvement in the coordination of access requests, it is not clear to us what problem is being addressed by the change in form and process. The news media's perception at the time was clearly that the greater interest was in control of information rather than coordination. The line between control and coordination can be paper thin, at least to perceptions, but it needs to be maintained visibly to ensure the public's confidence in the fair administration of its affairs. We do not have an inherent concern with an early alert system to coordinate responses so long as it does not impede compliance with the requirements of the legislation.

The Costs of Access to Information or What Price Accountability?

The announcement of the government's intention to review FIPPA came at the time that it was dealing with the applications for access to Ministerial briefing notes. The news release referred to "an exceptional level of labour-intensive requests under FIPPA [that] has put a great deal of strain on departments. 'Hundreds of hours of staff time has gone into attempting to fulfil these requests and even with this effort there have been instances where departments have not been able to comply in a timely manner.'" The release stated that one of the major focus points of the review would include "balancing public access under FIPPA with limited government resources available to comply…."

Balancing the public's rights of access to information privacy and the associated costs to the public purse could involve establishing a reasonably accurate value or cost of each element in the scales.

Fees under FIPPA are charged for search and preparation time beyond the first two hours, which are free, for locating and preparing records, computer programming and data processing costs. There is no application fee or charge for time spent by officials in reviewing records to determine if any exceptions to access apply.

Since 1988, government departments and agencies have received more than 6000 applications for information or about 465 a year on average. A total of about $825,000 in costs have been reported by government departments and agencies according to figures available in the *Annual Reports* for FOI and FIPPA distributed by Culture, Heritage and Tourism (CHT). This works out to about $63,460 annually. Fees have brought in nearly $24,000 in total, or about $1,830 annually. The average cost for responding to an application during this period has been about $130. To put this in some perspective, the cost for processing a cheque or a paper invoice in an

organization likely ranges from $35 to more than $100 an item. Costs reflected in CHT's compilations do not include legal counsel, compliance oversight, and court appeals. Typically, expenditures in these areas would increase the full costs substantially. Even so, these figures would have to be placed within in the context of the annual expenditures of the government and its agencies.

Nowhere are fees charged on the basis of a full cost-recovery regime. To do so would be inconsistent with the purposes of access and privacy legislation. It would be counterproductive to pass legislation providing legal access to information rights that encourage transactional openness, democratic accountability, and public involvement in government and then effectively disqualify people by imposing prohibitive fees to exercise the rights. Modest fees are assessed to act more as a mild deterrent to inappropriate use of the legislation and are usually leavened by fee waiver provisions to support equitable access rights for all.

We would suggest that balancing limited government resources with the rights of access to information held in trust by the government on behalf of the public will have to be more than an exercise in bookkeeping. Part of the reckoning must include the admittedly unquantifiable, but nevertheless real social, economic, and political values of the rights of access, and recognition that open and visible accountability plays a critical role in supporting the prudent, professional, and principled conduct of government. Part of the payback is public confidence in the acts and decisions of government.

Expanded Application of FIPPA

While the City of Winnipeg has been covered by FIPPA since August 31, 1998, the remaining local public bodies were brought within the scope of FIPPA on April 4, 2000. These entities – educational, health care, and local government bodies – include more than 370 school divisions, colleges and universities, hospitals and regional health authorities, local government districts, planning and conservation districts

As a notable aside, any of these educational and local government bodies that collects or maintains personal health information also falls under *The Personal Health Information Act* along with health professionals, health care facilities, and health services agencies and are therefore responsible for providing access to personal health information in accordance with the legislation.

The following table shows the distribution of complaints to our office:

Table 2 – Type and Target of Complaint

TYPE OF COMPLAINT	LOCAL PUBLIC BODY (WPG)*	HEALTH CARE FACILITY	HEALTH PROF-ESSIONAL	PROV'L DEPART-MENT	PROV'L AGENCY	NON-JURISDIC-TIONAL	TOTAL
FIPPA Access	13(25)*	0	0	85	31	0	154
FIPPA Privacy	2(2)*	0	0	14	7	2	27
PHIA Access	0	10	8	1	2	0	21
PHIA Privacy	1(1)*	3	8	2	2	0	17
Ombudsman Act (Access)	2	0	0	2	0	0	4
Ombudsman Act (Privacy)	0	1	0	0	0	0	1
TOTAL	**46 [21%]**	**14 [6%]**	**16 [7%]**	**104 [47%]**	**42 [19%]**	**2**	**224**

* *The numbers of complaints against the City of Winnipeg are shown separately in parenthesis.*

About 34% of complaints to our office under FIPPA and PHIA were against local public bodies and health care facilities and professionals (both trustees under PHIA). Inasmuch as the local public bodies came under FIPPA for only three-quarters of the year under review, it is premature to suggest trends from the statistical indicators available in the FIPPA *Annual Report* for the year 2000.[8] Nevertheless, we note that of the 244 applications for access to information under FIPPA, there were 36 complaints to our office, or just under 15%.

PRIVACY MATTERS

Once the privacy of one's personal information has been compromised or lost, it can rarely be satisfactorily redeemed. Legislation protecting personal privacy therefore places an emphasis on preventive measures to control the collection, use, disclosure, retention, and disposition of personal information as well as on its security and protection. The explosive growth of recent years in the use and capabilities of electronic technologies to capture, store, manipulate, generate, and communicate vast amounts of information, virtually unconstrained by borders, has brought both benefits and risks to the public.

Having the right information available at the right time in the right place has never seemed more possible with all sorts of perceived benefits for people in the provision of goods and services by both the public and private sectors of society. Personal privacy is also being challenged as never before by these developments because personal information is often at the centre of providing more efficient and personalized services or benefits in sectors involving health, financial, educational, promotional, solicitation, and commercial activities.

The Number and Nature of Privacy Complaints

While the number of complaints about access to general information continued to be the largest, complaints arising from personal information access and privacy matters have risen to 30% of the total in 2000 – an increase of about 5% over the previous year.[9] Our operational experience mentioned in our 1999 *Annual Report*, was reinforced: *overall, privacy issues are proving to be the most time-consuming to investigate probably because of their intimate and particularistic nature*.

We are also seeing what appears to be evidence in Manitoba that public concerns about privacy are often class defined and usually based on concrete individual experience rather than on principle. This seems to reflect the results and analysis of a national privacy opinion poll published in 1995 by The Public Interest Advocacy Centre. The survey examined, among other things, people's perceptions of the likelihood of being beneficially or adversely affected by an action taken or a decision made on the basis of information gathered by an organization. Analysis of the results included:

> The most noticeable cleavage is along class lines. Opinions about invasiveness and justification often vary with income and education, but also with age. For instance, higher-income respondents will be more concerned about charities making uninvited solicitation calls and selling their donor lists, whereas lower-income respondents are more concerned about banks requiring their employment status in order to simply open a bank account or about Revenue Canada sharing information to prevent fraud. This is further evidence that Canadian's assessments tend to be personalized and situation-specific, as opposed to general, sweeping and abstract.[10]

The authors of the study admonish policy and decision makers – including top executives, personal information system designers, data protection coordinators, privacy commissioners and

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[8] Some statistics relating to the use of FIPPA in relation to these entities are provided by the FIPPA *Annual Report 2000* printed and distributed by Culture, Heritage and Tourism. The report is also available at http://www.gov.mb.ca/chc/fippa/annualreports/index.html

[9] See Chart 3 at the end of this section.

[10] Philippa Lawson and Marie Vallée, "Canadians Take Their Information 'Personal'", *Privacy Files*, v. 1, n. 1 (October 1995) p.7. A number of their survey findings are notably similar to those of the Australian Federal Privacy Commission's recent study: *Privacy and the Community, July 2001*. See http://www.privacy.gov.au/publications/rcommunity.html.

judges – that, "...to avoid class biases, they must be rigorous in their scrutiny of practices and sensitive to the perspectives of data subjects, when deciding... about the appropriateness of information management practices."[11]

Both *The Personal Health Information Act* (PHIA) and *The Freedom of Information and Protection of Privacy Act* (FIPPA) place onerous duties on our office in addition to handling complaints from the public. These other duties are, in effect, aimed at trying to avert breaches of the privacy provisions of the statutes. In other words, we have pro-active responsibilities to audit, monitor, comment, undertake research, review, inform the public, and make recommendations to help achieve the purposes of the legislation. Formal complaints from the public often do not identify systemic issues or major public interest problems in-the-making on a timely basis.

We must use our knowledge and judgement to identify matters that require investigation in addition to public complaints. One such initiative we began in 1998 was to develop a self-assessment tool for Manitoba public bodies and personal health information trustees. This tool, a Privacy Impact Assessment (PIA), was to be made available so that entities could use it to evaluate their own compliance with privacy legislation. As we noted in our *Annual Report* for 1999, we had to constrain our development of the PIA because of the increasing volume and complexity of complaints. Work did not resume in 2000 notwithstanding clear need or demand by public bodies and trustees.

The Changing Privacy Environment

Royal Asset was given in April 2000 to federal Bill C-6, the *Personal Information Protection and Electronic Documents Act* (PIPEDA). It was to come into force on January 1, 2001. This legislation applies to personal information collected, used, or disclosed by private sector organizations in the course of commercial activities and extends to personal information sold across provincial and territorial boundaries. For three years, the legislation will apply to federally regulated businesses only, and then it will be extended to all provincially regulated businesses unless a province has enacted substantially similar legislation.

Personal health information is to be covered starting on January 1, 2002. Manitoba, of course, has had personal health information legislation in place since late 1997. The degree of consistency and "harmony" between the federal and provincial statutes will not be really known until specific situations arise that test this question.

While personal information privacy protection will not be made seamless for Manitobans by this federal initiative, it will place significant requirements for the better management of information moving across borders in ways provincial jurisdictions cannot. In response to Bill C-6, the government of Manitoba issued a discussion paper in March of 1999, *The Protection of Personal Information in the Private Sector*, and conducted some public meetings in April and May.[12] The public consultation process was to conclude September 30, 1999. As it happened, a provincial election called for September 21 interrupted this process designed to help the province make its decision about whether to bring in substantially similar provincial legislation, to let the federal legislation take hold, or to challenge federal authority to legislate in the matter at the provincial level. At the time of writing our *Annual Report* for 2000, the direction of the provincial government was not known publicly.

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[11] *Surveying Boundaries: Canadians and their personal information*, Ottawa: Public Interest Advocacy Centre, September 1995) p. 9.
[12] The paper and other information, including synopses of submissions is available on line at: http://www.gov.mb.ca/cca/rtb/report/protect.html

COMPLIANCE MATTERS

Statistical Indicators

In analysing access and privacy activity statistics available for Manitoba, it is important to note, among other things:

- that a wider variety of figures are gathered for provincial departments and agencies under FIPPA than for local public bodies;
- that local public bodies, except for Winnipeg, have been under FIPPA for only part of the year 2000;
- that there are fewer statistics available for public bodies and personal health information trustees operating under PHIA; and,
- that the portrayal of trends over time may be somewhat distorted by the proclamation of new privacy rights under PHIA (1997) and FIPPA (1998) following a decade of experience with access to information rights under the old Freedom of Information Act.

Targets of Complaints

The principal targets of complaints to the Ombudsman's Office in 2000 under FIPPA and PHIA are shown in Chart 4.[13] Approximately two thirds of the complaints were aimed at provincial government departments and agencies with the remainder made up of local public bodies at 19%, health professionals at 7%, and health care facilities at 6%. These proportions do not in themselves indicate how these entities performed under the legislation and cannot be seen as a trend indicator in the absence of such information over time.

Some Worrying Indicators

During the past three years, the "rate of complaint"[14] for provincial government departments and agencies has nearly doubled the average of the preceding decade where access to requested information has been denied or partly granted. This could suggest that people are becoming less inclined to accept or to trust public body decisions with which they disagree. This interpretation seems to be complemented by the rise in the rate of complaints in relation to the total number of access applications from 11% to 22% for the same periods respectively.[15] It could also indicate, among other things, that the decisions being made by the public bodies are becoming more rigorous, less generous or that the public is demanding more information that is legally excepted from disclosure.

Our office reviews complaints and issues, acts and decisions, from an impartial perspective. From this vantage, it seems plausible that the access and privacy practices of well-informed, motivated, and committed public bodies would more often than not reflect the spirit and letter of the legislation. From 1988 to 1997, our office supported the access-to-information decisions of provincial public bodies more than half the time -- in better than 61% of the cases on average. Notwithstanding the ebb and flow of the data portrayed by Chart 7, it troubles us that this figure has dropped to 42% on average for 1998-2000 and that for the first time, two years in a row have been well under 50%.[16]

Rising Complaints and Backlogs

While statistics do not tell whole stories, changes in the numbers of access and privacy complaints opened and closed by our office are significant indicators of activity. Chart 5, "Complaint Cases

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[13] Chart 4 is at the end of this section.
[14] The "rate of complaint" compares the total number of complaints opened against the number of applications for access received by public bodies, excluding applications that were not dealt with for one reason or another (abandoned, withdrawn, etc.).
[15] See Chart 6 at the end of this section.
[16] See Chart 7 at the end of this section.

Opened, Closed, Pending and Carried Over", illustrates changes since 1988 under *The Freedom of Information Act* through 1997 and 1998 when PHIA and FIPPA were proclaimed bringing new privacy rights for the public and new duties and responsibilities for our office.[17]

A steep upward trend in the number of new complaint cases began in 1997. From 1988 to 1996, an average of 41 cases a year was opened, 39 were closed, 11 were pending completion (total backlog), and 9 were carried over to the next year. From 1997 to 2000, an average of 143 cases annually was opened, 116 closed, 67 were backlogged, and 55 were carried forward.

The total number of cases opened in 2000 was 224, 170 were closed, 119 formed the backlog, and 91 cases were carried forward to 2001. Of particular concern to us, completion of cases was taking an average of 4.5 months beyond the statutory time limit for investigation and reporting by our office.[18] This compared with three months in 1999.

Information and Educational Activities

The Ombudsman has statutory duties to inform the Legislature and the public about the Office's access and privacy work. Discharging these responsibilities requires well informed staff supported by access to current information and analyses through print and electronic sources, by monitoring current affairs in the context of an information world without borders, and direct or indirect discussions with persons working in the many-faceted environment of information access and privacy.

The Ombudsman and Office staff undertake numerous presentations and speaking engagements in the course of the year. In 2000, these activities involved special interest and private organizations of various types; health care professionals, administrators, audit and security specialists, health information managers; and local and provincial government departments and agencies. Several presentations were also made to high school and university classes, both graduate and post-graduate.

A variety of informative access and privacy seminars or conferences were attended both inside and outside Manitoba. Reflecting the contemporary focus nationally and internationally on the protection of personal information, most of the sessions attended dealt with privacy matters in relation to issues in health, law, human rights, electronic and paper information management and security, government on-line, and research.

In addition to the educational and training opportunities provided by the seminars and conferences, the Ombudsman and various staff members also gave presentations dealing with the role and functions of oversight offices, the legislative principles of PHIA and FIPPA, and experience-based analyses of the administration of access and privacy legislation.

For some years, the federal-provincial-territorial commissioners and ombudsman with oversight responsibilities for access and privacy legislation across Canada have met at least annually to discuss common issues, specific developments, and emerging strategies. Reflecting our federal system, these meetings have become an important internal communication process contributing to the maintenance and development of information access and privacy standards in the country. In 2000, our Office hosted the meeting in Winnipeg.

Our web site in the two official languages was launched in August 2000: http://www.ombudsman.mb.ca. It is a "cookie-free" site. For reasons of confidentially, we do not advise the use of e-mail for submitting complaints or communicating about matters under review. Soon after the appearance of our web site, we received a heartening volume of positive comments about its content, utility, and user friendliness. We welcome suggestions for improving the site.

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[17] See Chart 5 at the end of this section.

[18] Under FIPPA, a complaint investigation must be completed and reported upon within 90 days of the complaint being made. Under PHIA, the investigation must be completed within 45 days for access complaints and 90 for privacy. Both Acts permit the Ombudsman to extend the date for completion to an anticipated date if the Ombudsman gives notice to the parties concerned.

The site includes background on the Ombudsman's Office and basic information about the application and use of the three statutes central to the oversight mandate of the Ombudsman: *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act,* and *The Ombudsman Act*. Copies of the legislation, various annual and other reports and publications, Frequently Asked Questions, and links to other sites are among the features of the site.

Another important step in our communications strategy was taken with the production of two new bilingual brochures on the Office. One features information access and privacy rights and investigations under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act*; the other deals with investigations under *The Ombudsman Act* and promoting administrative fairness, equity and accountability.

FINAL WORDS

Reviews of legislation dealing with such fundamental public rights as information access and privacy are landmark events every time they occur in a democracy.

Information has become the sustenance, currency, and measure of democratic institutions and commercial enterprise. It seems axiomatic that improvement of legal information rights and information practices go hand-in-hand with better and more responsive governance and business. Regular and comprehensive reviews of statutes dealing with access and privacy are necessary to ensure that they continue to reflect societal and personal values to preserve or refresh the original spirit and intent, to determine if they are adapting satisfactorily to changing circumstances such as technology, and to correct or adjust technical or administrative deficiencies that may appear in any legislation put into practice.

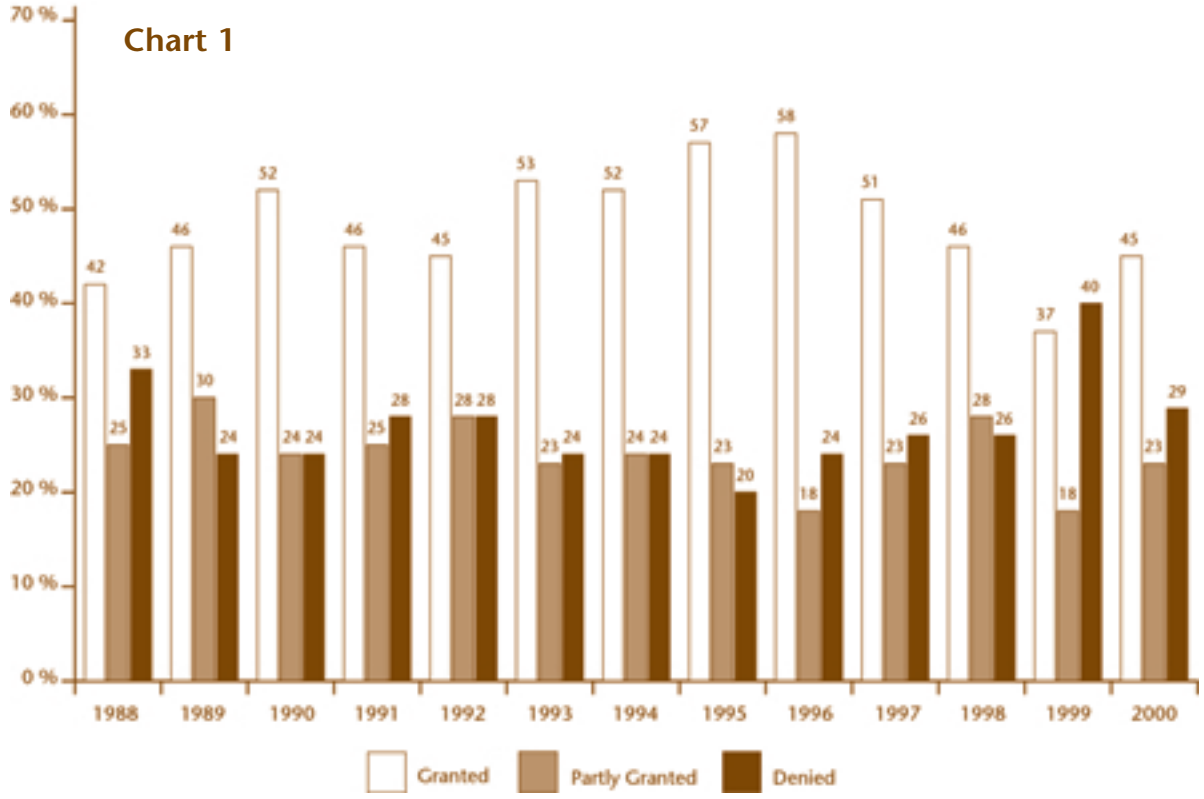
PHIA became the benchmark for legislation protecting personal health information when it passed the Manitoba Legislature in 1997. By the end of 2000, Saskatchewan, Alberta and Ontario were each at different stages in getting such legislation on the books. They had the advantage of examining and analysing PHIA while preparing their own personal health information protection legislation, but none proclaimed such statutes. Perhaps when PHIA is reviewed, Manitoba's legislators will benefit from the work and experience of other provinces that may have proclaimed personal health information legislation by then.

FIPPA received Royal Assent in 1997, marking the first major revision of Manitoba's access legislation since it was passed in 1985. During the government's struggle with fundamental principles relating to various applications for information in 2000, it became clear that there would be a focus on some of the access provisions when the Act was reviewed. This should be useful, since information privacy protection rather than access was the central concentration in developing FIPPA to replace Manitoba's Freedom of Information Act passed in 1985. While this review is going on, the federal experience with developing and implementing the *Personal Information Protection and Electronic Documents Act* may also influence how Manitoba finally decides to approach the protection of personal information in the private sector.

In a democratic society, there is no greater accountability mechanism than public scrutiny of decisions made and actions taken by the elected representatives of the people. At the same time, protection of personal privacy guards fundamental individual and societal values such as personal autonomy, freedom, and human dignity. These complementary rights of access and privacy are basic to the means of knowing, for self determination and personal autonomy, and are at once hallmarks and underpinnings of free, compassionate and democratic societies.

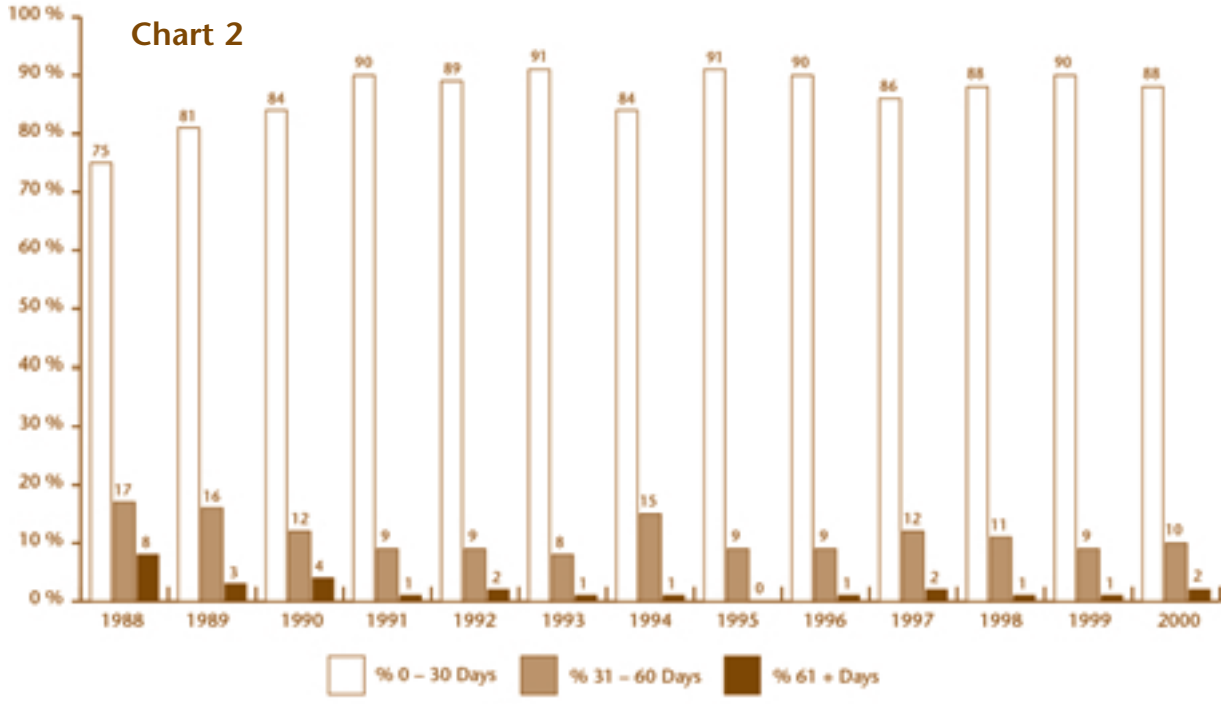
Access Decisions under FOI/FIPPA, Provincial Departments and Agencies

Chart 1



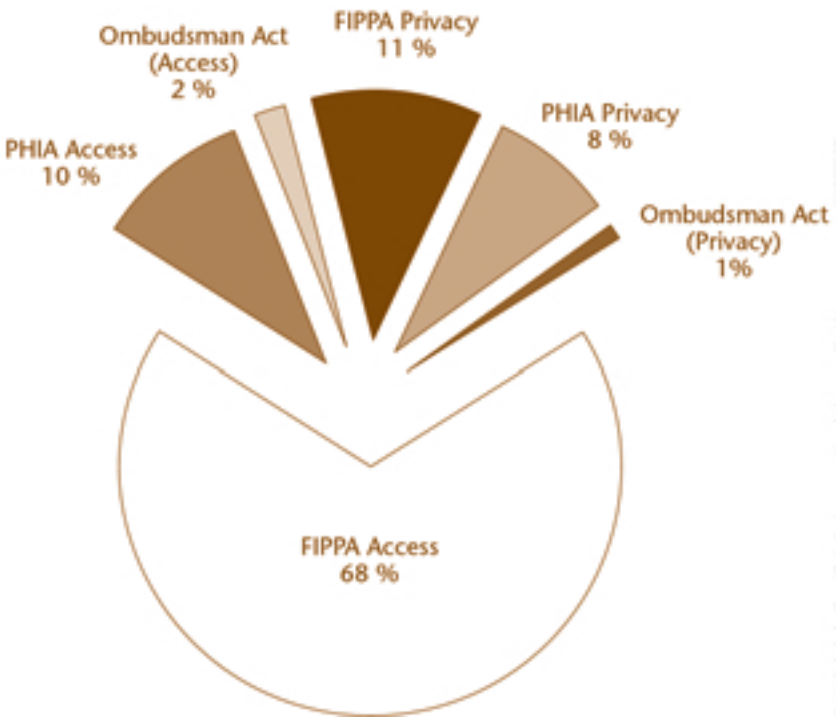
Time for Responding to Access Requests, Provincial Departments and Agencies

Chart 2



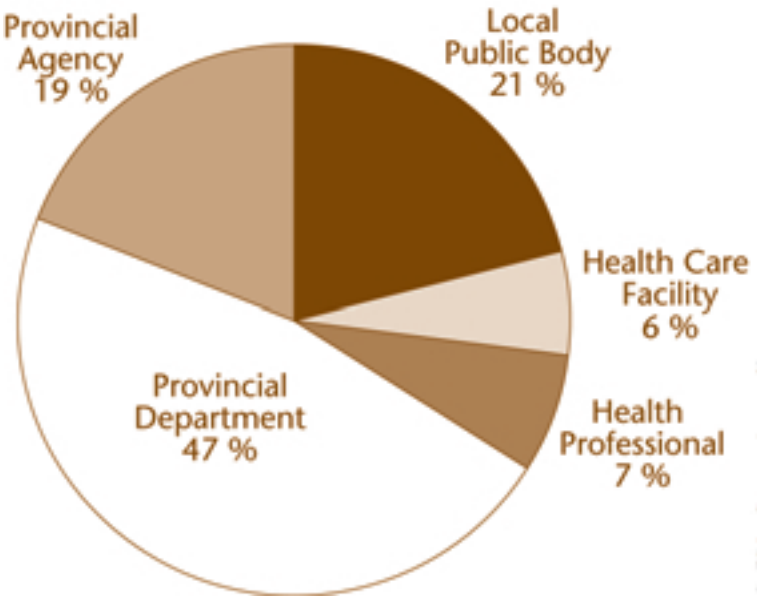
Types of Complaints in 2000

Chart 3



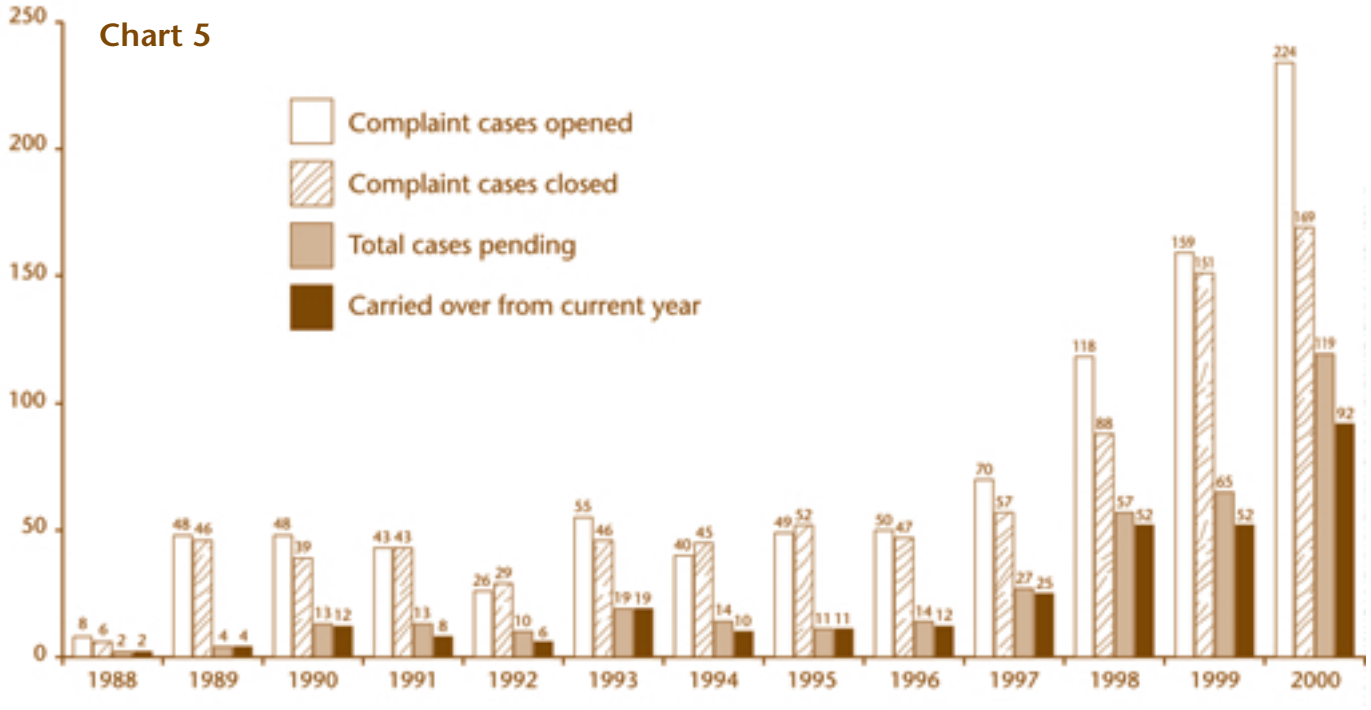
Targets of Complaints in 2000

Chart 4



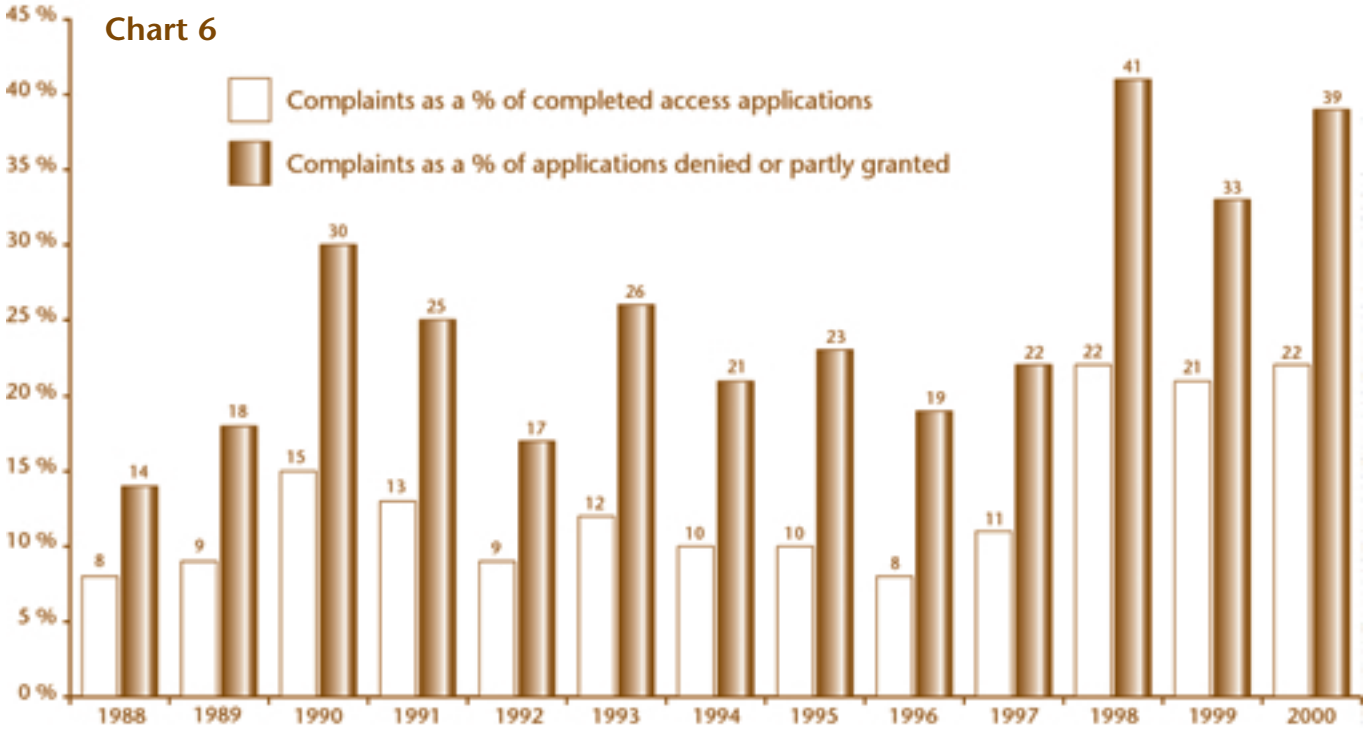
Complaint Cases Opened, Closed, Pending and Carried Over

Chart 5

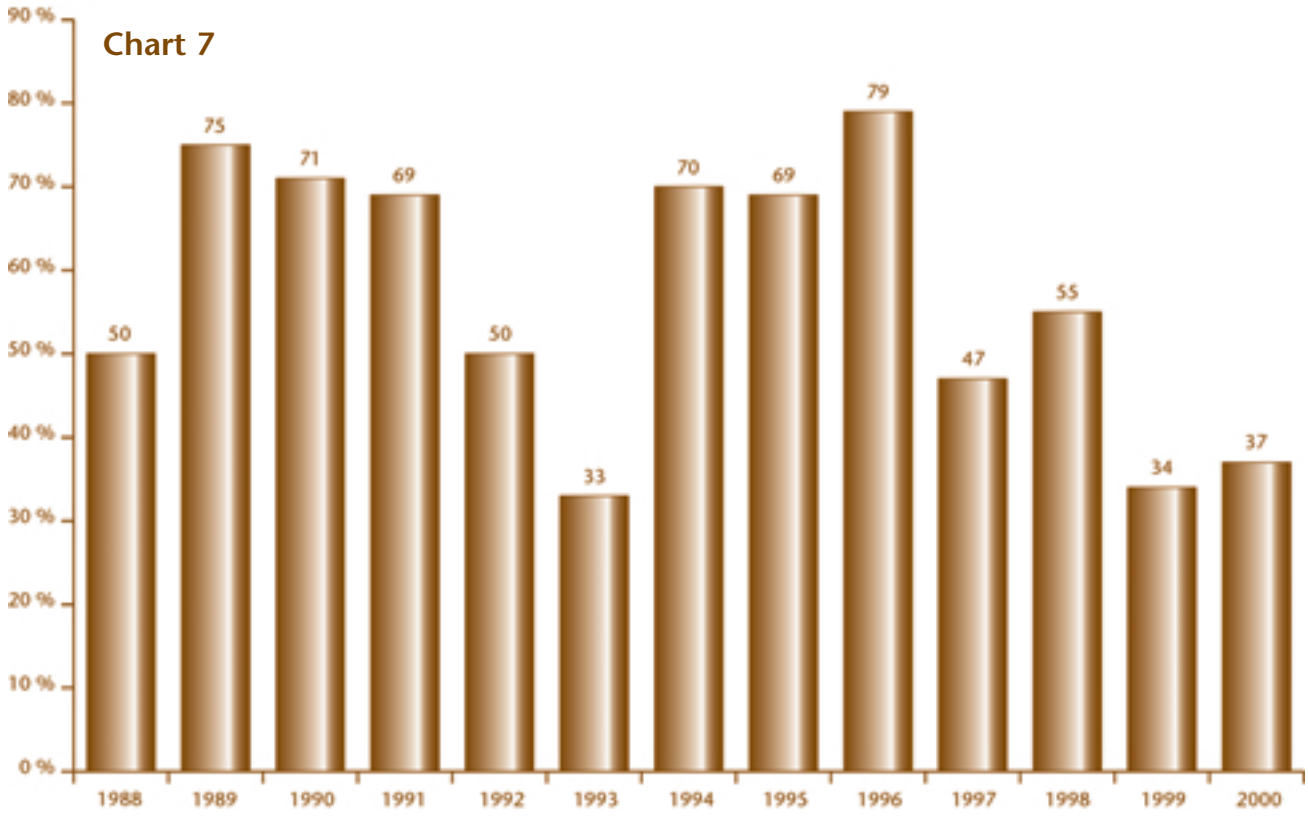


Rates of Complaint for Provincial Departments and Agencies

Chart 6



Percentage of Complaint Reviews Supporting Public Body (Provincial Government Departments and Agencies)



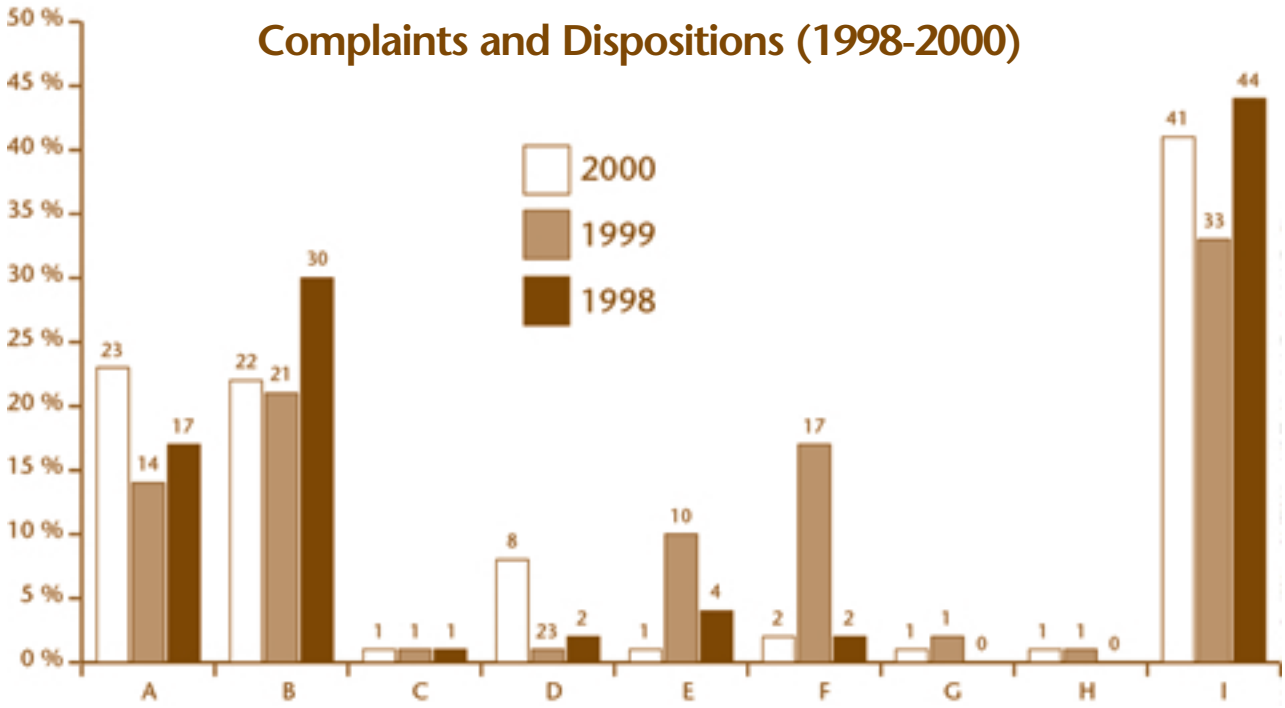
2000

Statistical Information

Complaints and Dispositions in 2000

Two hundred twenty-four access and privacy complaints were received by our office in 2000. Of these, 133 were closed and 91 were carried forward to 2001. Our office also closed three cases carried over from 1997, four from 1998 and thirty carried over from 1999. In total, 170 complaint cases were closed in 2000.

The disposition of the 224 access and privacy complaints received in 2000 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, 2001.

Source of Complaints

Community	Number
Anonymized Community*	15
Belair	1
Brandon	1
Camp Morton	2
Carman	1
East St. Paul	1
Flin Flon	1
Ile des Chenes	2
Lac du Bonnet	1
Lorette	1
Minnedosa	1
Morden	1
Morris	1
Oak Bank	1
Roblin	1
Russell	1
St. Andrews	1
St. Norbert	3
Strathclair	1
Winkler	1
Winnipeg	175
Canmore (Alberta)	1
Edmonton (Alberta)	1
Kimberly (British Columbia)	1
Vancouver (British Columbia)	2
Don Mills (Ontario)	1
Hamilton (Ontario)	1
Toronto (Ontario)	2
Hubbards (Nova Scotia)	2
TOTAL	**224**

Note: *Naming this small community could identify the complainant.

Complaints Received in 2000 by Category and Disposition Under *The Freedom of Information and Protection of Privacy Act*

Department or Catagory	Total	Declined	Discont'd (Client)	Discont'd (Omb)	Infor-mation Supplied	Not Supported	Supported or Partially Supported	Recomen-dation	Pending
Public Body									
Aboriginal and Northern Affairs	**2**	-	-	-	-	-	2	-	-
Agriculture & Food	**6**	-	-	-	-	1	4	-	1
Civil Service Commission	**1**	-	-	1	-	-	-	-	-
Conservation	**20**	-	1	-	-	5	5	-	9
Consumer and Corporate Affairs	**5**	-	-	-	-	-	2	-	3
Culture, Heritage and Tourism	**4**	-	-	-	-	1	-	-	3
Education and Training	**2**	-	-	-	1	-	1	-	-
Executive Council	**6**	-	-	-	-	1	3	-	2
Family Services & Housing	**8**	-	-	1	-	2	1	-	4
Child & Family Services of Central Manitoba	**1**	-	-	-	-	-	-	-	1
Child & Family Services (Unidentified Region)	**1**	-	-	-	-	-	-	-	1
Winnipeg Child and Family Services	**1**	-	-	-	-	1	-	-	-
Finance	**4**	-	-	-	-	2	1	-	1
Health	**7**	1	-	1	-	2	3	-	-
Highways and Government Services	**5**	-	-	-	-	2	3	-	-
Intergovernmental Affairs	**6**	-	-	2	-	-	1	-	3
Industry Trade and Mines	**3**	-	-	-	-	-	2	-	1
Justice	**14**	-	-	1	-	1	2	-	10
Labour	**6**	-	-	1	-	1	1	2	1
Human Rights Commission	**1**	-	-	-	-	-	1	-	-
Hydro	**1**	-	-	-	-	-	-	-	1
Manitoba Lotteries Corporation	**1**	-	-	-	-	-	-	-	1
Manitoba Public Insurance	**8**	-	-	-	-	4	-	-	4
Workers Compensation Board*	**24**	3	-	1	-	6	-	-	14
Local Public Body									
City of Winnipeg	**27**	1	-	1	-	8	9	-	8
R.M. of Cartier	**1**	-	-	-	-	-	-	-	1
R.M. of Lac du Bonnet	**1**	-	1	-	-	-	-	-	-
R.M. of Ritchot	**1**	-	-	-	-	-	-	-	1
R.M. of Rosser	**2**	-	-	-	-	-	-	-	2
R.M. of St. Andrews	**1**	-	-	-	-	-	1	-	-
R.M. of St. Clements	**1**	-	-	-	-	-	-	-	1
R.M. of Tache	**1**	-	-	-	-	-	-	-	1
Evergreen School Division	**2**	-	-	-	-	2	-	-	-
Lord Selkirk School Board	**1**	-	-	1	-	-	-	-	-
University of Manitoba	**1**	-	-	1	-	-	-	-	-
Seven Oaks General Hospital	**1**	-	-	-	-	-	-	-	1
St. Boniface General Hospital	**1**	-	-	1	-	-	-	-	-
Winnipeg Regional Health Authority	**1**	-	-	-	-	-	1	-	-
Not a Public Body	**2**	-	-	2	-	-	-	-	-
Total	**181**	**5**	**2**	**14**	**1**	**39**	**43**	**2**	**75**

Note: *Of the 24 complaints, 12 were filed by one individual and 10 were filed by another individual.

Complaints Received in 2000 by Category and Disposition Under *The Personal Health Information Act*

Department or Catagory	Total	Declined	Discont'd (Client)	Discont'd (Omb)	Not Supported	Supported or Partially Supported	Recomen-dation	Pending
Public Body								
Education and Training	**1**	-	-	-	-	-	-	1
Health	**1**	-	-	-	-	-	-	1
Justice	**1**	-	-	-	1	-	-	-
Winnipeg Child and Family Services	**1**	-	-	-	1	-	-	-
Manitoba Public Insurance	**1**	-	-	-	1	-	-	-
Workers Compensation Board	**2**	-	-	1	1	-	-	-
Local Government Body								
City of Winnipeg	**1**	-	-	-	1	-	-	-
Winnipeg Regional Health Authority	**1**	-	-	-	-	-	-	1
Health Care Facility								
Cancer Care Manitoba	**1**	-	-	-	1	-	-	-
Grace General Hospital	**3**	-	-	-	-	2	-	1
Health Science Centre	**1**	-	-	1	-	-	-	-
Misericordia Health Centre	**1**	-	-	-	-	-	-	1
Morden Medical Centre	**1**	-	-	-	-	-	-	1
River View Health Centre	**1**	1	-	-	-	-	-	-
St. Boniface Clinic	**2**	-	-	-	-	1	-	1
Seven Oaks General Hospital	**1**	-	-	-	1	-	-	-
Victoria General Hospital	**2**	-	-	2	-	-	-	-
Health Professional								
Chiropractor	**5**	-	-	-	1	-	-	4
Medical Doctor	**4**	-	-	-	-	3	-	1
Optometrist	**1**	-	-	-	-	-	-	1
Psychiatrist	**6**	-	-	-	2	2	-	2
Total	**38**	**1**	-	**4**	**10**	**8**	-	**15**

Complaints Handled by The Acces and Privacy Division in 2000 by Category and Disposition Under *The Ombudsman Act*

Department or Catagory	Total	Assist Rendered	Declined	Discont'd (Client)	Discont'd (Omb)	Infor-mation Supplied	Not Supported	Supported or Partially Supported	Recomen-dation	Pending
Eden Mental Health Centre	**1**	-	-	-	-	-	-	-	-	1
Health	**1**	1	-	-	-	-	-	-	-	-
Justice	**1**	-	-	-	-	-	1	-	-	-
R.M. of Lac du Bonnet	**1**	-	-	-	-	-	-	1	-	-
R.M. of Rosser	**1**	-	-	-	-	1	-	-	-	-
Total	**5**	**1**	-	-	-	**1**	**1**	**1**	-	**1**

Complaints Carried Over from Previous Years by Category and Disposition

There were fifty-two access and privacy complaints carried over to 2000 from 1999, 10 from 1998 and 3 from 1997. Of these 65 complaints, twenty-eight were carried over to 2001 and thirty-seven were concluded as follows.

Department or Catagory	Total	Declined	Discont'd (Client)	Discont'd (Omb)	Not Supported	Supported or Partially Supported	Recomen-dation	Pending
The Freedom of Information and Protection of Privacy Act								
Public Body								
Civil Service Commission (1998)	**2**	-	-	-	-	-	-	2
Consumer and Corporate Affairs	**1**	-	-	-	-	-	-	1
(1998)	**1**	-	-	-	-	-	-	1
Environment	**1**	-	-	-	-	-	-	1
Family Services	**3**	-	-	-	-	-	-	3
Finance	**1**	-	-	-	-	1	-	-
(1998)	**2**	-	-	-	-	-	-	2
Government Services	**2**	-	-	-	-	-	-	2
Highways and Transportation	**1**	-	-	-	-	-	-	1
Justice	**4**	-	-	-	-	-	-	4
(1998)	**4**	-	-	-	4	-	-	-
(1997)	**3**	-	-	-	3	-	-	-
Manitoba Public Insurance	**2**	-	-	-	1	1	-	-
Natural Resources	**3**	-	-	-	-	1	-	2
Rural Development	**1**	-	-	-	-	1	-	-
Workers Compensation Board	**11**	-	-	-	10	1	-	-
Local Public Body								
City of Winnipeg	**2**	-	-	-	1	-	-	1
(1998)	**1**	-	-	-	-	-	-	1
The Personal Health Information Act								
Public Body								
Addictions Foundation of Manitoba	**1**	-	-	-	-	-	-	1
Manitoba Public Insurance	1	-	-	-	-	-	-	1
Workers Compensation Board	1	-	-	-	1	-	-	-
Local Government Body								
City of Winnipeg	1	-	-	-	-	-	-	1
Health Care Facility								
Assiniboine Clinic	1	-	-	-	-	-	-	1
Health Sciences Centre	**3**	-	-	-	-	-	1	2
Middlechurch Home	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	-
The Ombudsman Act								
Health Care Facility								
Eden Mental Health Centre	1	-	-	-	-	1	-	-
Justice	1	-	-	-	-	1	-	-
Labour	1	-	-	-	1	-	-	-
Manitoba Public Insurance	1	-	-	-	1	-	-	-
Rural Development	1	-	-	-	-	-	-	1
Workers Compensation Board	1	-	-	-	1	-	-	-
Total	**65**	-	-	**1**	**23**	**7**	**6**	**28**

Note: *The names of these health professionals were made public in the news media and in our 1999 Annual Report.

Part 1:

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

☑ PUBLIC BODIES

☐ LOCAL PUBLIC BODIES

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

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 Counsel.

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 and a record made by or for an Officer of the Legislative Assembly, such as the Manitoba Ombudsman. The following Manitoba statutes or particular sections of these Acts 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 opened files in 2000 that we termed "special investigations". These generally related to broader or systemic issues arising from a complaint or concern that has come to our attention.

In May 2001, the Access and Privacy Division of our office was restructured into two groups, the Compliance Investigation Group and the Compliance Review Group. This demarcation was designed to counterbalance the relentless pressure of formal complaints under Part 5 of the Act ("Complaints") to absorb all available staff resources of the Division to the detriment of the major and pressing duties under Part 4 of the Act.

The Compliance Investigation Group, consisting of four Compliance Investigators and a manager, concentrates on individual complaints received under Part 5 of *The Freedom of Information and Protection of Privacy Act*, including some initiated by the Ombudsman. The Compliance Review Group, comprised of two Compliance Investigators and one manager, focuses on systemic complaints under Part 5 of the legislation, involving multiple public bodies, and exercises powers and duties of the Ombudsman under Part 4 of the Act. At the time of writing this Annual Report, the groups' responsibilities are in transition, with the effect that the Compliance Review Group is not exclusively exercising its intended role.

OUR INVOLVEMENT IN 2000

In 2000, our office received 181 complaints under *The Freedom of Information and Protection of Privacy Act*, 137 of these against public bodies, that is provincial government departments and agencies.

Following are selected case summaries from 2000, relating to provincial government departments and agencies. The significant technical and substantive challenges to the legislation that opened and closed the year 2000 are addressed under the heading "Executive Council/Manitoba Finance". The three other case summaries in this section concern information access and privacy issues relating to deceased individuals. All of these summaries reveal some of the detail involved in the investigation of access to information and privacy cases. Evident patterns and our views on the measure of compliance generally in 2000 are discussed in this Annual Report under "Year in Review".

Manitoba Consumer and Corporate Affairs

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

Commenting on an issue enables our office to provide guidance to a public body, and then prepare a written account of our findings. Where the office concludes that a practice or procedure does not comply with the legislation, we would include this opinion in our comment. The public body would then be provided with an opportunity to respond to our position. If, upon consideration of the response, our office continues to hold that the public body is not in compliance, we would decide whether a further investigation or recommendation is required.

As an example, the following is the background and a summary of a comment we provided to Manitoba Consumer and Corporate Affairs in 2000. This matter exemplifies the role of the Privacy Assessment Review Committee, a body under *The Freedom of Information and Protection of Privacy Act* established by the Minister responsible for the Act to provide advice, in specific circumstances, to the head of a public body.

CASE SUMMARY 2000 – 105

Commenting on the Bulk Disclosure of Data on Deceased Persons

The Vital Statistics Agency of Manitoba Consumer and Corporate Affairs requested that our office comment on the implications under *The Freedom of Information and Protection of Privacy Act* of renewing an agreement to provide personal information concerning deceased individuals to the Office of the Chief Electoral Officer at Elections Canada.

Elections Canada had requested that Vital Statistics disclose to it personal information collected and stored in a computer database maintained by Vital Statistics in order to match it with personal information stored in the federal voters list database. Elections Canada had developed a "permanent" electoral list that it updates by obtaining information from provincial databases. This procedure has replaced periodic door-to-door enumeration to obtain information about voters.

Some two years earlier, Vital Statistics had entered into an agreement with Elections Canada in which Vital Statistics agreed to provide personal information with respect to every death that occurred in the province, including name, birth date, gender and address, for the purpose of updating the National Register of Electors. This agreement was suspended when personal information submitted to Elections Canada by another Manitoba government department was lost.

Issues that we considered for the purpose of our comment included whether *The Freedom of Information and Protection of Privacy Act* would authorize such disclosure and whether the suspended agreement would protect personal information in accordance with the Act.

The proposed agreement with Elections Canada would permit periodic bulk disclosures of personal information in order to match personal information from Vital Statistics information database with personal information in an Elections Canada database. We noted *The Freedom of Information and Protection of Privacy Act* provides that a public body shall not use or disclose personal information except as authorized under the Division of the Act entitled "Restrictions on use and disclosure of personal information".

Whereas sections 44 and 45 of the Act set out authorized purposes for which a public body may disclose personal information, it was our opinion that section 46 of the Act provides for an accountable, transparent and dynamic mechanism for approving bulk and certain other disclosures. It states, in part:

> ***Application***
> ***46(1)*** *This section applies only to uses and disclosures not otherwise authorized under this Division.*
>
> ***Assessment required for other uses and disclosures***
> ***46(2)*** *When a public body*
> *(a) proposes to use or disclose personal information in order to link information databases or match personal information in one information database with information in another; or*
> *(b) receives a request for disclosure on a volume or bulk basis of personal information in a public registry or another collection of personal information;*
> *the personal information may be used or disclosed only if an approval is given by the head of the public body under this section.*
>
> ***Government must refer to review committee***
> ***46(3)*** *If a proposal or request is made under subsection (2) by or to a department or a government agency, the head must refer it to the review committee for its advice.*

Where disclosures of personal information are not otherwise authorized under section 44 or 45 of the legislation, bulk disclosures may be approved through the review process set out in section 46. This seemed to be the most appropriate route for consideration in the circumstances of this case, so we did not focus on those provisions of the legislation that would authorize disclosure of personal information under sections 44 or 45 of the Act.

In accordance with section 46 of the legislation, the public body must receive and consider the advice of the Privacy Assessment Review Committee on several issues including consent, benefit and risk assessment, and protection of personal information before entering into a written agreement:

> *Review committee to provide advice*
> *46(5) The review committee shall assess a proposal or request referred to it under this section and provide advice to the head of the public body about the matters referred to in subsection (6).*
>
> *Conditions of approval*
> *46(6) The head may approve the proposal or request only if*
> *(a) any advice that was requested from the review committee has been received and considered;*
> *(b) the head is satisfied that*
> *(i) the purpose of the proposal or request cannot reasonably be accomplished unless the personal information is provided in a form that identifies individuals,*
> *(ii) it is unreasonable or impractical to obtain consent from the individuals the personal information is about, and*
> *(iii) the use or disclosure is not likely to harm the individuals the personal information is about and the benefits to be derived from the use or disclosure are clearly in the public interest;*

(c) the head has approved conditions relating to
(i) the use of the personal information,
(ii) the protection of the personal information, including security and confidentiality,
(iii) the removal or destruction of individual identifiers at the earliest reasonable time, where appropriate, and
(iv) 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 recipient of the personal information has entered into a agreement to comply with the approved conditions.

In addition to the stipulation in section 46(6)(c)(ii) of the Act regarding the protection of personal Information, the legislation sets out the following:

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

Vital Statistics informed us that the agreement contained a number of provisions that addressed security and protection of data issues. We reviewed the terms of the agreement in relation to *The Freedom of Information and Protection of Privacy Act* and made some suggestions for Vital Statistics to consider to enhance the security of the information in question.

Following receipt of our comments, we understand that the proposed bulk disclosures were reviewed by the Privacy Assessment Review Committee and that the head of the public body received the Committee's advice. It was also our understanding that our suggestions regarding the security provisions were considered by Vital Statistics. We were informed by Vital Statistics that personal information concerning deceased Manitobans was subsequently disclosed to Elections Canada for the purpose of updating the National Register of Electors.

Executive Council/Manitoba Finance

Referenced earlier, under "Year in Review", were 36 media complaints emanating from two blanket requests for information – cases that raised fundamental questions on the technical administration of access applications province-wide – and another media access complaint that challenged the substantive interpretation of the scope of Cabinet confidences in Manitoba.

These were significant investigations of critical concern to our office that ushered in and concluded the year 2000. The involvement of Executive Council, a public body under *The Freedom of Information and Protection of Privacy Act*, was prominent in these cases.

The blanket requests, relating to ministerial briefing notes and also to costs and other information concerning the travel of various ministers and the premier, were made to 15 different public bodies, including Executive Council. As discussed in more detail under "Year in Review", Executive Council assumed coordination of the responses from all the public bodies with the result that the existing process of the central administration of the Act, led by Manitoba Culture, Heritage and Tourism, was bypassed and public bodies seemed to defer to Executive Council rather than undertake their own responsibility to respond to their own requests under the law.

Investigation of these numerous complaints proved to be complicated and protracted, taking some nine months by our office to complete. Only two of the complaints related to the substantive reasons for refusing access, whereas the balance related to technical issues. The two cases were not finalized by our office as they were discontinued when the complainant moved from the jurisdiction.

The other case, mentioned in the "Year in Review" is detailed below. It saw our office closely consider the meaning and application of the Cabinet confidences exception to disclosure of information. This complaint of refused access was made against Manitoba Finance and specifically concerned Treasury Board, a committee of Cabinet. In the course of our review, however, we were referred to Executive Council for discussion on the matter. The interpretation of the Cabinet confidences provision of *The Freedom of Information and Protection of Privacy Act* had already been the subject of discussion by our office and Executive Council in the investigation of the blanket complaints that opened the year.

As discussed below, the government maintained, purportedly in accordance with parliamentary tradition, that the disclosure of names of Treasury Board members who attended Treasury Board meetings would reveal information protected by the mandatory exception of the Act concerning Cabinet confidences. This position is of concern to our office because it has the effect of extending the statutory exception beyond information that would reveal the substance of the deliberations of Cabinet. Ultimately, the requested information in this case was released to the applicant, but the disclosure was made on the basis of Cabinet consent.

Our office remains satisfied that *The Freedom of Information and Protection of Privacy Act* respects the principles of Cabinet solidarity and collective responsibility for Cabinet decisions.

Section 19(1) of the Act protects the confidentiality of Cabinet decision-making by excepting from disclosure information that would reveal the substance of deliberations of Cabinet. The necessary free flow of ideas and the candid exchange of opinions in the course of deliberations are thereby preserved.

CASE SUMMARY 2000 – 200

A Locked Cabinet

A member of the media complained to our office about a refusal of access under *The Freedom of Information and Protection of Privacy Act* (FIPPA) by Manitoba Finance, a public body under the Act. The individual had requested access to "attendance records of members of Treasury Board at Treasury Board meetings since October 5, 1999."

The Access and Privacy Officer for Manitoba Finance responded to the application, advising that access was denied. The letter stated:

> *Please be advised that the Freedom of Information and Protection of Privacy Act establishes mandatory exceptions to disclosure for matters involving Cabinet or committees thereof, such as Treasury Board. Subsection 19(1) of the Act requires the department to refuse access to information that would reveal a cabinet confidence. The requested records fall under Subsection 19(1), including clause (1)(a) as they are a record of cabinet which reveal the deliberations of cabinet and clause (1)(d) as they reflect communications among ministers for the purposes stated in that clause. Accordingly, your access request is denied.*

The cited exceptions were as follows:

> ***Cabinet confidences***
> ***19(1)*** *The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including*
> *(a) an agenda, minute or other record of the deliberations or decisions of Cabinet;*
> *(d) a record that reflects communications among ministers relating directly to the making of a government decision or the formulation of government policy;*

In response to the complaint, enquiries were made with Manitoba Finance. The public body advised us that the records coming under the request were minutes of Treasury Board meetings. We requested to review a representative sample of the withheld information and invited the public body to provide for our consideration any documentation that would support reliance on the cited exceptions. The public body provided our office with a legal opinion detailing the background to the advice it received regarding this access request, in support of its reliance on the cited exceptions.

In the course of the investigation, our office reviewed a copy of the minutes. We noted that listed on the first page under the heading, "IN ATTENDANCE", were the names of members who were present at the meeting. The public body confirmed that there were no other records that would contain information concerning attendance at Treasury Board meetings. The minutes were the only records containing responsive information.

Also in the course of our review, the complainant clarified with our office that she was seeking access to only the names of the actual members of Treasury Board and not other individuals who may have attended Treasury Board meetings. She additionally indicated that she was not seeking information in a form that would identify the specific dates of the meetings, only the names and numbers of meetings attended.

The public body provided us with information on the purpose of Cabinet confidences for protecting the decision-making process and substance of Cabinet deliberations. The public body suggested that revealing the identity of decision-makers would undermine the collective responsibility for Cabinet decisions. The public body further provided the view that section 19(1) of the Act excepts from disclosure entire classes of records, regardless of specific content, and that the records under consideration, Treasury Board minutes, come squarely within the section 19(1)(a). Further, we were advised that disclosing the names of attendees would reflect communications amongst ministers and therefore come under section 19(d) of the Act. The opinion was proffered that as this exception to disclosure applies to the record as a class rather than to information in the record, the requirement to sever the record would not apply.

Our office carefully considered the information provided by the public body in support of its reliance on the cited exceptions and made the following findings.

In our opinion, section 19(1) of *The Freedom of Information and Protection of Privacy Act* does not except entire classes of "records" from disclosure, rather, it excepts a specific class of "information" that reveals the substance of Cabinet deliberations. For the exceptions to apply, the information in question must itself reveal the substance of the deliberations of Cabinet. In our view, the issue concerning the application of the cited exceptions was whether release of the information in question would reveal the substance of the deliberations of Treasury Board.

The public body had advised our office that it did not have attendance records per se, although it did have records containing attendance information. The responsive information was contained in minutes of Treasury Board meetings. The applicant was not seeking access to information in the minutes except for the names of attendees.

Section 19(1)(a) of the Act does not, in our view, except the minutes as a class of record. This exception would only apply to information in the minutes that would reveal the substance of the deliberations. In our opinion, section 19(1)(d) did not apply to the names of attendees because it was not supportable that release of the names of Treasury Board members, in and of themselves, would reveal the substance of such deliberations.

It seemed clear that information in the minutes, which was not requested by the applicant, was subject to the cited exceptions to disclosure but could be severed. Section 7(2) of *The Freedom of Information and Protection of Privacy 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.*

Additionally, the Act provides that a public body may create a record in the form requested by 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.*

We discussed our findings with Manitoba Finance and efforts to resolve this matter informally were undertaken. Our office noted that access to the requested information could be provided either by severing the records and releasing only the names of Treasury Board members in the records or by creating a record of attendance containing the requested information from the responsive records.

Further to these discussions, the public body reconsidered its position. Manitoba Finance remained of the view that section 19(1) of the Act applied to all of the requested information and release was made on the basis of Cabinet consent rather than on concurrence with our office on the scope and meaning of the Cabinet confidences exception.

Manitoba Justice

The following case is interesting in the many ways it reflects the interaction between *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act*.

The request concerned access to a third party's personal health information. Application for a third party's personal health information can be made under *The Freedom of Information and Protection of Privacy Act* (subject to clear exceptions, most notably personal privacy considerations) whereas an individual must seek his or her own personal health information under *The Personal Health Information Act*. The third party in this case was deceased. Had the applicant been the deceased's personal representative, he could have exercised the access rights of the deceased under *The Personal Health Information Act* as if he were that person and not a third party. This, however, was not the situation.

With this case coming under *The Freedom of Information and Protection of Privacy Act*, personal privacy issues came into consideration yet so too did *The Personal Health Information Act*. *The Freedom of Information and Protection of Privacy Act* recognizes an exception to the personal privacy exemption where another Act expressly authorizes or requires disclosure. *The Personal Health Information Act* expressly authorizes disclosure if the trustee maintaining personal health information reasonably believes that disclosure would not be an unreasonable invasion of the deceased's privacy. A public body under *The Freedom of Information and Protection of Privacy Act* is also a trustee under *The Personal Health Information Act*.

In addition to making a refusal of access complaint, the applicant, as a relative of a deceased person, contested the decision of the public body not to disclose his relative's personal information under section 44(1)(z) of *The Freedom of Information and Protection of Privacy Act*, a privacy provision under Part 3 of the Act. This is a basis for complaint on the prescribed complaint form under the Act and this was the first time that our office considered this provision. Again, we encountered a shift to *The Personal Health Information Act*. Section 35 of that Act provides that Part 3 does not apply to personal health information to which *The Personal Health Information Act* applies.

CASE SUMMARY 2000 – 211

The FIPPA-PHIA Puzzle and Privacy After Death

An individual complained to our office under *The Freedom of Information and Protection of Privacy Act* that he had been refused access by Manitoba Justice (Chief Medical Examiner) to the records for which he applied concerning his deceased relative. As is also possible under the Act, the individual contested, as a relative of a deceased person, that the public body did not disclose to him his relative's personal information under section 44(1)(z) of the legislation.

The public body responded to the applicant's access to information request by citing section 17(1) of *The Freedom of Information and Protection of Privacy Act*, which reads:

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

Our office made enquiries with the public body and we arranged to examine the withheld records. It was noted that the majority of these records consisted of the personal health information of the applicant's relative. The other records coming under the request did not contain personal health information. The applicant advised our office that he was interested only in the personal health information of the third party.

The public body advised our office that in determining that disclosure would be an unreasonable invasion of the third party's privacy, it relied on section 17(2)(a) of *The Freedom of Information and Protection of Privacy Act*, which provides:

> ***Disclosures deemed to be an unreasonable invasion of privacy***
> ***17(2)*** *A disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy if*
> *(a) the personal information is personal health information;*

Our review of the requested information confirmed that it was subject to the cited provisions. Section 17 of *The Freedom of Information and Protection of Privacy Act* is a mandatory exception to disclosure and, where this section applies, the law states that the public body must not disclose the information in question.

Nevertheless, section 17(4) of the Act provides exceptions to the requirement not to disclose personal information, including personal health information. Our review considered whether any exceptions could apply to this situation, particularly the following two provisions:

> ***When disclosure not unreasonable***
> ***17(4)*** *Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if*
> *(c) an enactment of Manitoba or Canada expressly authorizes or requires the disclosure;*
> *(h) the information is about an individual who has been dead for more than 10 years;*

Concerning section 17(4)(c) of *The Freedom of Information and Protection of Privacy Act,* we noted that *The Personal Health Information Act*, an enactment of Manitoba, applies to personal health information in the custody or control of trustees and that Manitoba Justice is a trustee under this legislation. *The Personal Health Information Act* sets out a discretionary provision allowing a trustee to disclose personal health information to a relative of a deceased, as follows:

> ***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*
> *(d) to a relative of a deceased individual if the trustee reasonably believes that disclosure is not an unreasonable invasion of the deceased's privacy;*

In the course of our review, we discussed this provision with the public body. Our office sought the public body's consideration of whether it would be authorized to disclose the information in question under section 22(2)(d) of *The Personal Health Information Act*.

The public body noted that the personal health information relating to the relative was obtained from another trustee, a health care facility. After considering the applicability of this section to the information in question, the public body advised our office that it could not conclude that the disclosure would not be an unreasonable invasion of the relative's privacy.

Because the information originated from the health care facility, the Chief Medical Examiner's Office was of the opinion that it would be more appropriate for that trustee to make the determination of whether disclosure of this information would not be an unreasonable invasion of the relative's privacy. Accordingly, the public body was of the view that it was not appropriate for it to disclose the personal health information of the relative to the applicant.

Concerning section 17(4)(h) of *The Freedom of Information and Protection of Privacy Act*, we learned from the applicant that the deceased had been dead for fewer than ten years. Under the

circumstances, therefore, section 17(4)(h) did not apply. Accordingly, the requirement under section 17(2)(a) to refuse access to the information in question remained applicable.

In considering release, we also noted that section 7(2) of *The Freedom of Information and Protection of Privacy 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.*

Consideration was therefore given in our review as to whether the records could reasonably be severed. Based on our review of the records in question, we were of the opinion that severing could not reasonably be conducted.

In his complaint to our office, the applicant also contested the public body's decision not to disclose his relative's personal information under section 44(1)(z) of *The Freedom of Information and Protection of Privacy Act*. This provision allows a public body to disclose personal information of a deceased person to the person's relative if the head of a public body reasonably believes that disclosure would not be an unreasonable invasion of the deceased's privacy.

Section 44(1)(z) is a privacy provision under Part 3 of *The Freedom of Information and Protection of Privacy Act*, entitled "Protection of Privacy", which restricts the disclosure of personal information. Significantly, the Act provides that the application of Part 3 does not extend to personal health information, as follows:

> ***Part does not apply to personal health information***
> ***35*** *This Part does not apply to personal health information to which The Personal Health Information Act applies.*

This being the case, the contesting of the public body's refusal to disclose the relative's personal health information under section 44(1)(z) of *The Freedom of Information and Protection of Privacy Act* was not supported.

Manitoba Labour

The case summarized below is not an unusual situation. It is highlighted here because the issue has been encountered several times over the past few years by our office. Often a family member of a deceased worker will request from Manitoba Labour access to the Workplace Health and Safety Incident Investigation Report concerning the fatality. This report will typically include witness statements regarding the incident. The purpose of the investigation and resulting report is to determine if charges will be laid with respect to the death.

Whether or not a report is releasable when requested depends on the circumstances. As in the case below, if Court proceedings are underway, the report will not be released by the public body. When such proceedings are completed, or if they are not undertaken, it is our understanding that the report is releasable, although subject to severing for reason of, for example, third party personal privacy.

CASE SUMMARY 2000 – 164

Release of Fatality Reports: An Expectation of Harm

A complaint was made to our office under *The Freedom of Information and Protection of Privacy Act* against Manitoba Labour that access was refused to documentation in the possession of Workplace Health and Safety regarding a workplace accident that resulted in a death.

The public body had responded by letter to the applicant and advised that access was refused under section 25(1)(n) of The Freedom of Information and Protection of Privacy Act, which states:

> ***Disclosure harmful to law enforcement or legal proceedings***
> ***25(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*
> *(n) be injurious to the conduct of existing or anticipated legal proceedings.*

Upon receipt of the complaint, enquiries were made with the public body and the withheld information was reviewed in relation to the provisions of *The Freedom of Information and Protection of Privacy Act*. Our review indicated that the withheld information consisted of an Incident Investigation Report, photographs of the work site, a Stop Work Order and an Improvement Order.

During the course of our review, the public body clarified that it had also relied on section 25(1)(a) of *The Freedom of Information and Protection of Privacy Act* in refusing access to the information. Section 25(1)(a) states:

> ***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*
> *(a) harm a law enforcement matter.*

We were advised by the public body that Court proceedings were underway in this matter and that, in the opinion of the public body, release of the information at that time could reasonably be expected to be injurious to the conduct of these proceedings. For example, it was discussed that disclosure of information could reasonably be expected to affect testimony at a hearing.

Our office was satisfied that sections 25(1)(a) and (n) of the legislation were applicable to the withheld information. Nevertheless, because these exceptions are discretionary, discussions were held with the public body as to why it chose to refuse access rather than release the information. The public body reiterated that it was of the opinion that release of the Incident Investigation Report, and appendices could reasonably be expected to be harmful to the Court proceedings. Our office was of the view that the public body's decision to withhold the information in question was reasonable.

The public body has advised our office that it would provide the applicant with a copy of the Incident Investigation Report, in severed form, once the Court proceedings were concluded. We were informed that all third party information would be severed from the report.

Because our office was of the opinion that the requested information was subject to exceptions of *The Freedom of Information and Protection of Privacy Act* and that the public body's decision to withhold the information was reasonable, we could not recommend that the information be released.

Part 1:

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

☐ PUBLIC BODIES

☑ LOCAL PUBLIC BODIES

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

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 4, 2000, more than 350 additional local public bodies – not counting individual schools, for example – were added to the jurisdiction of the legislation.

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.

OUR INVOLVEMENT IN 2000

In 2000, we received 44 complaints against local public bodies under *The Freedom of Information and Protection of Privacy Act*, two of which were not jurisdictional. Eight of these complaints were declined or discontinued by the Ombudsman or the complainant.

Twenty-seven of the complaints against local public bodies concerned the City of Winnipeg. Eight complaints were against seven other local government bodies. There were three complaints against health care facilities and four complaints against three educational bodies.

In our 1999 Annual Report, we reported on two complaints received against an educational body -- a school board -- in 2000. These cases, concerning fees, were reported at that time because they were instructive and were the first cases concerning an educational body under *The Freedom of Information and Protection of Privacy Act*.

Two other 2000 cases completed in 2001 -- both concerning local public bodies -- are summarized below. These cases, relating to refused access, are examples of local public bodies altering, in part, their initial position and demonstrating, through their openness and cooperation, a commitment to *The Freedom of Information and Protection of Privacy Act*.

City of Winnipeg

The following case of refused access concluded with additional information being released to the complainant by the City of Winnipeg.

What seemed to be a straightforward request, for the addresses and telephone numbers of presenters at a public meeting, proved to be more complicated when the matter was investigated. Some information, as the public body had first concluded, could not be released because that would result in an unreasonable invasion of third parties' personal privacy. However, the personal privacy provision of the Act does not apply in instances where the information is publicly available, as was the situation with written presentations. Also, the personal privacy provision does not apply in situations where the presenter is not a human person but a corporation, business or organization.

CASE SUMMARY 2000 – 057

Ingredients for Preserving Personal Information Privacy: An Individual and Private Information

An individual complained to our office that he had been refused access to part of the records for which he had applied from the City of Winnipeg, a public body under *The Freedom of Information and Protection of Privacy Act*.

By an application for access under the legislation, the complainant wrote:

> *The Committee on "Winnipeg Plan 2020" held various hearings in 1999.*
>
> *On October 5th, 1999 a public meeting was held in the West Committee Room, at City Hall. The public was invited to submit open comments and criticism of PLAN WINNIPEG 2020…..*
>
> *I wish to receive the phone numbers and the addresses of people who made presentations.*

The Chief Administrative Officer for the City of Winnipeg responded to the application by letter, in which she stated:

> *Regarding your request "to receive the phone numbers and the addresses of people who made presentations" at the October 5, 1999 Plan Winnipeg Review policy consultation, I enclose a copy of the list of presenters, which is public information. As well, you can obtain copies of the presentations upon payment of the appropriate fee….*
>
> *Please be advised that your request for home addresses and phone numbers is denied. The material requested falls under the exceptions to disclosure in The Freedom of Information and Protection of Privacy Act (FIPPA). Section 17 (Privacy of a third party) is applicable in this case….*

In response to the complaint, our office made enquiries with the public body. We were advised that a total of 23 presentations relevant to this request were made at the public meeting held on October 5, 1999. We were further advised that nine of the presenters were private individuals and that the remaining 14 presentations were made on behalf of various organizations. The mailing addresses for three of the organizations were the home addresses of members of each organization.

The public body also noted that written versions of presentations made at public meetings were available for examination by the public following the meeting, and that 12 of the presenters chose to include their addresses and/or telephone numbers in their written presentation. This included a combination of private individuals and organizations.

Our office discussed with the public body the applicability of section 17 of *The Freedom of Information and Protection of Privacy Act* to the information requested. The public body clarified with our office that in denying access to information on the basis of section 17 of the Act, it was relying specifically on section 17(3)(i). The relevant provisions of the legislation provide:

> ***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.*
>
> ***Determining unreasonable invasion of privacy***
> ***17(3)*** *In determining under subsection (1) whether a disclosure of personal information not described in subsection (2) would unreasonably invade a third party's privacy, the head of a public body shall consider all the relevant circumstances including, but not limited to, whether*
> *(i) the disclosure would be inconsistent with the purpose for which the personal information was obtained.*

Our office asked the public body about the purpose for its collection of the presenters' names, addresses and telephone numbers. We were advised that these particulars were routinely collected by the public body from presenters so that it could send them information subsequent to the meeting.

We asked if the personal information collected from presenters was used by the public body for any other purposes. Specifically, we asked if this information was made available to the public at any time during or after the meeting. We were advised that in the past, this information was made available to anybody who requested it. More recently, however, out of concern for the privacy of presenters, the procedure had been revised to protect personal information. We were advised, for example, that in the case of public presentations, the public body no longer entered addresses and telephone numbers of presenters into the minutes, which are available to the public. Based on the information provided by the public body, we were satisfied that the purpose for collecting this personal information was to distribute information to participants related to the meeting at which they had made a presentation.

Section 17(1) of *The Freedom of Information and Protection of Privacy Act* requires a public body to refuse disclosure of personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy. It is a mandatory exception to disclosure under the legislation; when a public body determines that information comes under this section, it must not disclose that information. However, *The Freedom of Information and Protection of Privacy Act* provides an exception to section 17(1), allowing for the release of this information where the personal information requested by an applicant is publicly available:

> ***When disclosure not unreasonable***
> ***17(4)*** *Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if*
> *(i) the record requested by the applicant is publicly available.*

As already noted, of 23 presentations, nine were made by private individuals. Based on our review, we were of the opinion that section 17(3) of *The Freedom of Information and Protection of Privacy Act* applied to the requested information of six of these private individuals. Nevertheless, three other private individuals chose to include their contact information in the written version of their presentation. Based on section 17(4) of the legislation, disclosure of their personal information did not seem to be an unreasonable invasion of their personal privacy because the information was included in their publicly available reports. This was discussed with the public body.

The remaining 14 presentations were made by or on behalf of various types of organizations. Our office discussed with the public body the applicability of section 17 of *The Freedom of Information and Protection of Privacy Act* to these entities, which were not individuals. We noted that section 17 prohibits the disclosure of third party personal information to applicants, and that "personal information" is defined in the legislation as "recorded information" about an "identifiable individual". We observed that section 17 of the Act relates only to personal information about identifiable individuals, and not to third parties that are corporations, organizations or businesses. In the case of 11 of the 14 non-human entities, we were of the opinion that their organization addresses and telephone numbers did not constitute personal information under section 17 of the Act.

We noted, however, that in the case of three of the 14 organizations that made presentations, the information consisted of the home address and telephone of a member of the organization. It was our opinion that, in this context, the information was "personal information" as defined by *The Freedom of Information and Protection of Privacy Act* and, therefore, subject to section 17 of the Act. It was significant that this personal information was not included in the written presentations – that is, it was not captured on a publicly available record; therefore, release of this information seemed to be an unreasonable invasion of the personal privacy of these individuals.

Accordingly, our office discussed with the public body the release of the information relating to the three private individuals who included their contact information in their written presentation and the contact information for the 11 organizations that did not constitute personal information. The public body decided to disclose this information to the requester and subsequently did so.

Rural Municipality of Ritchot

In another case that resulted in additional records being released, documents responsive to the request were located in the course of the complaint investigation. Enquiries were made with third parties about release of these records and consent for release was obtained.

CASE SUMMARY 2000 – 163

More Information Surfaces

Our office received a complaint from an individual that the Rural Municipality of Ritchot, a public body under *The Freedom of Information and Protection of Privacy Act*, refused to provide him with access to all or part of the records for which he had applied.

In his application for access, the requester sought:

> *Re: Operations Review Committee Records and Documentation*
>
> *… Municipality of Ritchot records, notes and documentation from the review by the Red River Floodway Operation Review Committee and its December 1999 report.*
>
> *… documentation to support the position of the former…and present…governments, that the Municipality provided vigorous representation on behalf of upstream residents, in the review of the existing operating rules.*

The public body responded to the applicant:

> *Further to your request for records and documentation regarding the R.M. of Ritchot's "vigorous representation on behalf of upstream residents, in the review of the existing operating rules", I am enclosing copies of the minutes of council meetings….*
>
> *The Municipality has no other records regarding the Red River Floodway Operation Review Committee.*

Upon receipt of the complaint, we made enquiries with the requester to clarify the nature of his complaint. He noted that he had received a copy of the minutes of Council meetings that contained proceedings of the Red River Floodway Operation Review Committee. He advised our office that he believed that there were additional records in existence that were responsive to his request.

Enquiries were made with the public body. Our office advised the public body of our understanding that the applicant was seeking access to any documents that might provide background information concerning the public body's involvement in, and position taken, during meetings of the Red River Floodway Operation Review Committee. We noted that the public body had provided some records and we enquired if there were any other records that would fall under the request, such as minutes of Committee meetings, notes and other similar documents.

The public body conducted a further search in response to our enquiries and located a file containing additional records relating to the Red River Floodway Operation Review Committee. Following our preliminary examination of the records and further enquiries, the public body considered these records in relation to *The Freedom of Information and Protection of Privacy Act*.

The public body was of the view that some of the records were subject to section 20(2) of the Act, which provides:

> ***Information provided by another government to a local public body***
> ***20(2)*** *The head of a local public body shall refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence by*
> *(a) a government, local public body, organization or agency described in subsection (1); or*
> *(b) the Government of Manitoba or a government agency.*

Our review of the records indicated that they were subject to the cited provisions. We noted that section 20(2) is a mandatory exception to disclosure and, where it applies, the law states that the public body must not disclose the information in question. Nevertheless, section 20(3) of *The Freedom of Information and Protection of Privacy Act* sets out an exception to this requirement, where the government that provided the information consents to the disclosure:

> ***Exceptions***
> ***20(3)*** *Subsections (1) and (2) do not apply if the government, local public body, organization or agency that provided the information*
> *(a) consents to the disclosure; or*
> *(b) makes the information public.*

Our office was advised that the public body enquired as to the consent of the governments that provided the information. The public body further advised our office that consent was obtained in each instance and, subsequently, the requester was provided with copies of the records.

Following the requester's receipt of these records, he asked our office to make enquiries with the public body to determine if there were further records to which he did not receive access. The public body informed our office that the only records not provided to him were documents such as public reports and letters that he had submitted to the public body. The public body advised that as it understood the requester had copies of these records, he would not require additional copies. Our office discussed these other records with the requester who advised us he was not interested in obtaining copies of them. Accordingly, our review did not consider the release of this information.

As the public body provided the requester with all of the records we understood were responsive to his request, we concluded our investigation of this matter.

Part 2:

THE PERSONAL HEALTH INFORMATION ACT

☑ TRUSTEES

INTRODUCTION TO *THE 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 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 MANITOBA 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 link age or using information technology in the collection, storage, use or transfer of personal health information.*

OUR INVOLVEMENT IN 2000

In 2000, our office received 38 complaints under *The Personal Health Information Act*. Seven of these concerned provincial government departments or agencies, two concerned local public bodies, 13 concerned health care facilities and 16 concerned health care professionals.

Our office considered more than four times as many complaints in 2000 under *The Freedom of Information and Protection of Privacy Act* as under *The Personal Health Information Act*. Most of the cases under *The Personal Health Information Act*, however, concerned privacy issues. As reported in our 1999 Annual Report, allegations of breach of privacy normally result in lengthy investigations.

In last year's Annual Report, we questioned whether health care users were aware of access and privacy rights under the legislation. Since December 1997, when the Act was proclaimed, there have been no complaints made against school divisions, colleges or universities. In more than three years since proclamation, there has been a total of only three complaints against municipalities. Nevertheless, ten more complaints under *The Personal Health Information Act* were handled by our office in 2000 as compared with 1999 (an almost one-third increase). Of the 38 complaints received under *The Personal Health Information Act* in 2000, one was declined and four were discontinued by the Ombudsman. Nine of the cases received under the Act in 2000 were initiated by the Ombudsman.

Trustees are required and expected to be in compliance with *The Personal Health Information Act*. Our office is aware, however, that many are not PHIA-compliant in their health information practices, particularly with respect to written security policies and procedures, including lawful retention and destruction policies and pledges of confidentiality. We understand that compliance with the safeguards for electronic information, as first set out under *The Personal Health Information Act* Regulation, has proven to be a challenge for many trustees.

On June 22, 2001, section 4 of the Regulation, which expressly deals with the security of personal health information in electronic form, was amended. Until then, the Regulation, which came into effect on December 11, 1997, required a trustee to comply with the safeguards for electronic information in section 4 "as soon as reasonably possible but not later than December 11, 2000". With the amendment, the section 4 security safeguards are now required to be incorporated into electronic or automated health information systems designed or acquired by a trustee on or after December 11, 2000.

Our office is of the view that the most effective way to address legislative compliance is not by responding to complaints under *The Personal Health Information Act* but by promoting measures that help avoid breaches from occurring, including education of trustees and the public and by assisting trustees in assessing and monitoring their own health information policies and practices. As noted above, in addition to the investigation of complaints relating to access and privacy, the Ombudsman has several powers and duties under Part 4 of *The Personal Health Information Act* intended to engage the office on a proactive basis.

We have not fully directed our attention to our Part 4 powers and duties. The high and increasing number of complaints received by our office in recent years has caused us to focus on our Part 5 responsibilities of individual complaint investigation. To help us address the situation, the Access and Privacy Division of our office was restructured, in May 2001, into two areas called the Compliance Review Group and Compliance Investigation Group. These will concentrate on Parts 4 and 5 of the Act, respectively.

The Compliance Review Group, consisting of two Compliance Investigators and a manager, focuses on systemic complaints under Part 5, involving multiple trustees, and exercises powers and duties of the Ombudsman under Part 4 of the Act. Projects of this group to date have included investigation of issues that, by their nature, have an impact on personal health information access and privacy rights province-wide, comments on issues relating to the Act and reviewing trustees' implementation of policies and procedures subsequent to recommendations made by the Ombudsman. At the time of writing this Annual Report, however, the groups' responsibilities are in transition such that the Compliance Review Group is not exclusively exercising its intended role.

In 2000, several significant information privacy cases were handled by our office under *The Personal Health Information Act*. One of these cases, not summarized in this Annual Report, was the subject of a news release and background paper in both official languages. It can be found on our web site – www.ombudsman.mb.ca – or obtained from our office in hardcopy format. The case concerns a publicized incident involving a hospital employee who tampered with her friend's demographic data that was personal health information under the Act.

The four cases summarized below, concern various collection, use and disclosure issues and are briefly introduced under the headings "Public Bodies" and "Health Care Facilities".

As a last comment, an alleged breach of information privacy, received by our office and investigated in 2000, is now the subject of prosecution under *The Personal Health Information Act*. The matter concerns a health care professional. We are not commenting on the case in this Annual Report because it is before the Court.

Public Bodies

The Personal Health Information Act concerns access to and protection of personal health information collected or maintained by trustees, specifically public bodies, health care facilities, health care professionals and health services agencies. Nevertheless, as illustrated in the following case summary, there are situations under *The Personal Health Information Act* where a "person", other than a trustee, is permitted to collect or use another individual's Personal Health Identification Number (PHIN), a type of personal health information.

This case involved the allegedly wrongful collection and use of the PHIN by an entity that is not a trustee under the Act. Our office worked cooperatively on this matter with Sport Manitoba, which, being a government agency and, therefore, a public body under *The Freedom of Information and Protection of Privacy Act*, is also a trustee under *The Personal Health Information Act*. Sport Manitoba serves as an umbrella body overseeing amateur sports organizations in the province. The entity directly involved in this matter was an amateur sports organization coming under its purview.

CASE SUMMARY 2000 – 047

PHIN and Games: Sometimes Everybody is Responsible

An individual contacted our office and informed us that certain youth sports teams collect the Personal Health Identification Number (PHIN) of athletes, reportedly for the purpose of obtaining health care in the case of injury. In the opinion of the individual, a primary reason for the collection of the PHIN by some teams was to establish authoritatively the place of residence of young athletes to combat some forms of alleged "stacking" of teams with preferred players.

After discussion with the individual, we determined there were reasonable grounds to initiate an investigation under section 39(4) of *The Personal Health Information Act*:

> ***Ombudsman may initiate a complaint***
> ***39(4)*** *The Ombudsman may initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate under this Act.*

Under The Personal Health Information Act, the PHIN is an identifier that constitutes personal health information:

> ***"PHIN"*** *means the personal health identification number assigned to an individual by the minister to uniquely identify the individual for health care purposes;*
>
> ***"personal health information"*** *means recorded information about an identifiable individual that relates to*
> *(d)the PHIN and any other identifying number, symbol or particular assigned to an individual….*

The legislation sets out specific provisions regarding the production, collection and use of the PHIN:

> ***Production and use of PHIN***
> ***26(1)*** *No person other than a trustee may require the production of another person's PHIN or collect or use another person's PHIN.*

Exceptions

26(2) *Despite subsection (1), a person may collect or use another person's PHIN*

(a)for purposes related to the provision of publicly funded health care to the other person;

(b) for the purpose of a health research project approved under section 24; or

(c) In circumstances permitted by the regulations.

Amateur sports organizations are not trustees under *The Personal Health Information Act* and, accordingly, section 26(1) of the Act would not permit them to collect or use the PHIN of an athlete. Nevertheless, we reviewed whether section 26(2)(a) would permit sports organizations to collect or use a player's PHIN; specifically, we considered whether the purpose for collection or use could be related to the provision of publicly funded health care.

Enquiries were made with Sport Manitoba, an umbrella body that oversees approximately 90 organizations that run independent amateur sports such as hockey, soccer, gymnastics and track and field. Sport Manitoba has been designated as a "government agency" in Schedule B of the *Access and Privacy Regulation 64/98* under *The Freedom of Information and Protection of Privacy Act* and is therefore defined as a "public body" under that legislation, and a "trustee" under the provisions of *The Personal Health Information Act*.

Staff members from our Access and Privacy Division met with representatives of the various sports organizations at a public forum arranged by Sport Manitoba. It was apparent that many of these organizations routinely collect the PHIN of athletes. It was the position of many of the representatives that the collection was for purposes related to the provision of health care, to be able to provide the PHIN in the event that an athlete required immediate medical attention arising from an injury while participating in his or her sport.

We were also advised that the PHIN is required in other jurisdictions when Manitoba athletes participate in games outside the province. We understand for example, that in the U.S., medical care would be denied without the presentation of a health identifier such as the PHIN. Additionally, we were informed that Sport Manitoba requires identifying health numbers from athletes from visiting jurisdictions when the Province hosts sporting events. The sports organizations expressed the concern that without providing the identifying health number, an athlete would not receive medical attention and potentially would not be allowed to participate in events because of that.

Enquiries were made with relevant authorities about the need for presenting the PHIN to receive publicly funded health care. We were informed that production of the PHIN is not mandatory. We were advised by Manitoba Health that a person should not be denied treatment in a Manitoba hospital if he or she could not produce a PHIN unless the person were seeking elective care, which was not the situation posed by the sports organizations. We understand that many people do not have a PHIN, including newborns, new residents and persons normally resident outside Manitoba. We were also informed that out-of-province residents are provided with care and then billing takes place in accordance with reciprocal agreements between the provinces. We were further advised that a person from a jurisdiction not covered by a reciprocal agreement would be provided with care unless they were seeking an elective procedure.

While the production of the PHIN does not appear to be required to receive publicly funded health care in Manitoba, we gave further consideration to the thought that sports organizations need not collect the PHIN for health care purposes. Given the substantial problems this would cause athletes travelling in the U.S. and other countries, where treatment could be refused without a PHIN, we were reluctant to conclude that it is unnecessary for sports organizations to collect the PHIN. In theory, the production of the PHIN is not mandatory. In practice, without the provision of the PHIN, the timeliness or even the provision of health care could on occasion suffer with unaccept-

able consequences for the health and well being of an athlete. We were advised in our investigation, for example, that without the PHIN, access to Manitoba's Drug Program Information Network is not possible.

With respect to the concern that initiated this investigation, we were of the opinion that any collection and use of the PHIN by sports teams to verify address or age would be contrary to *The Personal Health Information Act* as the legislation does not provide for any collection or use other than "for purposes related to the provision of publicly funded health care". Thus, sport organizations that collect and use the PHIN for any purpose that is not related to the provision of publicly funded health, such as to verify address and/or age, would be subject to sections 63 and 64 of *The Personal Health Information Act*:

> ***Offences***
> ***63(1)*** *Any person who*
> *(e)requires production of or collects or uses another person's PHIN contrary to section 26;*
> *is guilty of an offence.*
>
> ***Penalty***
> ***64(1)*** *A person who is guilty of an offence under section 63 is liable on summary conviction to a fine of not more than $50,000.*

It was our opinion, however, that section 26(2)(a) of *The Personal Health Information Act* does permit the collection and use of the PHIN by sports organizations when the collection and use are for specific circumstances that involve the provision of publicly funded health care. Notably, the specific circumstances would have to be directly related to a situation where it is necessary for an athlete to attend a publicly funded health facility for care.

Where sports organizations collect the PHIN, we would emphasize the legal responsibility of these organizations to ensure that the use, disclosure, security, retention and destruction of the PHIN is in accordance with the provisions of *The Personal Health Information Act*.

As a starting point, we suggested that Sport Manitoba develop a standard consent statement for the PHIN to be used by member organizations. While parents appear to provide the PHIN when requested, a standard consent statement modelled on our guidelines, "Personal Health Information - Elements of Consent", would provide a meaningful opportunity for the provision of informed consent. These guidelines were published in our 1999 Annual Report and are on our web site (www.ombudsman.mb.ca).

We also suggested that Sport Manitoba should consider every opportunity (such as newsletters, open letters, meetings, forums, and special events) to communicate to member organizations that the collection, use, disclosure, retention, security and destruction of the PHIN is strictly controlled by *The Personal Health Information Act*.

Health Care Facilities

The following case summaries all deal with disclosure of personal health information.

The first case, which also addresses notification, use and consent, concerns the disclosure of names and addresses by a health care facility to a hospital funding body. Such identifying information, when collected in the course of the provision of health care, is considered "personal health information" under *The Personal Health Information Act*.

The disclosure of this information by the heath care facility to the hospital funding body was made with the intention that it would be authorized under *The Personal Health Information Act*. It was the finding of our office, however, that the actions were not in compliance with the Act. This case raises significant issues and has implications for all trustees in Manitoba.

The second case is an example of an inadvertent disclosure, by a hospital employee, through the routine task of sending a fax.

The third case was not, by the terms of the legislation, a disclosure and reveals the limitation of *The Personal Health Information Act* when an alleged disclosure involves an oral communication rather than the release of recorded information.

CASE SUMMARY 1999 – 085

Taking Care of Business: Hospital Fundraising

An article published in the print media in July 1999, suggested that the Health Sciences Centre, a trustee under The Personal Health Information Act, might be soliciting donations from former patients of the facility without their consent. Our office was concerned that this might constitute a use of personal health information not authorized under the Act and, accordingly, a file was opened by the Ombudsman. Section 39(4) of The Personal Health Information Act provides:

> ***Ombudsman may initiate a complaint***
> ***39(4)*** *The Ombudsman may initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate under this Act.*

Enquiries were made with the Health Sciences Centre, which is a trustee under the Act, and information was provided to our office for consideration. We were advised in our investigation that the Trustee did not conduct its own fundraising. At that time, fundraising was the function of an arms-length body, the Health Sciences Centre Foundation. We were advised by the Trustee that one of the purposes of the Foundation was to raise money to improve health care by funding research and health care excellence. These funds were dispersed through grants, with a large proportion given to the Health Sciences Centre.

Prior to the implementation of *The Personal Health Information Act,* the Health Sciences Centre would provide a mailing list of potential donors to the Foundation. This mailing list was composed of names and addresses of patients discharged from the hospital. The Foundation would then use the mailing list to invite donations as part of its "Grateful Patient Program".

We were informed that, with the introduction of *The Personal Health Information Act*, the Health Sciences Centre realized such lists could no longer be disclosed to the Foundation. Apparently, Manitoba Health advised that the Foundation would have to obtain consent from patients to disclose their names to it, or take over the fundraising function itself.

In the opinion of the Health Sciences Centre, obtaining consent at the time of admission was difficult because patients would have not yet experienced the service. The Health Sciences Centre was

of the view that, after admission or at the time of discharge, obtaining consent would be difficult due to resource costs and logistics. After consulting the Foundation and seeking legal advice, the Health Sciences Centre adopted a different process. Rather than providing the mailing list to the Foundation, the Health Sciences Centre decided to send discharged patients mailings that promoted the work of the Foundation. Those interested in providing donations could send an enclosed "response card" and contribution to the Foundation. It was thought that this would permit the Foundation to continue fundraising for the Health Sciences Centre without incurring the unauthorized disclosure of personal information.

This new fundraising program was called the "Discharged Patient Mailing Program". Under this program, the Foundation determined the timing for fundraising campaigns and notified the Health Sciences Centre when to prepare a mailing list. Once the Health Sciences Centre was advised to prepare this information, it ran a computer program to extract a list of potential donors from the Master Patient Index and the Health Sciences Centre Abstract System database. The Master Patient Index lists every patient processed at the facility, while the Abstract System contains a summary of information on every patient discharged from the hospital.

A computer program compiled the list after applying exclusion criteria to the data. The list was converted to ASCII format and copied to a diskette. This diskette was provided to Prolific Graphics, an information manager under *The Personal Health Information Act*, to prepare and undertake mailings.

In addition to the mailing list, a "Do Not Solicit" list was also prepared by the Health Sciences Centre and provided to Prolific Graphics. This contained the names of persons who had directly contacted the Health Sciences Centre or the Foundation to request that their names be removed from the mailing list.

The Health Sciences Centre advised that it contracted with Prolific Graphics because it did not have the resources to perform the mailings itself. The information manager checked the accuracy of the information on the diskette and then used it for addressing the material. The company inserted prepared information into the envelopes and mailed the fundraising package. Once the mailing was completed, the diskette was returned to the Health Sciences Centre.

The fundraising package consisted of several documents, including a letter from the Health Sciences Centre addressed to the discharged patient, a brochure and response card from the Foundation and a self-addressed return envelope. The brochure from the Foundation described some of the research funded by the Foundation and solicited donations:

> *The future quality of health care depends on new treatments, new technologies and insight into prevention. Your donations make it possible. Thank you.*

The personalized letter from the Health Sciences Centre specifically referred to the recipient being a patient at the hospital. While this letter informed discharged patients about the role of the Foundation, we noted that it also solicited donations on behalf of the Foundation through the following statement:

> *You can help…*
>
> *A response card is enclosed to permit you the opportunity to request further information about the Foundation's free public HealthTalks, a complimentary copy of the Foundation Newsletter, information about Donor Recognition Sculpture, or make a gift contribution. You are invited to complete and return the form to the Foundation in the enclosed self-addressed return envelope.*

The discharged patient's name and address were pre-printed on the response card, which could be sent to the Foundation in the return envelope. As indicated in the personalized letter, the response card could be used to request further information or to provide donations.

There were two fundraising mailings conducted after the enactment of *The Personal Health Information Act*. The first mailing occurred in February 1999, based on patient information

collected between October 1997 and October 1998. The second mailing took place in June 1999, based on patient information collected between November 1998 and March 1999. The next mailing was to have occurred in the fall of 1999, but was suspended pending the Ombudsman's investigation.

Collection of Personal Health Information

We were advised that there are approximately 30,000 in-patients per year entered into the Health Sciences Centre computer system. At the time of admission, the Health Sciences Centre collects (among other information) the names and addresses of patients.

Notification and Consent

At the time of our investigation, we were advised that there was no notification to the hospital's patients of the purposes for which their personal health information was being collected. We were further advised that consent was not sought from patients for subsequent uses and disclosures of their information. Specifically, the Health Sciences Centre did not, at the time, provide notice or seek consent regarding the donation program.

Nevertheless, the Health Sciences Centre informed us that it was in the process of developing a notice, setting out the purpose for collection, and that this process was nearing completion. We were advised that copies of the notice would be posted at each unit of the Health Sciences Centre.

We considered several issues relating to the collection, use and disclosure of the names and addresses of patients discharged from the Health Sciences Centre, including disclosure to an information manager and patient notification.

Purpose of Collection

Under the provisions of *The Personal Health Information Act*, the names and addresses of patients are "personal health information" as contemplated by section 1(1) of the Act:

> ***"personal health information"*** *means recorded information about an identifiable individual that relates to … and includes*
>
> *(e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care;*

As personal health information, the names and addresses may only be collected for purposes that are authorized by *The Personal Health Information Act:*

> ***Restrictions on collection***
>
> ***13(1)*** *A trustee shall not collect personal health information about an individual unless*
>
> *(a) the information is collected for a lawful purpose connected with the function or activity of the trustee; and*
>
> *(b) the collection of the information is necessary for that purpose.*

In our investigation, we were advised that the Health Sciences Centre collected personal information to provide patient care, education (as a teaching hospital), health promotion and research. Reference was made to provisions of *The Health Sciences Centre Act* and *The Regional Health Authorities Act* that mandate the activities and functions carried out by the Health Sciences Centre.

With respect to the matter of soliciting funds for the Foundation, it was evident that the collection of identifiable personal health information related most specifically to the purpose of providing health care to individuals. "Health care" is defined in section 1 of *The Personal Health Information Act* as follows:

> ***"health care"*** *means any care, service or procedure*
>
> *(a)provided to diagnose, treat or maintain an individual's physical or mental condition,*
>
> *(b)provided to prevent disease or injury or promote health, or*
>
> *(c)that affects the structure or a function of the body, and includes the sale or dispensing of a drug, device, equipment or other item pursuant to a prescription;*

It was our opinion that the personal health information of an identifiable person is not collected for the incidental purposes of education and research. Notwithstanding their importance, we did not find authorization for such collection in the general purposes and duties of *The Regional Health Authorities Act* or in its antecedent legislation. In our view, identifiable personal health information is not necessary for these additional activities, and should not be used except where otherwise authorized by legislation.

The Health Sciences Centre advised us that fundraising is an integral aspect of the provision of health care in Manitoba because, without donations from the public, the Health Sciences Centre could not provide the level of health care that the residents of Manitoba required and expected. The Health Sciences Centre therefore maintained that fundraising was directly related to the provision of health care.

In our view, fundraising was not conducted for the purposes of providing health care, as it does not constitute a care, service or procedure that would be provided to diagnose, prevent, treat or maintain an individual's physical or mental health. It is an activity that is carried out for the purpose of obtaining money from donors. Further, identifiable personal health information is not necessary to accomplish fundraising and, we felt, should not be used except where otherwise authorized by legislation.

Accordingly, the Ombudsman did not find that collection of personal health information for the specific purpose of soliciting donations was justified under *The Personal Health Information Act* or the legislation governing the Health Sciences Centre.

Use

This case also raised the issue of lawful use of personal health information under *The Personal Health Information Act*. Specifically relevant to the matter under consideration, section 21 of the Act places restrictions on the use of personal health information, including:

> *Restrictions on use of information*
> *21 A trustee may use personal health information only for the purpose for which it was collected or received, and shall not use it for any other purpose, unless*
> *(a) the other purpose is directly related to the purpose for which the personal health information was collected or received;*
> *(b)the individual the personal health information is about has consented to the use;*

The use of identifiable personal health information to solicit donations from discharged patients was not, in the Ombudsman's opinion, directly related to the purpose for which it was collected or received as contemplated under *The Personal Health Information Act* and would not be a lawful practice.

Consent

Nevertheless, section 21(b) of *The Personal Health Information Act* does provide a means by which soliciting donations may be lawful, and that is by obtaining the consent of the individual the information is about:

> *Restrictions on use of information*
> *21 A trustee may use personal health information only for the purpose for which it was collected or received, and shall not use it for any other purpose, unless*
> *(b)the individual the personal health information is about has consented to the use;*

Disclosure of Personal Health Information to an Information Manager

Based on our investigation, we believed that Prolific Graphics was an information manager for the Health Sciences Centre because personal information was provided to the company in accordance with a written contract for the purpose of processing the mailing and fundraising materials. In the course of our review, we were advised that this personal information had been disclosed to Prolific Graphics without patient consent, and it was suggested to us that this disclosure was permitted

under the provisions of *The Personal Health Information Act*. We noted this seemed consistent with sections 25(1) and 22(2)(f) of *The Personal Health Information Act*:

> ***Trustee may provide information to an information manager***
> ***25(1)*** *A trustee may provide personal health information for the purpose of processing, storing or destroying it or providing the trustee with information management or information technology services.*
>
> ***Disclosure without the 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*
> *(e) in accordance with section 23 (disclosure to patient's family), 24 (disclosure for health research) or 25 (disclosure to an information manager);*

Use of Personal Health Information by an Information Manager

According to section 25(2) of *The Personal Health Information Act*, an information manager may use only personal health information that a trustee is authorized to use:

> ***Restriction on use***
> ***25(2)*** *An information manager may use personal health information provided to it under this section only for the purposes and activities mentioned in subsection (1), which must be purposes and activities that the trustee itself may undertake.*

As we determined that the provisions of *The Personal Health Information Act* would not permit the Health Sciences Centre to use, without consent, personal health information for fundraising, we similarly found that the patient names and addresses could not be used by the information manager.

Notification

The final issue in this case concerned the requirement for notice. Since personal health information was collected directly from patients, *The Personal Health Information Act* required that the Health Sciences Centre provide notice to each individual of all the purposes for which this information would be used:

> ***Notice of collection practices***
> ***15(1)*** *A trustee who collects personal health information directly from the individual the information is about shall, before it is collected or as soon as practicable afterwards, take reasonable steps to inform the individual*
> *(a) purpose for which the information is being collected; and*
> *(b) if the trustee is not a health professional, how to contact an officer or employee of the trustee who can answer the individual's questions about the collection.*

According to information received in our review, patients were apparently not being formally advised of the purposes for which their personal information was collected. We were informed, however, that written notices would be posted at each unit of the Health Sciences Centre.

Recommendations

In the Ombudsman's opinion, the complaint concerning the use of personal health information for the purpose of soliciting donations, without consent, was supported.

Based on our review, the Ombudsman made the following recommendations in the report to the Health Sciences Centre:

1. The HSC cease forthwith its practice of using personal health information for the purpose of soliciting donations or promoting the fundraising activities of a third party.
2. The HSC ensure forthwith that the personal health information provided to an information manager for the purpose of soliciting donations or promoting the fundraising activities of a third party, is or has been returned to the Trustee or destroyed.

3. The HSC take immediate steps to provide notice to individuals from whom personal health information is collected, as required under s.15 of PHIA.

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

> ***Trustee's response to the report***
> ***48(4)*** *If the report contains recommendations, the trustee shall, within 14 days after receiving it, send the Ombudsman a written response indicating*
> *(a) that the trustee accepts the recommendations and describing any action the trustee has taken or proposes to take to implement them;*
> *(c) or the reasons why the trustee refuses to take action to implement the recommendations.*

I am pleased to advise that the Health Sciences Centre informed our office that all of the recommendations were accepted. In its response, the hospital stated:

> *Although it remains our opinion that HSC was "using" personal health information in accordance with PHIA, we are prepared to obtain consent directly from the individuals. A regional committee will address this issue at its next meeting and will develop a plan to operationalize obtaining consent in accordance with PHIA.*

The Health Sciences Centre also requested guidelines that have been prepared by our office on obtaining consent. Copies of the checklist we developed, "Personal Health Information Elements of Consent" and "Personal Information Elements of Consent", were forwarded by our office for consideration. These guidelines were published in our 1999 Annual Report and on our web site (www.ombudsman.mb.ca).

Because the issue with the Health Sciences Centre had implications for all health care facilities and agencies that rely on donations from patients and clients, it was decided by the Winnipeg Regional Health Authority to deal with this issue on a regional basis.

We were advised that, subsequent to the Ombudsman's recommendations, a meeting was held at the Winnipeg Regional Health Authority, attended by its directors, the chief executive officers of hospitals and personal care homes and representatives from community health agencies, home care agencies, mental health agencies and health clinics. We were informed that, at this meeting, it was agreed consent would be obtained directly from individuals before providing their names and addresses to foundations.

As a result of the Ombudsman's recommendations, the Winnipeg Regional Health Authority Regional PHIA Committee was assigned the task of developing a plan to operationalize obtaining consent in accordance with *The Personal Health Information Act*. We are aware of the substantial time, research and consideration that has been undertaken by the Winnipeg Regional Health Authority Regional PHIA Committee and other representatives that formed the subcommittee to tackle this issue.

Ultimately, the subcommittee agreed upon three alternative options that might be implemented by facilities within the Winnipeg Regional Health Authority immediately. These were for a facility to undertake no fundraising, to require no consent for reason that names were not being provided to the facility's foundation, or to obtain written consent so that names could lawfully be provided to the facility's foundation.

Additionally, the subcommittee developed two consent forms. One of these forms is now being used across the region in order to obtain the patient's written consent to release his or her name and address to a foundation in order to receive information about the facility, the foundation and possibly donations to the foundation. The second consent form, similarly worded but not in use at this time, was developed to obtain documented consent. It may be considered for use by some facilities in the future.

CASE SUMMARY 2000 – 212

Dial "D" for Disclosure

On November 30, 2000, articles appeared in *The Winnipeg Free Press* and *The Winnipeg Sun* newspapers that the Misericordia Health Centre, a trustee under *The Personal Health Information Act*, had faxed a 15-page report containing the personal health information of a patient to an unintended recipient. Our office opened a file on the Ombudsman's own initiative as provided for under section 39(4) of the Act, which states:

> ***Ombudsman may initiate a complain***
> ***39(4)*** *The Ombudsman may initiate a complaint respecting any matter about which the Ombudsman is satisfied there are reasonable grounds to investigate under this Act.*

The Misericordia Health Centre acknowledged from the outset that the personal health information had been faxed to the wrong address because of an error in dialing the fax number by an employee of the Centre. Our review consisted of discussions with the Centre's Privacy Officer and a review of several documents relevant to the incident. These consisted of the patient's authorization to release the information, a summary of the incident, memoranda on the matter and the Centre's policies and procedures related to the faxing of information and the reporting of security breaches.

Under *The Personal Health Information Act*, trustees must establish written policies and procedures relating to the security safeguards for personal health information. Trustees are also obliged to inform staff about these policies and procedures, have all staff sign a "Pledge of Confidentiality" and provide ongoing training about the Act, its Regulation, and the polices and procedures required by the legislation.

Specifically, section 18 of the Act provides:

> ***Duty to adopt security safeguards***
> ***18(1)*** *In accordance with any requirements of the regulations, a trustee shall protect personal health information by adopting reasonable administrative, technical and physical safeguards that ensure the confidentiality, security, accuracy and integrity of the information.*
>
> ***Specific safeguards***
> ***18(2)*** *Without limiting subsection (1), a trustee shall*
> *(c)if the trustee uses electronic means to request disclosure of personal healthinformation or to respond to requests for disclosure, implement procedures to prevent the interception of the information by unauthorized persons;*

The Regulation sets out the following additional obligations of trustees:

> ***Written security policy and procedures***
> ***2*** *A trustee shall establish and comply with a written policy and procedures containing the following:*
> *(a) provisions for the security of personal health information during its collection, use, disclosure, storage, and destruction ….*
> *(b) provisions for the recording of security breaches;*
> *(c) corrective procedures to address security breaches.*
>
> ***Orientation and training for employees***
> ***6*** *A trustee shall provide orientation and ongoing training for its employees and agents about the trustee's policy and procedures referred to in section 2.*

Pledge of confidentiality

7 *A trustee shall ensure that each employee and agent signs a pledge of confidentiality that includes an acknowledgement that he or she is bound by the policy and procedures referred to in section 2 and is aware of the consequences of breaching them.*

Our office was provided with copies of the Centre's policies relating to:

- *Transmission of Personal Health Information Via Facsimile ("Fax")*
- *Protection of Privacy During Use and Disclosure of Personal Health Information*
- *Reporting of Security Breaches Related to Personal Health Information and the Corrective Procedures to be Followed.*

Section 2.2 of the Centre's Policy entitled "Transmission of Personal Health Information Via Facsimile" sets out that staff are responsible for:

- *determining whether a fax transmission is a secure and appropriate method to send the information. A factor to consider in determining whether the fax transmission is an appropriate method to transmit personal health information is whether or not the information is required for urgent, emergent or critical care;…*
- *ensuring security of the personal health information transmitted.*

In addition, section 3.1 of policy states:

Senders must take utmost care to ensure the accuracy of fax number dialed. Use visual check on the display to ensure that the correct number was dialed.

The Centre's Policy entitled "Reporting of Security Breaches Related to Personal Health Information and the Corrective Procedures to be Followed" requires that:

3.1.1 *Any individual receiving an allegation of a breach of confidentiality or having knowledge or a reasonable belief that a breach of confidentiality of personal health information may have occurred shall immediately notify his/her supervisor or …. shall notify the Centre's Privacy Officer, or designate….*

3.1.3 *If the decision is made to proceed with an investigation, it shall be the responsibility of the supervisor, in consultation with the Privacy Officer, to investigate the allegation (this process will include obtaining the alleged violator's version of events), consult with the appropriate resources, document findings and made a determination as to whether there has been a breach of confidentiality of personal health information….*

3.1.5 *The Privacy Officer shall be informed in writing of all allegations that have been made and their outcome and shall maintain a database of this information.*

In discussions with the Centre's Privacy Officer, we were advised that, prior to this event, all staff of the Centre had received education on *The Personal Health Information Act* and had been made aware of the Centre's policies and procedures. In addition, all staff had signed the Pledge of Confidentiality required by the Regulation.

It was reasonable, in our opinion, to believe that this incident was the result of human error. Our review of Misericordia Health Centre's policies and procedures and of its handling of this matter led us to conclude that the Centre was in substantive compliance with the requirements of *The Personal Health Information Act* and its Regulation. We note that the misdirected personal health information was recovered very quickly by the Centre and the patient whose information this concerned was notified as soon as possible about the breach of his privacy. The Centre apologized to the patient and reminded staff of the fax policy and the need to be vigilant when transmitting information electronically.

CASE SUMMARY 2000 – 203

No Record – No Breach

An individual provided a letter of complaint to our office alleging that their personal health information had been disclosed in contravention of *The Personal Health Information Act* by a trustee, specifically a health care facility. The complainant alleged that an employee of the Trustee made a statement about the complainant's health care in the company of others in a public place.

We met with the individual upon receipt of the letter of complaint to obtain additional information. We advised the complainant that, in the opinion of our office, for a verbal disclosure to constitute a breach under *The Personal Health Information Act*, the personal health information disclosed orally would have to exist in a recorded format and be maintained by the trustee in question. *The Personal Health Information Act* provides:

> ***Right to make a complaint about privacy***
> ***39(2)*** *An individual may make a complaint to the Ombudsman alleging that a trustee*
> *(a) has collected, used or disclosed his or her personal health information contrary to this Act; or*
> *(b) has failed to protect his or her personal health information in a secure manner as required by this Act.*

"Personal health information" is defined in section 1(1) of the Act as "recorded information", as follows:

> ***Personal health information*** *means recorded information about an identifiable individual that relates to*
> *(a) the individual's health, or health care history, including genetic information about the individual,*
> *(b) the provision of health care to the individual, or*
> *(c) payment for health care provided to the individual,*
> *and includes*
> *(d) the PHIN and any other identifying number, symbol or particular assigned to an individual, and*
> *(e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care; [emphasis ours]*

In reviewing the matter, we conducted interviews with various employees and management staff of the Trustee, examined personal health information and other relevant documentation, and considered the provisions of *The Personal Health Information Act.*

Our review indicated that the information apparently revealed to the complainant by the employee of the Trustee was not information recorded within the complainant's personal health information maintained by the Trustee. Accordingly, under the Act, we could not consider this to be a breach of privacy or a violation of the legislation.

Nevertheless, our enquiries respecting this matter raised other important issues, specifically the Trustee's lack of policies and procedures as required by *The Personal Health Information Act*. Accordingly, we opened our own investigation into the Trustee's compliance with the Act.

There have been several meetings and discussions with the Trustee over recent months. In 2001, the Trustee drafted and implemented written policies and procedures that, based on our review, appear to be compliant with *The Personal Health Information Act* and its Regulation. We are satisfied that the Trustee now has a better appreciation of its responsibilities under the law.

Part 3:

THE OMBUDSMAN ACT

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

INTRODUCTION TO *THE OMBUDSMAN ACT*: PROVINCIAL GOVERNMENT DEPARTMENTS, AGENCIES AND MUNICIPALITIES (EXCLUDING THE CITY OF WINNIPEG)

Since 1970, the Manitoba Ombudsman has derived duties and powers from *The Ombudsman Act* that 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 do not fall under *The Freedom of Information and Protection of Privacy Act* or *The Personal Health Information Act* for a jurisdictional reason, 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 situations where the complainant, the entity complained about or the records in question do not come within the access and privacy legislation.

As with Manitoba's access and privacy legislation, the Ombudsman under *The Ombudsman Act* receives complaints and can initiate investigations on his own initiative. Similarly, the Ombudsman acts independently and has broad powers to investigate, report publicly and make recommendations where a complaint is supported and 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 the year 2000, five complaints were handled by the Access and Privacy Division under *The Ombudsman Act*. One case was pending at the end of the year and each one of the remaining four cases was concluded with a different disposition: supported, not supported, assistance rendered and information supplied.

A privacy case that was received by our office in 1999, completed in 2000, and handled under *The Ombudsman Act* is summarized below.

Manitoba Justice

An individual complained to our office about an alleged breach of privacy by Manitoba Justice. Specifically, it was claimed that Court records pertaining to a matter for which the complainant had been pardoned were released to a third party by a Court of Queen's Bench office.

The matter could not be investigated under The Freedom of Information and Protection of Privacy Act because the Act does not apply to information in a Court record. The Ombudsman, however, could investigate the matter as a complaint about administration against a government department.

CASE SUMMARY 1999 – 009-X

Pardon Me

A complainant, who had been granted a pardon by the National Parole Board, advised our office that copies of the Indictment, Trial Disposition and Criminal Disposition Sheet were released to a third party by an office of the Court of Queen's Bench. The complainant learned of the disclosure of these records when they were provided anonymously to the complainant's employer.

The complainant provided our office with a copy of a letter received from the Court office concerning the disclosure. This letter indicated that a person claiming to be the complainant telephoned the Court office and requested copies of documents relating to the Court matter. The caller provided a fax number and requested that the documents be faxed to that number. It was determined by Court office staff that the Court file in question had been transferred to the Provincial Archives and a request was made to the Archives for copies of these documents. Copies of the Indictment, Trial Disposition and Criminal Disposition Sheet, were subsequently received by the Court office and faxed to the third party who claimed to be the complainant.

The complainant expressed the view to our office that the policies and processes surrounding the release of information at the Court of Queen's Bench required review and change to ensure no further breaches of privacy, like this one, occurred.

Enquiries were made by our office with the Courts Division of the Department of Justice. The Courts Division consists of Winnipeg Courts and Regional Courts, which includes three regions: South Central, West Central and Northern. The Court office is located in the South Central Region.

We made enquiries concerning the process at the Court office for responding to requests for access to court files. Our office was advised that, generally, adult court records are publicly accessible for viewing. We understand that records concerning young offenders and those concerning adult matters for which a pardon has been granted are not publicly accessible, although copies could still be provided to the individual who had been convicted.

Our office also made enquiries with the Department concerning policies or procedures for obtaining access to court records relating to pardoned matters. The Department informed us that, at the time of the incident in question, there was no province-wide policy regarding the release of Court documents concerning pardoned matters. Our office was also advised that the Court office did not have a written policy or procedure at that time concerning access to documents relating to pardoned matters. Nevertheless, we were informed that the practice in the Court office was to allow the pardoned individual to have copies of their own information from the court file. We were advised that there was no written procedure for providing access to pardon records or for verifying the identity of the requestor.

We made further enquiries about the recordkeeping system in the Court office for locating a Court file and determining whether the matter had been subject to a pardon. Our office was advised that the Court office maintained a manual ledger that lists court file names. We understand the ledger would be consulted by staff when an enquiry was made about a particular court file.

We discussed with the Department how staff of the Court office, in order to guard against inadvertent disclosure of information, would be able to determine whether an enquiry related to a pardoned matter from checking the ledger. Our office was advised that, at the time of the incident in question, there was no differentiation between pardon and non-pardon files in the ledger. This manual system did not identify or "flag" a pardon file in any manner.

The Department informed us that when a pardon notification was received at the Court office from the National Parole Board, it would be placed on the relevant court file. Accordingly, staff of the office would be able to determine that a pardon had been granted once the file was checked.

The time frames for the retention of government records, including court files, are established in Records Authority Schedules as required under *The Legislative Library Act*. We were advised that the Records Authority Schedule pertaining to adult criminal Court files sets out that these files are to be retained in the court offices for the current year in which they are opened plus five years. These files are then transferred to the Provincial Archives. The Department advised that when the pardon notification is received by a Court office after the file has been transferred to the Provincial Archives, the pardon notification is forwarded to the Archives to be attached to the court file.

Our office made enquiries with the Provincial Archives. We were advised that the Court office transferred its Queen's Bench criminal files from 1987 to 1989, to the Archives on May 1, 1995.

We were informed by the Archives that a file that is subject to a pardon would be separated from the other files comprising the transfer and placed with other pardon files in a high security vault. Our office confirmed that the letter from the National Parole Board notifying of the pardon relating to the complainant's matter was forwarded by the Court office to the Archives. The Court file was removed from the transfer and placed in a high security vault. While other adult Court files held at the Archives can be viewed by the public, pardon files are not identified to the public nor would they be accessible by the public.

We understand that staff at the Court office would not have been aware that the request for documents from the complainant's court file related to a pardoned matter. The Court ledger did not identify pardon files. The file concerning the complainant's matter had been transferred to the Provincial Archives in accordance with the Records Authority Schedule. The pardon notification received from the National Parole Board had been forwarded to the Archives to be placed on the complainant's file. We were advised that no record of the pardon had been maintained in the Court office.

There was no indication from our review that the disclosure in question had been made in bad faith. Nevertheless, this disclosure raised serious concerns relating to the handling of files involving pardons and responding to requests for information from these files in a manner that protects the privacy of the individual.

Throughout our review, we found the Department to have taken this disclosure very seriously. In response to complainant's concerns about the confidentiality of information relating to a pardoned matter, the Court office advised us of how this was subsequently addressed in the ledger of court files containing the complainant's name. We were informed that the Court office now protects the complainant's confidentiality by identifying in the ledger that the file concerns a pardon to ensure that the existence of the pardon record would not be divulged. Our office was advised that the Court office now marks in bold letters "Pardon Granted" beside the complainant's name in the ledger in order to identify to staff that no information about this Court file may be disclosed.

In the course of our review, we discussed with the Department concerns arising from this incident. It was apparent that the Court office did not have a procedure in place for identifying pardon files. Accordingly, there was no mechanism to ensure that when an enquiry related to a pardoned matter, staff would be able to respond in a manner that would protect the confidentiality of the pardoned individual. It was also noted that, further to receiving the notification of pardon and forwarding it to the Provincial Archives, a record of the pardon had not been maintained by the Court office. Finally, in terms of responding to requests for documents relating to a pardoned matter, it was noted that there was no procedure in place to verify the identity of the requestor.

We made enquiries with the Department concerning the procedures for handling pardon files in other Manitoba court offices. Our office was advised that there are different recordkeeping systems in place, some manual and some computerized. We understand that there were also different approaches for handling requests for access to pardon files.

This incident brought to light the need for the Department to review practices in the Courts Division relating to pardon records. The Department informed our office that Winnipeg Courts had developed a procedure for handling requests for such pardon documentation. We were advised that the Department was undertaking the development of a consistent approach throughout the Courts Division and that this led to the Department's preparation of a provincial policy on the issue.

In the course of our review, our office was provided with a copy of the "Courts Division Pardoned Record Policy", dated April 19, 2000. We were advised that this is a Division-wide policy that applies to courts throughout the province. The Department informed our office that this policy has been implemented.

We reviewed the Policy in relation to the concerns arising from the release of court records about the complainant's pardoned matter. It was noted in the introduction of the *Policy* that the federal *Criminal Records Act* allows the National Parole Board to grant, deny or revoke pardons for convictions of offences under federal Acts. When a pardon is granted, departments and agencies of the federal government having records of the conviction are required to keep those records separate and apart. Although the *Criminal Records Act* applies only to records maintained by the federal government, other jurisdictions may cooperate by restricting access to their records. The Policy states:

> *…It is Manitoba's intention to comply with the spirit of this Act….*

The introduction further states:

> *…A pardon is not an official recognition that the individual was wrongly convicted.*
>
> *A pardon means that someone deserves the chance to live their life without the shadow of a past conviction hanging over them….*

The Policy sets out procedures for identifying a pardoned matter in the manual and electronic records systems to ensure that Court offices maintain records of pardon court files. For manual records, this would involve stamping "PARDONED" on the records. The cover of the court file would also be stamped.

When the court file is housed at the Provincial Archives, a notification form is to be completed and sent to the Archives along with the relevant documentation concerning the pardoned matter. A portion of the form is to be completed by Archives staff and is to be returned to the sender.

The Policy also sets out procedures for responding to enquiries relating to a pardoned matter. The Policy provides for individuals to be able to obtain copies of court documents relating to their pardoned matter by attending the Court office and providing photo identification. For individuals outside the province who cannot attend personally, the procedure requires that a written request be made and a notarized photocopy of the sender's proof of identification be sent for verification purposes. The Policy contains a cautionary note that information concerning a pardoned matter cannot be released to individuals over the telephone.

There was no policy concerning such a disclosure at the time of the disclosure of records relating to the complainant's pardoned matter. Nevertheless, we note that the disclosure of these records to a third party was a breach of the complainant's privacy. This disclosure highlighted issues relating to the handling of pardoned files and to responding to requests for information from these files in a manner that protects the privacy of the individual.

Our review indicated that issues arising from the complaint to our office were considered by the Department and were incorporated into the "Courts Division Pardoned Record Policy". We understand that following the incident the complainant received a verbal apology from a staff member of Manitoba Justice. Our office requested that the Department send the complainant a letter of apology concerning the release of records from the pardon file.

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's 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