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December 2004

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 sixth Annual Report of the Manitoba Ombudsman under these statutes, covering the calendar year January 1, 2003 to December 31, 2003.

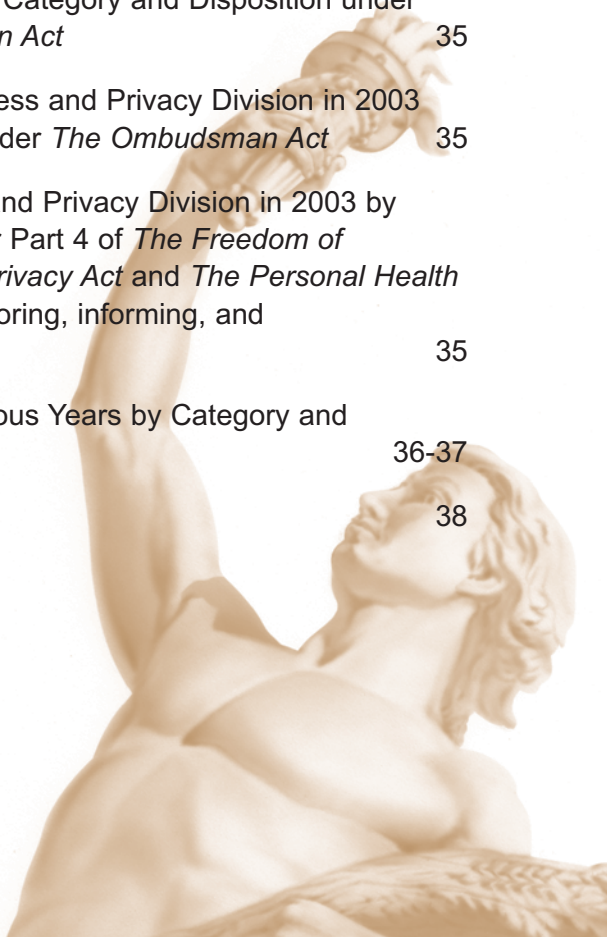
Yours very truly,
Original signed by

Barry E. Tuckett
Manitoba Ombudsman



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Barry E. Tuckett
Manitoba Ombudsman

A Message from the Manitoba Ombudsman

Access to information and protection of personal information privacy are fundamental rights in open, accountable, and modern democratic governments. Manitoba has supported these rights through the passing of legislation over the years that incorporates the basic principles of good information access and privacy practices. The passing of legislation in itself is not enough, however, to ensure that rights are respected. There needs to be a culture of openness, transparency, and accountability that demonstrates to the public in a visible way that there is commitment from the top to access and privacy rights.

Over the years in reporting to the Legislative Assembly, I have drawn attention to many access and privacy issues wherein the message was sometimes positive and sometimes negative. In looking back, it seems that, while we have moved forward in establishing and providing access rights and privacy protection, there is still a long way to go in refining processes, procedures and attitudes to enhance the effectiveness and efficiency of the administration of access and privacy legislation. The following is a bit of the history of the start and growth of access and privacy legislation in Manitoba. In addition, I would like to share some observations and comments with the Legislative Assembly based on the many years of experience our office has had with this legislation.

MANITOBA'S FIRST ACCESS LAW

Freedom of Information legislation was introduced to the Manitoba Legislature on March 15, 1985. It was the first such provincial legislation west of Quebec, and the government of the day believed it to be the "...best in the country." At the opening of the second reading of Bill 5, the Attorney General stated:

It has been said, perhaps with too much of the truth about it, that the term 'open government' is an oxymoron, a contradiction in terms. It need not be, and subject to reasonable exemptions all information in government files should, as a matter of principle, be available to the public, to whom, in every sense, we are answerable; and with respect to whom we must always strive to be the servants and not the masters.

Freedom of Information legislation is sometimes called 'sunshine legislation' principally because an informed citizenry and democracy are two sides of the same coin.

The Opposition Critic commented:

We certainly on this side of the House can support the principle that individual citizens have the right to know and obtain information from their government, subject to the government's obligations to act in the public interest and to perform its legitimate functions. People in government sometimes forget that government is there to serve the public and not be its master.

There is also the tendency, I think, on the part of government of all political stripes to be too secretive, a tendency which is followed through by members of the Civil Service.

Open government has to be the basis of a stronger democracy and through more information being made available to members of the public the democratic process can be strengthened.

The Freedom of Information Act (FOI Act) passed the Legislature on July 11, 1985, with all party support and came into force in 1988. Notably, information privacy protection was treated more as an exemption from access than a legal right itself. This limitation was recognized on both sides of the House at the time the members debated and discussed the Bill.

Of critical importance to the new access to information statute, and the review mechanisms that were to give it teeth, according to the Attorney General, was an oversight process to “ensure the rights of access are enforceable and not illusory.”

Addition of stronger information privacy rights

By the mid-1990s, the government of Manitoba had recognized the growing need to underpin personal information protection by giving it a stronger statutory foundation. To meet this need, two statutes were developed and proclaimed: *The Personal Health Information Act* (PHIA) in 1997 and *The Freedom of Information and Protection of Privacy Act* (FIPPA) in 1998.

PHIA was the first legislation of its kind in Canada to establish clear and certain rules for the collection, use, disclosure, retention, and security of personal health information, including a right of access to one’s own personal health information. The most significant change to the old FOI Act was the introduction of similar personal information protection into what became FIPPA. Together, these complementary Acts broadened the coverage of access and privacy rights extensively to most public bodies including municipalities, schools, hospitals and private sector personal health information trustees.

THE ROLE OF THE OMBUDSMAN

Democratic principles have been built into our parliamentary system of government and the role of the Ombudsman has been recognized as an integral part of the mechanisms that support compliance with these principles. This recognition was quite evident in 2003 when the Commonwealth Heads of Government met in Abuja, Nigeria, and fully endorsed the recommendations of their Law Ministers on what is referred to as the Latimer House Guidelines, which specified the “Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government”. Of particular interest was the support for the role of independent oversight bodies.

The guidelines read in part:

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process.

Steps which may be taken to encourage public sector accountability include:

- (a) The establishment of scrutiny bodies and mechanisms to oversee Government, enhances public confidence in the integrity and acceptability of government’s activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in*

enhancing public awareness of good governance and rule of law. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances,

(b) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

It is encouraging to see the articulation of these principles by the Heads of Commonwealth Governments. It is even more encouraging to note that Manitoba Legislatures over the years have shown their commitment of these principles with the passing of *The Ombudsman Act*, access and privacy legislation, human rights legislation, *The Auditor General Act*, etc.

In 1970, the Manitoba Legislature had proclaimed *The Ombudsman Act* which established an independent office of the Legislative Assembly to investigate complaints against departments and agencies of the provincial government relating to matters of administration. With its broad powers of investigation, the office provided people who felt they had been treated unfairly by government with an avenue of obtaining a thorough and impartial review of actions and decisions of government. Even before the FOI Act was proclaimed, complaints to the Ombudsman included matters relating to accessing government records and concerns over violations of privacy.

Manitoba's access and privacy legislation provides for the Ombudsman to investigate complaints involving non-compliance with the Acts. In addition, the Ombudsman has other duties such as auditing, monitoring, ensuring compliance, informing the public, and commenting on the implications for information access and privacy of proposed legislative schemes, programs or practices of public bodies and personal health information trustees. Of necessity and probably design, the Ombudsman's duties under access and privacy legislation became more proactive especially in the areas of information privacy protection where there is a paramount need for the exercise of due diligence by public bodies and trustees to avert privacy breaches.

The most important role of the Ombudsman?

A less obvious role of the Ombudsman, but arguably the most important one, is the value the office provides in enhancing the principles of open, transparent, and accountable government. This function was recognized in 1970, 1985, 1997, and again in 1998 when the laws under which the office operates were introduced or changed. This role may well be even more important today as we seem to hear and read increasingly about the growing prevalence of public disillusionment, cynicism, distrust, apathy, and non-participation in many of our society's mechanisms of governance.

Accountability and empowering the public

The demand for public accountability seems to be on the increase as a result of various instances of questionable behaviour by some governments that have resulted in specialized inquiries concluding with revelations of wrong doing. In past annual reports, I have commented that there is a price governments have to pay in

safeguarding the public's democratic right to open, transparent, and accountable government. Time and money are required to ensure that democratic rights are respected. Government must be prepared to endure rigorous scrutiny, opposition, and criticisms that come from meaningful public participation in matters of public interest when people raise questions, seek answers, and voice concerns.

Empowering public participation in government decisions and actions not only enhances accountability, transparency, and openness, it is also a positive way of revealing good governance and disclosing where government truly serves the public interest.

OBSERVATIONS AND COMMENTS ON HOW THE LEGISLATION IS WORKING

In my 1994 Annual Report, I made some observations and comments to assist in identifying some of the positive and negative activities that impact on the administration of the legislation. Subsequent annual reports have also raised access and privacy issues that I felt should be considered by those involved in the legislation. As my term as Ombudsman draws to an end, I believe it is timely to again provide some observations and comments on the administration of the legislation for consideration.

The need to support access and privacy coordinators and officers

Access and privacy coordinators and officers, who have responsibilities delegated from the top, must be supported materially, in principle, and in practice. Like the current provincial government's "At Your Service Manitoba" initiative, commitment must begin at the top and involve everyone in the organization.

Access and privacy coordinators under FIPPA and the privacy officers under PHIA are on the front lines of service to the public. I hear comments from time to time about the work and status of Manitoba's coordinators that remind me of a description written by the former federal Privacy Commissioner, John Grace. Referring to federal privacy coordinators in his 1985/86 annual report, he stated:

Theirs is a difficult role. They have divided loyalties, pulled on the one side to their own department where their careers are at stake; on the other to the Privacy Act and to fair information practices. Sometimes the two roles are difficult to reconcile, and that, of course, is inevitable.

Not inevitable is the lack of support given to some privacy coordinators by their superiors. Some coordinators are even reluctant to press their concerns with departmental lawyers lest they be considered disloyal. Nor, as a group, do they seem influential as the privacy consciences of their departments. Many of them are not in the mainstream of their organization. The position of coordinator is not yet generally seen as desirable for career progress.

These words were quoted by a Parliamentary Committee in 1987 noting that they applied with equal force to access coordinators.

Perhaps less well known than I would like, is that this office is an important support for access and privacy coordinators. While the decisions and recommendations coming from this office reflect the unique circumstances of each and every case, I believe they are helpful in giving some indication of our approaches and interpretations. This is why we are making efforts to get

more cases on our web site, though I caution that we treat each case on its own merits. Decisions in cases are not precedents, but they may be persuasive.

I also regard the ongoing training and education of all access and privacy coordinators and officers to be fundamental to public bodies and trustees in complying with the letter, spirit, and intent of FIPPA and PHIA, and with best practices. It must be recognized that the legislation sets the floor and not the ceiling for managing general and personal information.

The need for privacy impact assessments as a due diligence practice

Information and communication technologies have brought many efficiencies and conveniences to play in the provision of public services, in managing and using large volumes of data, and in developing new information from the combination of existing information reservoirs. The concentration and transmission of personal and personal health information have also brought magnified risks for this information if only because of the sheer volumes involved and the extraordinary ease of communicating it. This is not to say that traditional paper-based information systems are without risks to the security and privacy of personal information. Both sets of risks need to be addressed by public bodies and trustees to ensure that personal information is properly protected in accordance with legislative requirements and best practices.

Our office has repeatedly drawn attention through our presentations and annual reports to the obligation of public bodies and trustees to ensure that they are in compliance with the information privacy provisions of FIPPA and PHIA so far as possible. To contribute positively to this important precautionary responsibility, my office undertook the very uncommon measure of making a Special Report to the Legislature introducing a privacy impact assessment process. We developed a broadly based Privacy Compliance Tool (PCT) that public bodies and trustees may use to perform a privacy self-examination. In other words, we prepared this tool to assist these bodies in undertaking a systematic and appropriate due diligence and risk management process to minimize the risks associated with handling personal information.

Risks of not practicing due diligence

The categories of risks that are associated with failing to undertake a systematic privacy assessment are widely accepted.

- *Foremost is the risk for the information privacy of individuals in the knowledge that once privacy has been lost, it usually cannot be fully reinstated.*
- *The program or legislative initiative may be brought into discredit with a significant and sometimes even a critical loss of public trust and confidence in an organization's regard for or consideration of the public's legal rights.*
- *Electronic systems in particular, but also programs, may have to be reconsidered, redesigned, or retrofitted at substantial cost.*
- *Personal or personal health information is disclosed or "shared" through existing agreements that may not comply with the legislation or "best practices", or without any written agreement at all.*
- *Liabilities may ensue for employees and the organization.*

A disappointing response from the provincial government, public bodies and trustees

It is a matter of considerable disappointment and concern to me that, with the exception of Manitoba Health, which has developed a privacy impact assessment focussed on its electronic systems, the provincial administration has shown little interest in the process notwithstanding the clear duty that entities have under the legislation for the protection of the personal information that they hold in trust. I don't know any other conclusion I can realistically reach from the lack of response to us about the PCT.

Informing and consulting with the Ombudsman

In the vein of meeting obligations under the Acts, I would note that FIPPA and PHIA share provisions that place a general duty on the Ombudsman to comment on certain matters. Following are two of the clauses from Part 4 of FIPPA:

49 In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may

(d) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies;

(e) comment on the implications for the confidentiality of personal health information of
(i) using or disclosing personal information for record linkage, or
(ii) using information technology in the collection, storage, use or transfer of personal information;

To discharge these duties presupposes, it seems to me, that our office would have knowledge of proposed legislative schemes or programs, and of initiatives involving record linkages or using information technology in the collection, use or transfer of personal information. I am hard pressed to find examples where our office has been informed of such matters in a way that would enable us to comment in a timely and constructive manner. The media has been the usual source of information about government proposals and initiatives that may implicate privacy and access rights. This is not as it should be.

It is my view that such statutory provisions were intended to make the considerable expertise of our office available on a consultative basis to help minimize negative impacts on the public's access and privacy rights. On the one hand, such use of our services would require additional resources for our office; on the other hand, there would be a substantial gain in the area of due diligence and risk management.

Making the legislation work: mutual responsibilities

I must also emphasize that making the legislation work well is a two-way street. There must be responsible use by information applicants and complainants. This is certainly not always the case, but the instances of deliberate misuse are not really all that many. Nevertheless, just as poor performance by some in the administration of the Acts tends to reflect negatively on how well the access and privacy regime is working, so too does abuse of the legislation by the few. Public bodies and trustees need to be able to manage these few cases. For this reason, we have suggested to the Government that an "abuse of the right of access" provision be considered during the current review of the legislation that would allow public bodies and trustees to exercise a limited discretion in responding to an applicant's access request, so long as this discretion remains subject to review by our office.

Crucial role of the news media

It has been brought to my attention on many occasions by public bodies that the news media can be very troublesome. It is important for the various news media to be responsible users, but it is equally important for the holders of information to acknowledge that access legislation is a right and proper research tool for their work in helping the public know what is going on. It is worth repeating here for public bodies and trustees the Latimer House guidelines that I quoted at the beginning of this message:

Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

The media's role in relation to oversight offices such as ours is a crucial part of bringing scrutiny to bear on issues that are matters of public interest. These matters and the responses to them by public bodies and trustees can be of unrivalled importance in maintaining the trust and confidence of the people.

Duty to assist

Turning again to the "duty to assist" provision of the legislation, I have long thought that this was one of the most important additions to the requirements of FIPPA and PHIA. *The Freedom of Information Act* did not have this explicit requirement to assist an applicant or individual, though one would think that this is simply an underlying and well understood part of the daily duties of public service. The duty to assist requires the heads of a public bodies and trustees to make every reasonable effort to assist an applicant for access to information and "to respond without delay, openly, accurately and completely." The duty to assist should be the byword in administering the legislation.

POSITIVES AND NEGATIVES

In looking back to the positive and negative activities we identified in 1994, it is interesting to note that there are a number of similar concerns today. I find this somewhat discouraging. It suggests to me that there is an ongoing need to refresh, revitalize and recommit to the principles of access and privacy legislation. The following views on what are the positives and negatives are offered to assist in this process.

■ POSITIVES

- Manitoba's legislation incorporates the basic principles for good information access and privacy practices.
- Many public bodies have a more or less acceptable level of understanding of the access requirements of the legislation. There is an awareness of information privacy rights, but the legal requirements are less well understood.
- Many health authorities and facilities have a notable commitment to and understanding of PHIA and of FIPPA where it applies. The Winnipeg Regional Health Authority is a leader in developing policy, training, supporting, and promoting personal health information access and privacy rights.
- The Manitoba Centre for Health Policy is an outstanding supporter and exponent of personal health information privacy rights and best practices provincially and nationally.
- Manitoba Health is a leader both provincially and nationally in supporting personal health information privacy rights, and has developed a privacy impact assessment process in relation to its electronic systems.

- Most public bodies have a good response rate (within 30 days) to requests for access to information.
- Manitoba Culture, Heritage and Tourism maintains a very informative and well presented web site.
- Civil Legal Services produced a worthy FIPPA Resource Manual in cooperation with Culture, Heritage and Tourism.
- There are many examples of commitment to access and privacy rights by public bodies and personal health information trustees “out there”. These examples would become much more numerous with greater training and educational opportunities.

■ NEGATIVES

- There does not appear to be a culture of openness and transparency with visible commitment from the leaders of the public bodies.
- A number of Provincial Government Departments and the City of Winnipeg in general are not responding to access requests according to the statutory requirements by:
 - Not providing reasons for denying access to information in compliance with the legislation.
 - Not practicing severing as required under the laws. Severing must be applied as the legislation requires and as the Court of Queen’s Bench has affirmed: the exceptions “must be strictly interpreted and...must fall squarely within the ambit of the exempting section.”
 - Using a “shotgun approach” in the application of exceptions responding to access requests, rather than being specific as the legislation requires. This practice is wrong and reflects a very weak understanding of the legislation or a misguided hope that at least one of the exceptions cited may apply.
- Discretion to refuse access is exercised without clearly identifying the adverse affects and providing reasons. The exercise of discretion at times is not guided by the need to be reasonable, equitable, lawful and not vague, capricious or arbitrary.
- Access and privacy coordinators are not given the support, including training, essential to them in conducting their work in accordance with the legislation.
- There is too little communication between applicants for information and access officers and/or access coordinators. More open communication and transparent activities will make the system work better.
- Our office has an unacceptable backlog of complaints and is not active enough in carrying out duties such as
 - conducting audits and reviews of systemic issues,
 - commenting on the access and privacy implications of programs and activities of public bodies, and
 - public educational activities.
- Many public bodies at the provincial and municipal levels do not undertake self-assessments of their compliance with FIPPA and PHIA.

CONCLUDING REMARKS AND SUGGESTIONS

Over the years, our office has had the opportunity to work with many fine competent individuals who are committed to democratic principles and ethical behaviour. Staff in the Office of the Ombudsman, to whom I owe a great deal for their dedication and hard work, have shown these qualities as have many of the elected officials, civil servants, and the public. We have found that breakdowns in the system have seldom been willful or a result of bad faith.

While there are many positive aspects about the administration of access and privacy legislation in Manitoba, improvement is needed.

Firstly, I would suggest that provincial government departments and agencies, other public bodies and health information trustees commit themselves to self-assessments of their compliance with FIPPA and PHIA and make the results of the assessments public.

Secondly, most provinces with access and privacy legislation give vibrancy and meaning to the legislation through encouraging and supporting an annual forum or conference. I would suggest that the Manitoba Government take steps to encourage and support the holding of an annual forum where access and privacy issues can be brought forward and discussed; where specialists can share their expertise with those responsible for administering the legislation; and where access and privacy officers and coordinators, and trustees of personal health information have the opportunity to share their experiences and knowledge, and to learn and strengthen their commitment to the principles of access and privacy.

Thirdly, I have observed that the response of government departments and agencies to access and privacy issues has not always been consistent nor has there been a uniform positive commitment to the principles of the legislation. There does not appear to be a culture of openness across government. This in turn has led to non-compliance issues and public doubt about government's commitment to openness and accountability.

A clear statement/declaration, in writing, from the highest level of government would send a strong message both within government and to the public that the present government expects its public servants to respect both the letter and spirit of the legislation and will hold them accountable for doing so. I would suggest this be done.

I believe implementation of the above suggestions would go a long way in creating a culture of openness and accountability and raising the public's confidence and trust in the government's commitment to access and privacy rights.

2003

Year in Review





INTRODUCTION

In 2003, the Access and Privacy Division opened 194 new cases. There were 209 cases carried over from previous years, which resulted in our case workload for the year being 403 cases. This was the second highest workload the Division has experienced, down slightly from 428 cases worked on in 2002.

During the year, 251 of the 403 cases were closed, leaving 152 cases to be carried over to 2004. This was the highest number of cases that the Division has ever closed in a year. The carry-over of 152 cases was an improvement from the two previous years, which is attributable in part to the reduction in the number of new cases opened in 2003.¹

Staff also responded to approximately 450 inquiries from the public about access and privacy matters during the year. In response to these questions or concerns, we provided information concerning the application of FIPPA and PHIA and about rights of individuals and obligations of public bodies and trustees under the legislation. Where issues raised were non-jurisdictional, we referred individuals to appropriate organizations.

Proactive projects undertaken by our office in 2003 included the comprehensive consideration and drafting of our suggestions on legislative concerns relating to FIPPA and PHIA in anticipation of the calling of the public reviews required by both Acts. Another major task was the completion of our Privacy Compliance Tool as discussed in our 2002 Annual Report. This is a privacy impact assessment process for use under FIPPA and PHIA. Associated tasks undertaken in 2003 were the issuance of a Special Report to the Legislature relating to the Tool and the development of special interactive workshops. These activities are more fully discussed in this Annual Report under “Compliance Matters” below.

REFLECTIONS ON THE ACCESS AND PRIVACY SYSTEM

Information access and privacy legislation is based primarily on fundamental rights of people such as:

- the right to access information, including information about oneself, from entities subject to the legislation, and
- the right to privacy of the information about oneself that is maintained by those entities.

What might be called the “access and privacy system” includes those who exercise their information rights under the legislation, public bodies and trustees who have obligations under the legislation, and the Ombudsman who oversees compliance with the Acts. To help ensure that these rights and obligations are respected, the Ombudsman has the mandate to investigate complaints and review compliance with the requirements of FIPPA and PHIA.

¹ Appendix 1, Chart 6 provides a six-year comparison for these statistics.

The cumulative experience of the Ombudsman's office provides a unique vantage point from which to observe and comment on the functioning of the system, and to offer suggestions for its improvement.

Our Observations

Better communication between the individuals using the legislation and public bodies and trustees would, in our opinion, significantly improve the system. We believe that public bodies should clearly explain the reasons for their access and privacy decisions to the individuals affected by those decisions. Where individuals have access or privacy concerns, we feel they should give the public body or trustee an opportunity to resolve them before a complaint is made to the Ombudsman.

Obviously, it is in the best interest of all parties to resolve concerns at an early stage and reduce the incidence of complaints. We have encountered numerous situations where, had there been better communication between individuals and public bodies or trustees, we believe fewer and more focussed complaints would have resulted and fewer resources would have been consumed. This would complement our ongoing efforts to improve our office's efficiency and timeliness in investigating complaints.

Drawing from the most commonly occurring "process" problems we have observed, we offer the following basic suggestions to individuals using the legislation and to the public bodies and trustees that are responsible for acting in accordance with the legislation. Since communication is a two-way street, there is some overlap between our suggestions for individuals and for public bodies or trustees.

For Individuals Using the Acts:

The legislation sets out a right of an individual to seek access to information. FIPPA and PHIA provide for a right of complaint to the Ombudsman concerning access matters and alleged breaches of privacy. We have observed that initiating contact with public bodies or trustees about their decisions could assist individuals in resolving issues at an earlier stage and avoid unnecessary complaints or narrow the focus of their complaints. We believe that such communication is a part of using the Acts responsibly.

When considering applying for access to information under FIPPA, individuals should first try to determine that it is necessary to use the legislation since some records are available without an application. The Act is not intended to replace or limit existing procedures for access to information normally available to the public. Individuals should also ensure that their requests clearly identify the records to which they are seeking access. It may be helpful to contact the FIPPA Access and Privacy Coordinator or the PHIA Privacy Officer for assistance in making a request. For records of provincial government departments and agencies, there is also the *FIPPA Access and Privacy Directory* that can provide an overview of the series and types of records held. There is a somewhat similar set of directories for local public bodies that describe their mandates and functions, and identify the records in general that they create and receive. These directories are available on the government's web site: www.gov.mb.ca/chc/fippa/directories/index/index.html. General information about the responsibilities, functions and programs of provincial government departments may also be found by reviewing the "Department Directory and Information" section of the Government's web site.

It is very important to note that the legislation sets out a right of access to “records” and is not intended to be a mechanism for asking questions, so the request must sufficiently identify or describe the records being sought. Assistance in the process should be available from access and privacy personnel.

Public bodies and trustees have up to 30 days from the date an access request is received to respond to a request. Individuals have a right of complaint to the Ombudsman where they believe that the public body or trustee is not complying with the time limit. We do find, however, that such complaints are often made prematurely as a written reply may have been mailed shortly before or on the 30th day and not reached the applicant. Compliance with the legislation is not contingent on individuals *receiving* a response by the 30th day. A response *sent* on the 30th day is still compliant with the legislation. We encourage individuals to contact the public body or trustee first if they have concerns about the response time. If it has been more than 30 days and it has been determined that no response has been made, then a complaint may be made to the Ombudsman about the delay.

A public body may extend the 30-day time limit for responding to an access request on the basis of one of the circumstances permitted under FIPPA. Public bodies are required to write to applicants to notify them of their decision to extend the time limit and to inform applicants of their right to complain about that decision. Where applicants are unsure as to why an extension is deemed to be necessary, it can be useful to contact the public body for additional information. This contact may resolve the concern about the extension or even result in clarification of the access request that in turn facilitates its processing.

Understandably, individuals may not be aware of how broad their access requests might be in terms of the volume of records that are encompassed or that would need to be searched to locate the requested records, or of the time required to prepare the records. Accordingly, individuals may be taken aback when they receive an unanticipated Estimate of Costs under FIPPA from the public body for the time involved in processing their request. FIPPA enables an applicant to modify the access request to change the amount of fees within 30 days from the day the estimate is given. It also allows a public body to consider a request to have been abandoned by the applicant after that period.

Under PHIA, trustees may charge a reasonable fee for processing a request for personal health information.² Where there is a concern about the fees under FIPPA or PHIA, we encourage individuals to contact the public body or trustee to clarify how the amount of fees was determined. This could result in a better understanding of the justification for the fees or it could identify a misunderstanding about the records being requested, which could resolve the concern. Where a request was interpreted as being broader than the individual intended, this could result in the reduction of the fees. If individuals are not satisfied that the fees are being applied in accordance with the legislation, a complaint may be made to the Ombudsman.

The majority of the complaints made to the Ombudsman stem from situations where applicants have been refused access under FIPPA to part or all of the records they requested.

Where the refusal of access is based on the public body determining that the requested records do not exist or cannot be located, and the applicant has reason to believe that the records do exist, contacting the public body may resolve concerns about the refusal. By communicating with the public body, the applicant may be able to provide clarification about the requested

² At the time of writing, no regulation has been established under PHIA specifying the fees that trustees may charge for the examination and copying of personal health information.

records that could assist in locating them. When refusing access to records that exist, FIPPA requires a public body to advise the applicant in writing of the specific provision under FIPPA on which the refusal is based and the reasons for the refusal, among other things. The reasons may consist of an explanation of how or why the referenced exception to disclosure applies to the withheld information. If the applicant does not understand why records are being withheld in whole or in part, it is advisable to contact the public body to clarify or determine the reasons for the refusal.

Where individuals feel that there may be a breach of their privacy under FIPPA or PHIA, we encourage them to first contact the public body or trustee to seek an explanation of the handling of their personal or personal health information. By allowing the public body or trustee an opportunity to resolve a privacy concern and to provide an explanation of their handling of the information as well as clarification on whether, in their view, their actions were in accordance with provisions of the legislation, individuals may be able to have their privacy concern resolved at an early stage. Then, if individuals still feel that there was a breach of their privacy under the legislation, they could exercise their right of complaint to the Ombudsman.

For Public Bodies and Trustees:

FIPPA and PHIA set out responsibilities for public bodies and trustees in responding to access requests and handling personal and personal health information to ensure the privacy of that information. Both Acts impose a duty to assist individuals making requests for access to information. We are of the view that increased communication with individuals using the Acts would assist them in understanding the basis of decisions being made by public bodies and trustees. This could result in faster resolution of an access issues and fewer complaints made to the Ombudsman about those decisions or, at least narrow the focus of complaints made. Additionally, providing explanations for decisions concerning access requests could identify misunderstandings between the individual and public body or trustee and thereby eliminate unnecessary work based on these misunderstandings.

Where requests for information are unclear, we feel public bodies and trustees should contact the individual to clarify the interpretation or intended scope of the request. We note that this could pre-empt unnecessary work in processing the request, such as requiring an extension of the time limit to complete the work or preparing a fee estimate based on records the individual may not have intended to fall within the scope of the request.

When an extension of the 30-day time limit under FIPPA is needed to complete the processing of an access request, the Act requires the public body to provide the individual with written notice of the decision to extend. In our experience, such letters generally quote the provision of the Act that forms the basis for the extension; however, we believe it would be helpful in assisting the individual to understand the decision if an explanation of the need for the extension were provided. For example, when relying on section 15(1)(b) of FIPPA, an explanation of the volume of records involved or the scope of the searches conducted would assist the individual to appreciate the need for the extension. This should be accompanied by an explanation of why such work would interfere unreasonably with the operations of the public body. Additionally, providing an explanation may result in the individual clarifying what was intended by the request, which could result in less time being needed to process the request.

FIPPA and PHIA provide for fees to be assessed for the processing of access requests. Where a request may be interpreted in different ways, contact with the individual to confirm the

interpretation of a broad or unclear request could reduce the time needed for calculating a fee estimate as well as the time for processing the request. Providing information to explain how the amount of chargeable time estimated for processing the request was determined would assist the individual in understanding the basis for fees and may pre-empt a complaint about the fees. As noted earlier, being notified of fees can signal to an individual a misunderstanding about the records being requested and, where a request was interpreted more broadly than the individual intended, a revised fee estimate can be calculated.

When notifying an applicant of a decision to refuse access under FIPPA, the Act requires a public body to advise the individual in writing of this decision. Section 12(1)(c) dictates the contents required in the written response, including the specific provision of the Act on which the refusal is based and the reasons for the refusal. We have observed that response letters are more often than not incomplete in one or more aspects of the contents that are required by law. Frequently, we see examples of non-compliance where public bodies have identified the general rather than the specific provision. For example, section 18(1) is identified rather than specifying 18(1)(c)(i). Despite the mandatory requirement to provide reasons for the refusal, in addition to identifying the specific provision, we have also noted that public bodies routinely do not provide any reasons.

As noted earlier, the reasons may consist of an explanation of how or why the referenced provision applies to the withheld information. For example, an explanation concerning section 18(1)(c)(i) might include explaining whether the withheld information reveals commercial or financial or labour relations or scientific or technical information, and explaining how or why disclosure of that information could reasonably be expected to harm the competitive position of a third party.

Our concerns about the repeated occurrence of non-compliant responses led to the development in 2001 of a *Checklist for Contents of a Complete Response under Section 12 of FIPPA*. This concern was noted in our two previous Access and Privacy Annual Reports. We will be increasing our efforts to address the issue of non-compliance with section 12.

If the decision not to give access is based on the public body or trustee determining that the requested records do not exist or cannot be located, we encourage them to explain to the applicant how it was determined that the records do not exist or to explain the searches conducted to try to locate the requested records.

Providing fully compliant response letters to individuals not only would demonstrate accountability and transparency for access decisions, but also would assist individuals in understanding the decisions, which in turn may pre-empt some complaints about those decisions.

Concerning privacy matters, we have encouraged individuals to first contact the public body or trustee to seek an explanation about the handling of their personal or personal health information. When this occurs, the public body or trustee could provide information to the individual to explain its handling of the individual's information and clarification about its actions in relation to the relevant privacy provisions of the legislation. In doing so, the public body or trustee may be able to resolve the privacy concern or perhaps the concern may raise issues that could be addressed pro-actively by the public body or trustee to ensure compliance in the future.

ACCESS AND PRIVACY MATTERS

Of the 194 new cases opened in 2003, 157 cases (81%) were opened under FIPPA, 33 cases (17%) under PHIA, and 4 cases (2%) under *The Ombudsman Act*. Of these new cases, 166 were complaints opened under Part 5 of FIPPA and PHIA.³ Concerning these complaints, 136 related to access matters and 30 related to privacy matters. There were 24 cases opened under Part 4 of FIPPA and PHIA. These cases concern broader issues under the legislation such as monitoring, informing, and commenting on compliance with the Acts.

Of the cases opened under FIPPA, 144 (92%) were complaints received under Part 5 of the Act and 13 (8%) were cases opened under Part 4 of the Act. The Part 4 cases related to both access and privacy matters.

Regarding the 144 new FIPPA complaints opened under Part 5, 122 (85%) pertained to access matters and 22 (15%) to privacy matters. The majority of the access complaints concerned refusals of access (67 or 55%) and not responding to requests for access within the 30-day time limit (35 or 29%). Together, these two categories made up 102 or 84% of access-related complaints. The remaining 20 (16%) access-related complaints were about other issues such as fees and extensions of the time limit for responding or were non-jurisdictional.

Although 22 privacy complaint files were opened under FIPPA in 2003, 9 of these complaints each had multiple issues, which in turn identified 36 concerns for investigation. For example, 3 complaints were about collection, use, and disclosure of personal information; 1 complaint was about collection, use, and security, and 5 complaints were about collection and use. Collectively, of the 36 concerns, 12 related to collection, 10 related to use, 11 were about disclosure, and 3 were about security.

Of the 33 new PHIA cases, 22 (67%) were complaints received under Part 5 of the Act and of these, 14 (64%) related to access and 8 (36%) related to privacy issues. The other 11 (33%) cases were opened under Part 4 of the Act and all of these were related to privacy issues.

With reference to the case distribution of all new files opened in 2003, provincial government departments and provincial agencies were involved in about half (52%) of the cases opened and local public bodies made up 34% of cases opened. The remaining 14% of cases were distributed across health care facilities and health professionals, were non-jurisdictional, or were related to the provision of information about the Acts because there was no specific complaint or no public body complained against. (See Appendix 1, Chart 4)

About 40% of the new complaint cases opened under Part 5 of FIPPA were concentrated within 4 public bodies. These are Manitoba Conservation, Manitoba Family Services and Housing, Manitoba Public Insurance and the City of Winnipeg. The other complaints were dispersed across 39 public bodies.

Geographically, almost 75% of the 2003 access and privacy complaints under PHIA, FIPPA and *The Ombudsman Act* originated from the Winnipeg area. The remaining 25% of new complaints were distributed across 20 communities in Manitoba and 4 locations outside of Manitoba.

Of the 1,213 requests for access that were made to provincial government departments and agencies under FIPPA, the number of completed requests where access was denied or partly denied was 694.⁴ The number of complaints received by our office regarding the responses to

³ Both FIPPA and PHIA have two Parts dealing directly with the mandate, duties, and authority of the Ombudsman. **Part 4** of each Act deals with "Powers and Duties of the Ombudsman" including investigating, auditing, commenting, and monitoring to ensure compliance with the Acts. **Part 5** of both Acts deals with complaints, which may be made by the public or may be initiated by the Ombudsman

⁴ The source of these and various other statistics used in our report relating to requests for information under FIPPA derived from the annual reports published by Manitoba Culture, Heritage and Tourism. These reports are available from 1998 on the department's web site: www.gov.mb.ca/chc/fippra/annual/reports/index.html.

access requests by the provincial public bodies was 78. This represents 6% of completed access requests or 11% of requests where access was denied or partly denied. (See Appendix 1, Chart 5) The response times of provincial public bodies to access requests continued to be reasonably close to the historical levels of good overall performance. Appendix 1, Chart 1 portrays response times in percentages over ten years broken into periods of up to 30 days, 31-60 days, and more than 60 days.

Our office closed 132 of the 194 cases that were opened in 2003. We also closed 9 cases from 1999, 9 cases from 2000, 28 from 2001 and 73 from 2002, for a total of 251 closures in 2003. Appendix 1, Chart 6 provides a six-year comparison of new cases received by the Ombudsman, total pending, closed, and those carried over in total to the next year.

For these cases closed in 2003: less than half, 102 or 41% were not supported; about one-quarter, 64 or 26%, were supported or partially supported; 24 or 10% were discontinued (by Ombudsman); 19 or about 7% were declined; 19 or about 7% were completed under Part 4; 15 or 6% were discontinued (by client); 5 or approximately 2% involved the provision of information; and 3 or 1% were closed by recommendation. More detailed information about our cases and their general disposition may be found in the final section of this report entitled "Statistical Information".

COMPLIANCE MATTERS

While complaints from the public under FIPPA and PHIA made up again, in 2003, the majority of our work in the Access and Privacy Division, the Ombudsman is also charged with the responsibility for broad oversight powers and duties under Part 4 of FIPPA and PHIA. Accordingly, we undertook projects of a proactive nature in 2003.

Under Part 4 of FIPPA and PHIA, the Ombudsman may:

- conduct investigations and audits and make recommendations to monitor and ensure compliance with the Acts, including requirements relating to the retention and security of personal or personal health information;
- inform the public about the Acts;
- receive comments from the public about the administration of the Acts;
- comment on the implications for access to information or protection of privacy of proposed legislative schemes or programs of public bodies or practices of trustees;
- bring to the attention of the head of a public body any failure to fulfil the duty to assist under FIPPA to assist applicants;
- where personal health information is involved, refer a matter to a body with authority to regulate health professionals;
- recommend that a public body or trustee
 - cease or modify a specified practice of collecting, using or disclosing information that contravenes the Act, or
 - destroy a collection of personal or personal health information that was not collected in compliance with the Acts;
- make recommendations to the head of a public body or the responsible minister about the administration of FIPPA;
- consult with any person with experience or expertise in any matter related to the purposes of the Acts; and,

- engage in or commission research into anything relating to the purposes of the Acts.

In 2003, larger tasks undertaken by our office within these broad duties and powers included completion by our office of a Privacy Compliance Tool for use under FIPPA and PHIA; the issuance of a Special Report to the Manitoba Legislature related to that project; the development of two interactive workshops that apply the Privacy Compliance Tool to scenarios and privacy considerations under FIPPA and PHIA; the preparation of comments containing our input and suggestions relating to FIPPA and PHIA as part of the mandatory legislated, comprehensive, and public reviews of the operation of FIPPA and PHIA that were held in the spring of 2004; and various other information and educational activities.

Privacy Compliance Tool for FIPPA and PHIA, Special Report, and Workshops

In our last five Annual Reports, we have promoted the value of public bodies and trustees conducting privacy impact assessments as a routine part of their business and we have reported on the progress of our consideration and work on developing such a process directed to compliance with FIPPA and PHIA. In our 2002 Annual Report, we noted that our work on a Privacy Compliance Tool, specifically designed for use under Manitoba's laws, was mostly completed. This work was finalized in 2003.

A clear intention of FIPPA and PHIA is to prevent breaches of information privacy before they occur. Our office has long been of the belief that use of a privacy impact assessment process by Manitoba public bodies and trustees would reduce the risks of people's personal and personal health information being compromised and would enhance public trust and confidence in how this information is being managed. As discussed in our 2002 Annual Report, conducting a privacy impact assessment offers a structured and systematic approach to organizations of all sizes that simplifies the task of bringing information privacy practices in line with both legal obligations and best practices. The Privacy Compliance Tool developed by our office provides a template for assessing an organization's information systems. The Tool highlights eight general principles that underlie FIPPA and PHIA and, for each of these concepts, sets out in a "Checklist" a series of questions or considerations relating to the organization's information system. The Tool includes a comprehensive "Guide" that serves to remind users about legal requirements and identifies some best practices. As a summary form and overview of the process, the Tool also includes a "Checklist at a Glance".

The Privacy Compliance Tool is available on our office web site at www.ombudsmn.mb.ca/compliance.htm. A shorter compliance tool that may be used by trustees subject to PHIA is available from our office in hardcopy and has been placed on our web site.

Pursuant to the Ombudsman's responsibilities to inform the public and to serve the oversight function relating to the collection, use, disclosure and security of personal and personal health information, the Ombudsman issued a Special Report on October 29, 2003, titled *Respecting Privacy: A Compliance Review Tool for Manitoba's Information Privacy Laws*. Under section 58(3) of FIPPA and section 37(3) of PHIA, the Ombudsman may, in the public interest, publish a Special Report relating to any matter within the scope of the powers and duties of the Ombudsman. The specific purpose of this Special Report, only our second since 1998, was to provide a context for and to publicly launch the Privacy Compliance Tool.

The Special Report is available on our office's web site at www.ombudsman.mb.ca/reports.htm.

The task of completing a privacy compliance assessment may seem daunting. To further assist in the use of the Privacy Compliance Tool, our office also began developing, in 2003, two interactive workshops, one related to both FIPPA and PHIA and the other to PHIA exclusively. The purpose of the workshops is to provide organizations with the opportunity of gaining a more in-depth knowledge of information privacy requirements in Manitoba. The sessions examine the eight essential principles identified in the Privacy Compliance Tool, provide a method for conducting a privacy assessment within an organization or system, and include short scenarios that offer participants an opportunity to practice applying the ideas and methods found in the Tool.

Both workshops were launched in early 2004 with two one-day sessions, one involving senior managers and executives from Manitoba Government departments and the other involving representatives from regulatory bodies of the health professions in Manitoba. Staff members from our office are available to present these workshops, in one-day or half-day formats to public bodies and trustees, as time permits.

Comments Relating to the Statutory Public Reviews of FIPPA and PHIA

PHIA and FIPPA, enacted respectively on December 11, 1997, and May 4, 1998, contain similar provisions that, within five years of coming in force, the Minister shall undertake a comprehensive review of the operation of the Act

... that involves public representations and shall, within one year after the review is undertaken or within such further time as the Legislative Assembly may allow, submit a report to the Assembly (s. 67 PHIA, s. 98 FIPPA).

The Government of Manitoba declared its intention on May 19, 2000, to review FIPPA. Eleven months later, the government further announced that a public discussion paper would be issued in 2001. In February 2004, Manitoba Health (the department responsible for the administration of PHIA), and Manitoba Culture, Heritage and Tourism (the department responsible for the administration of FIPPA), issued separate discussion papers to stimulate interest and launch public discussion and debate as part of the review process. We were pleased to note that the Minister of Culture, Heritage and Tourism began his opening “Message” for his department’s discussion paper with these words:

Our government is committed to open and accountable operations that serve all Manitobans. The Freedom of Information and Protection of Privacy Act (FIPPA) and The Personal Health Information Act (PHIA) are two pieces of legislation that help contribute to that openness and accountability.

Based on the lengthy experience of our office in investigating complaints, making recommendations, conducting reviews and commenting on compliance with the legislation, it had long been our intention to provide our input and suggestions relating to FIPPA and PHIA in the course of the legislative review. Since the proclamation of the laws, we have been monitoring the workings of the provisions and have informed ourselves of similar provisions and related developments in other Canadian and outside jurisdictions.

In 2003, considerable work was conducted by the Compliance Review Group of the Access and Privacy Division, specifically considering our experience and research and drafting comments on the legislative provisions section-by-section and also as a thematic overview.

In the spring of 2004, the Minister of Culture, Heritage and Tourism and the Minister of Healthy Living requested the Ombudsman's comments as part of the legislative review process. Work on the office's considerations was finalized, led by the Compliance Review Group and with the input of all staff of the Access and Privacy Division.

On June 9, 2004, the Ombudsman wrote letters to the Minister of Culture, Heritage and Tourism and to the Minister of Healthy Living concerning the respective Acts, the legislative reviews and the general and specific comments of our office. Attached to each letter were two documents, a spreadsheet for each Act and Regulation with comments relating to specific statutory provisions and an overview of our comments. These documents, together with the letters, represented our legislative concerns with FIPPA and PHIA.

The long-term consideration of the Acts by our office, with the legislative reviews in mind, culminated on June 25, 2004, when the Ombudsman publicly released the packages that were sent to the Minister of Culture, Heritage and Tourism and the Minister of Healthy Living. The documents are on the office's web site at www.ombudsman.mb.ca/reports.htm. To accommodate those who may not have reasonable access to our web site, photocopies may be obtained by contacting our office.

Once the Government has developed and introduced amendments to the legislation, we anticipate that there will be a further opportunity to comment. One of our suggestions for both Acts was that consideration should be given to periodically reviewing the legislation.

Information and Educational Activities

The Ombudsman has statutory responsibilities to inform the Legislature and public about the office's access and privacy work and we continue to do this on a regular basis.

In 2003, the Ombudsman and staff participated in a wide variety of presentations and panels that included workshops, lectures, and addresses on the role and function of the Ombudsman under FIPPA and PHIA, informed consent related to information privacy, safeguarding personal information, health privacy compliance and security and information privacy in the context of health research. A representative of the office served as a consultant with other provincial representatives on issues involving the Canada Health InfoWay, an initiative to connect health information networks across the country. Also, with the prospect, as of January 1, 2004, of federal private sector information privacy legislation (the *Personal Information Protection and Electronic Documents Act*, "PIPEDA") being extended to the collection, use, disclosure and security of personal information in the course of any commercial activity unless a province or territory passed substantially similar legislation, there were numerous presentations and discussions on possible overlapping jurisdiction and the lessons learned from public sector information privacy legislation, including FIPPA and PHIA.

Attendees at the various information and education activities in 2003 included new members of the Legislative Assembly, Deputy Ministers, the Association of Manitoba Chiefs, the Law Society of Manitoba, access and privacy specialists -- among them Access and Privacy Coordinators and Privacy Officers in and outside of the Province, university students and various interest groups.

The Ombudsman gave numerous interviews to broadcast and print news media, more often than not about privacy issues and about cases that had become a matter of public interest.

Also in 2003, our office began placing summaries of selected access and privacy cases on the office web site. This was an alternative to publishing case summaries in our Annual Reports. We had hoped that as well as making selected case summaries more broadly available, more cost effective and, for most, more convenient, the publication of our summaries in this way would be more timely. This has not been the situation since June 2003. The case summaries have not been posted on a regular basis as we had intended due to our investigation backlogs and other tasks within the office. We are reviewing our priorities and process to make the case summary portion of our web site communications more timely and therefore more useful and relevant.

OMBUDSMAN'S RECOMMENDATIONS MADE IN 2003

In 2003, recommendations were made concerning three cases that were opened in 2000, 2001, and 2002. Two cases came under *The Freedom of Information and Protection of Privacy Act* (FIPPA) and one under *The Personal Health Information Act* (PHIA). All three cases related to alleged breaches of privacy. We have not identified the local public bodies in the two FIPPA cases in order to protect the privacy of the complainants. We have identified optometrist Keith Mondesir, the trustee in the PHIA case, because his name was made public in Court proceedings related to the same actions that we investigated. We also reported on the Court decision and provided his name in our 2002 Annual Report.

■ KEITH MONDESIR [Case 2000-069]

This PHIA complaint was received and investigated by our office in 2000. As a result of information that came to our attention during our investigation of an alleged disclosure contrary to PHIA, we had reason to believe that the trustee had committed offences under PHIA. As permitted by section 34(3) of PHIA, the Ombudsman disclosed that information to the Crown and charges were laid against the trustee. Our office deliberately did not report on our investigation until the matter was heard by the Court. In early 2003, the Ombudsman's report with recommendations was issued to the trustee, who no longer lives in Manitoba, through an agent of the trustee.

We determined from our investigation that the trustee was in contravention of PHIA by selling the personal health information of 15,729 patients, specifically their name, address and telephone number, to a non-trustee under the Act, LensCrafters International, Inc. of Cincinnati, Ohio, which sells optical products. We also found that, without authorization under PHIA, the trustee disclosed the patients' personal health information to LensCrafters International, Inc. and DPD Software Ltd., a Winnipeg computer company that he had hired to create an electronic database of his patients' information.

The Ombudsman made two recommendations. One was that Dr. Mondesir should ask LensCrafters to return all copies of the customer/patient database to him or alternatively, that he should ask the corporation to confirm in writing that all copies of the customer/patient database have been destroyed. The other recommendation was that Dr. Mondesir should provide an apology for his actions to each of the 15,729 patients identified in the customer/patient database, and inform them:

- that Dr. Mondesir sold their name, address and telephone number to LensCrafters on May 15, 1999; and
- how LensCrafters used their name, address and telephone number; and,
- whether LensCrafters returned or destroyed all copies of their name, address and telephone number.

The agent for the trustee responded by letter to the Ombudsman, wherein he made various comments to which the Ombudsman replied by a further letter. The Ombudsman was not satisfied that Dr. Mondesir accepted the recommendations in our report and noted that it appeared Dr. Mondesir was refusing to take action to implement the recommendations.

■ SCHOOL DIVISION

[Case 2001-177]

This case involved a FIPPA complaint alleging a breach of privacy arising from the use and disclosure of personal information about a student and parent by the school division.

Section 42(1) of FIPPA requires that a public body not use or disclose personal information except as authorized under the Act. Additionally, section 42(2) requires that every use and disclosure be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed. Section 43 sets out the purposes for which a public body may use personal information. The circumstances under which the disclosure of personal information is authorized are listed in section 44(1).

We determined that, although the division required some personal information in order to make certain decisions, in this case, the use of personal information within the division was not limited to the minimum amount of information necessary. We also found that the disclosure was not authorized under section 44(1). Accordingly, the Ombudsman made recommendations to the division to promote compliance with the requirements of the Act. The recommendations included taking steps to ensure that the use of personal information is limited to the minimum amount required and to provide ongoing awareness and education sessions for personnel, to help ensure that they are fully aware of their responsibilities under the Act.

As a result of the complaint, the division had begun taking steps towards ensuring that it complies with the privacy provisions of FIPPA. We were satisfied that the division accepted the recommendations.

■ RURAL MUNICIPALITY

[Case 2002-239]

This case involved a privacy complaint under FIPPA from an individual about a use and disclosure of personal information by a rural municipality. The provisions of FIPPA noted in case 2001-177 were relevant to this case as well (see immediately above).

Our investigation concluded that the use of the personal information and the disclosure to the third party were not authorized under FIPPA. The Ombudsman's recommendations included taking steps to ensure that personnel of the municipality are aware of their responsibilities under FIPPA. We were satisfied that the municipality accepted our recommendations.

NO RECENT COURT DECISIONS IN 2003... OBSERVATIONS ON THE OMBUDSMAN AND THE COURTS

There were no judgments under FIPPA or PHIA in 2003. Nevertheless, we are aware that an access appeal was initiated under FIPPA because the Ombudsman was served with a copy of the Notice of Application, the document that initiates a FIPPA access appeal to Court. We understand that the matter was resolved out of Court.

It may be helpful to note that although an access appeal under both FIPPA and PHIA requires an appellant (other than the Ombudsman) to serve the Ombudsman with the Notice of Application, the legislative provision is not always followed. FIPPA sets out the following:

Appeal served on head and others

67(5) *The person appealing shall, within 15 days of filing the application, serve a copy of it on*

- (a) the head of the public body;*
- (b) the Ombudsman; and*
- (c) in the case of an appeal by a third party notified under section 33 of a decision to give access to a record, on the person requesting access.*

Similarly, PHIA provides:

Appeal served on trustee and Ombudsman

49(5) *The person appealing shall, within 15 days after filing the application, serve a copy of it on*

- (a) the trustee concerned; and*
- (b) the Ombudsman.*

It should be noted that considerations on access and privacy issues by the Courts and the Manitoba Ombudsman Office are separate and distinct procedures.

On completing an investigation concerning a refusal of access under FIPPA or PHIA, the Ombudsman shall report if the complaint is justified and may make recommendations. Where the Ombudsman finds that an access complaint is unjustified, or where a public body or trustee refuses to implement the Ombudsman's recommendation to release information, the issue can be appealed to Court. On hearing an appeal under FIPPA or PHIA, the Court may dismiss the appeal or, in accordance with the legislation, order release or make any other order the Court considers appropriate.

On completing a privacy investigation under FIPPA or PHIA, the Ombudsman shall report his or her findings about whether the complaint is supported and may make recommendations. In the event that the Ombudsman considers there is a reason to believe an offence under either of the Acts has been committed, he may disclose information to the Crown. The Crown will determine whether any charges are pursued in Court. The Court may determine whether a public body or trustee is guilty of a privacy offence.

Both FIPPA and PHIA also include offence provisions relating to wilfully making a false statement to, or wilfully obstructing, the Ombudsman or a person in the performance of the duties and powers of the Ombudsman. To date, there has been no need to take such actions to Court.

As we have reported in previous Annual Reports, the Court of Queen's Bench of Manitoba has ruled on four access appeals under FIPPA:

- *Jaslowski v. The Minister of Justice* (August 20, 1999; Suit No. CI 98-0110175),
- *Kattenburg v. The Minister of Industry, Trade and Tourism* (November 19, 1999; Suit No. CI 98-01-08704),
- *Heber v. The Director of Animal Services, City of Winnipeg* (February 9, 2001; Suit No. CI 00-01-21102) and
- *Sigurdson v. The Minister of Conservation* (September 30, 2002; Suit No. CI 01-01-25052).

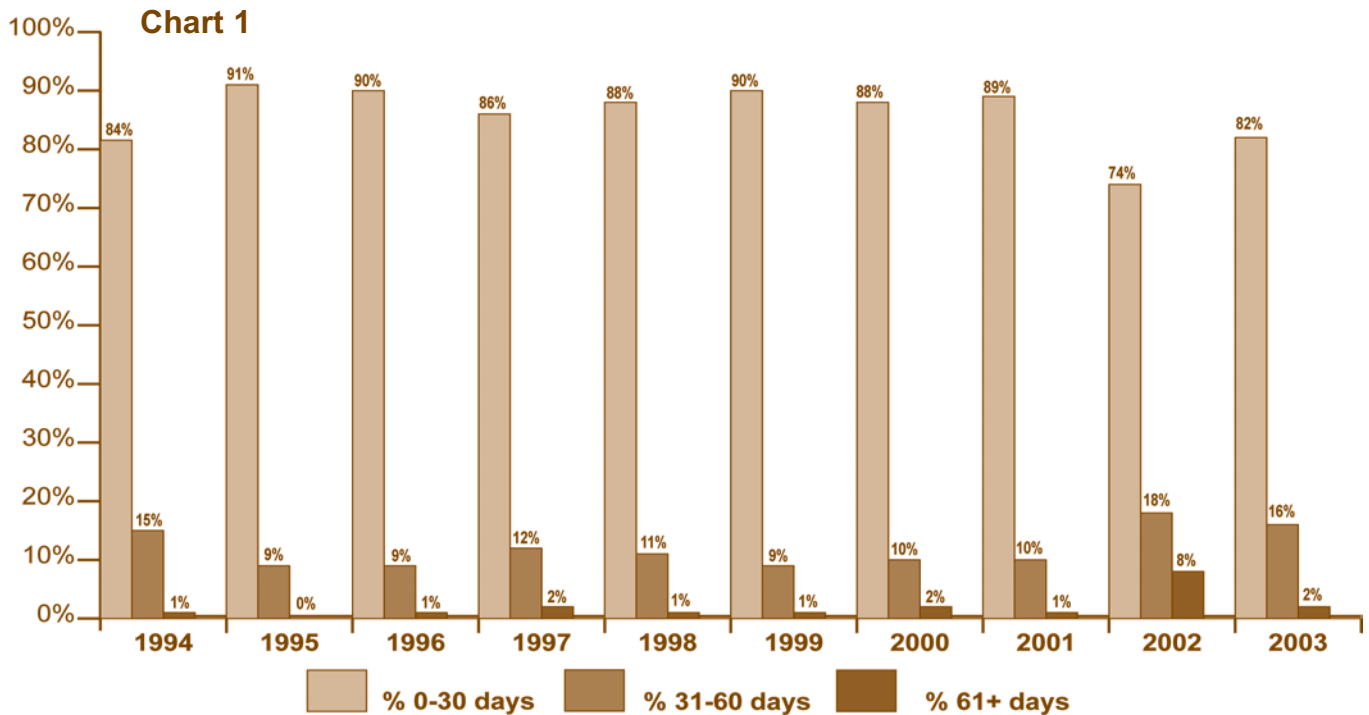
Also, the Provincial Court of Manitoba heard argument on three charges laid under PHIA against a health professional:

- *The Queen v. Keith Mondesir* (May 17, 2002).

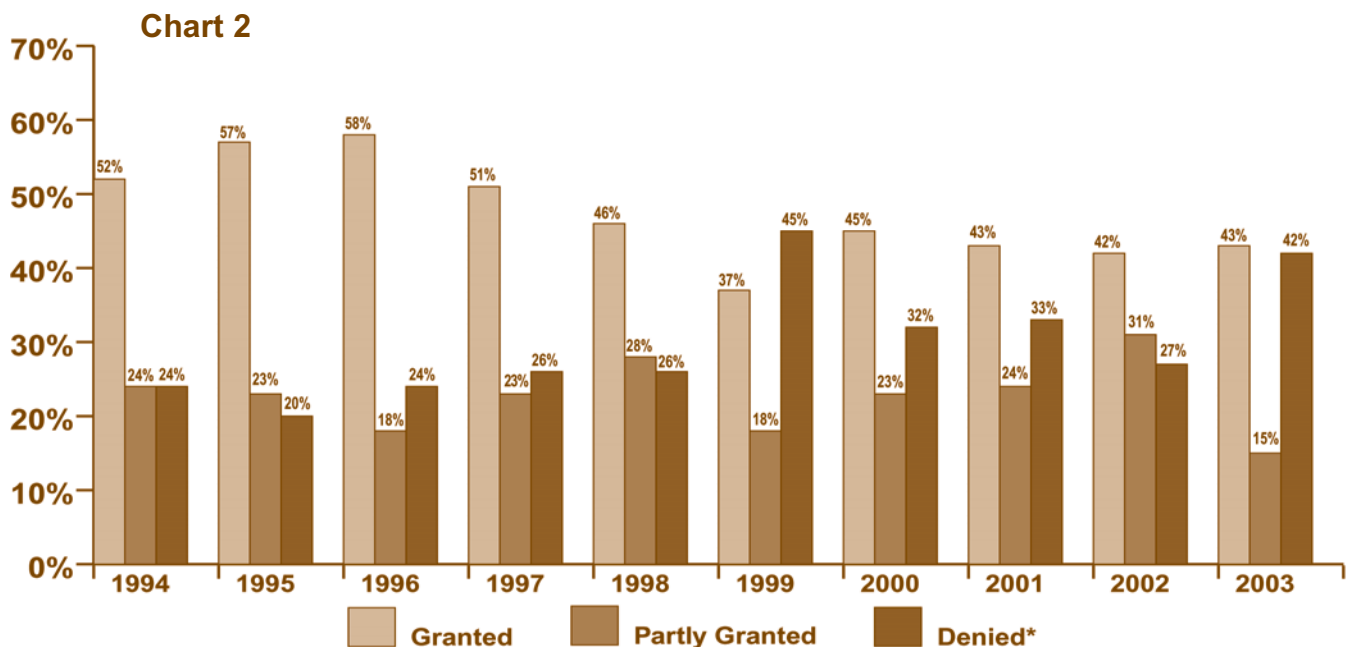
A PHIA complaint to our office relating to the same matter concerning Dr. Mondesir is briefly noted in this Annual Report under "Recommendations Made in 2003".

Response Times for Access Requests Provincial Departments and Agencies

APPENDIX 1

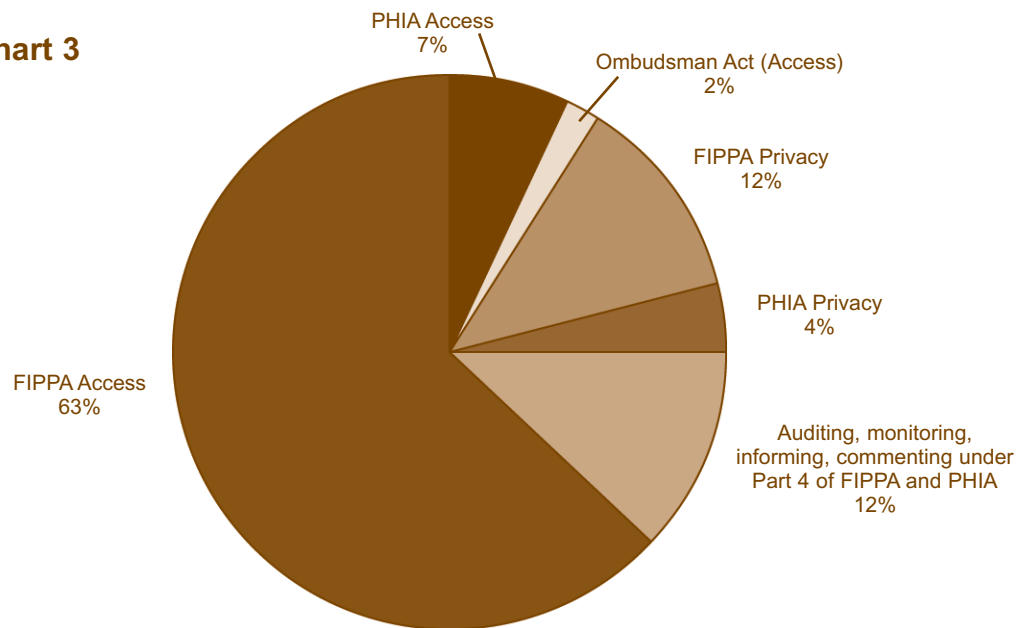


Access Decisions under FOI/FIPPA Provincial Departments and Agencies



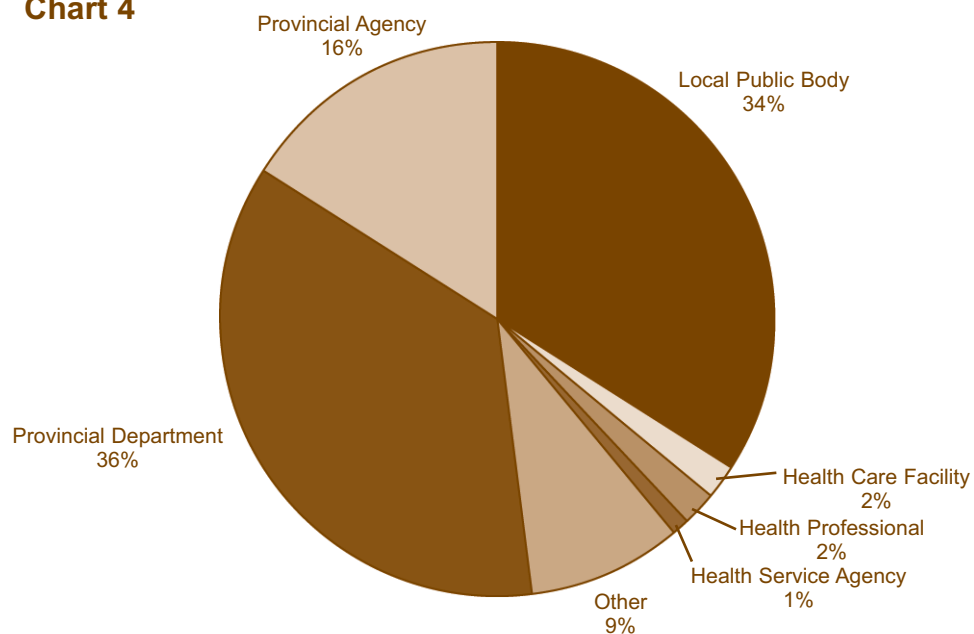
***Note:** this figure includes any requests denied because the applicant was informed the record did not exist, or the request was repetitive, or its existence could be neither confirmed nor denied.

Chart 3



Distribution of Cases

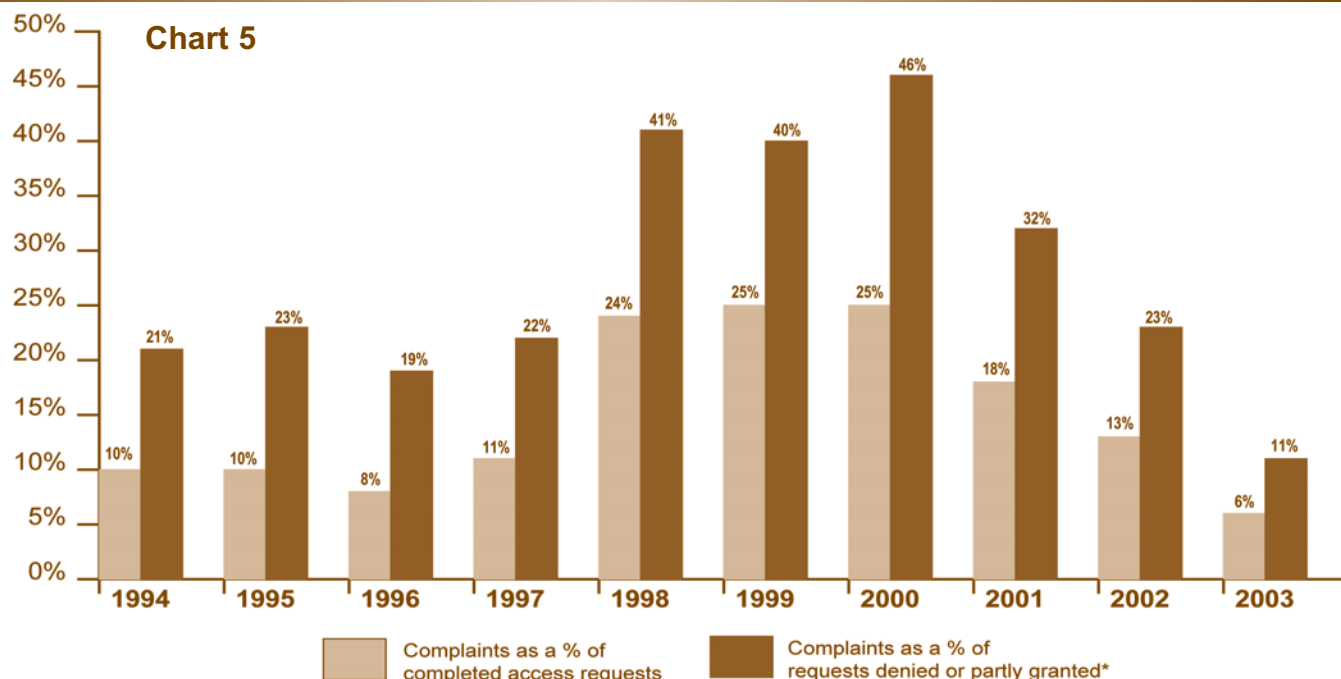
Chart 4



Rates of Complaint in Relation to Access Requests under FIPPA

Provincial Departments and Agencies

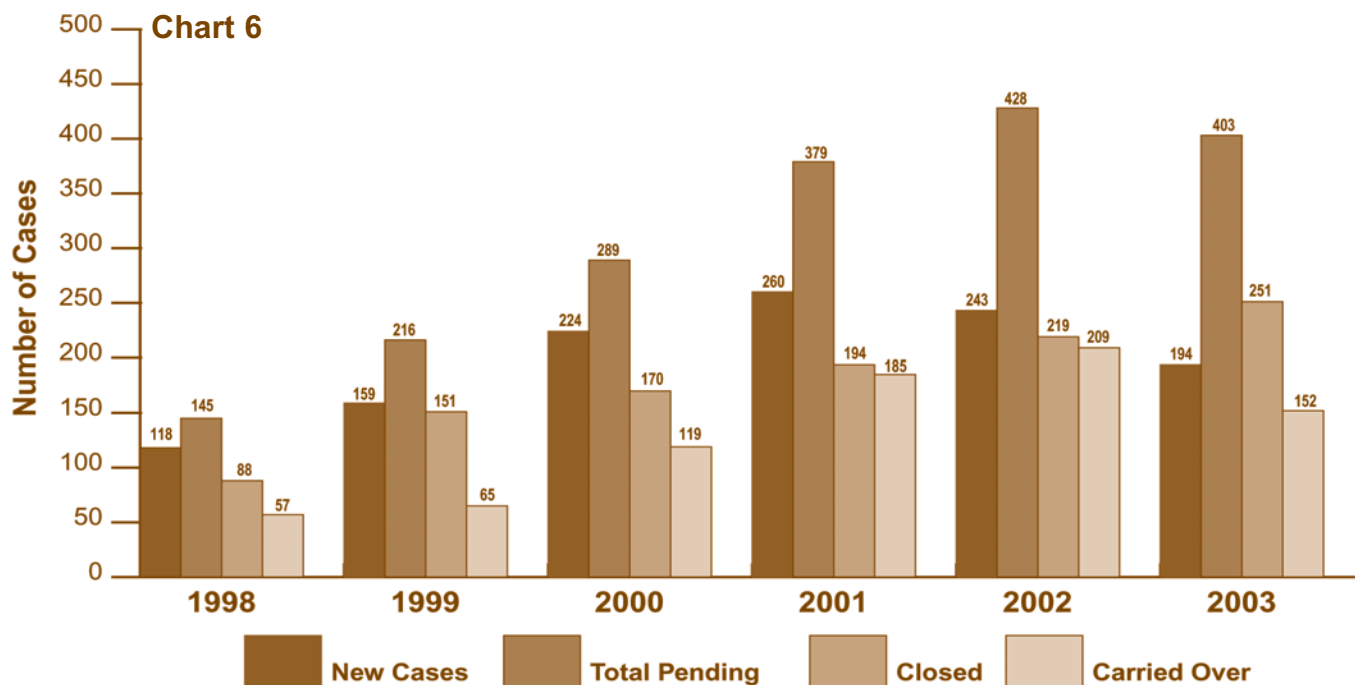
APPENDIX 1



***Note:** this figure includes any requests denied because the applicant was informed the record did not exist, or the request was repetitive, or its existence could be neither confirmed nor denied.

Workload

Access and Privacy Division



2003

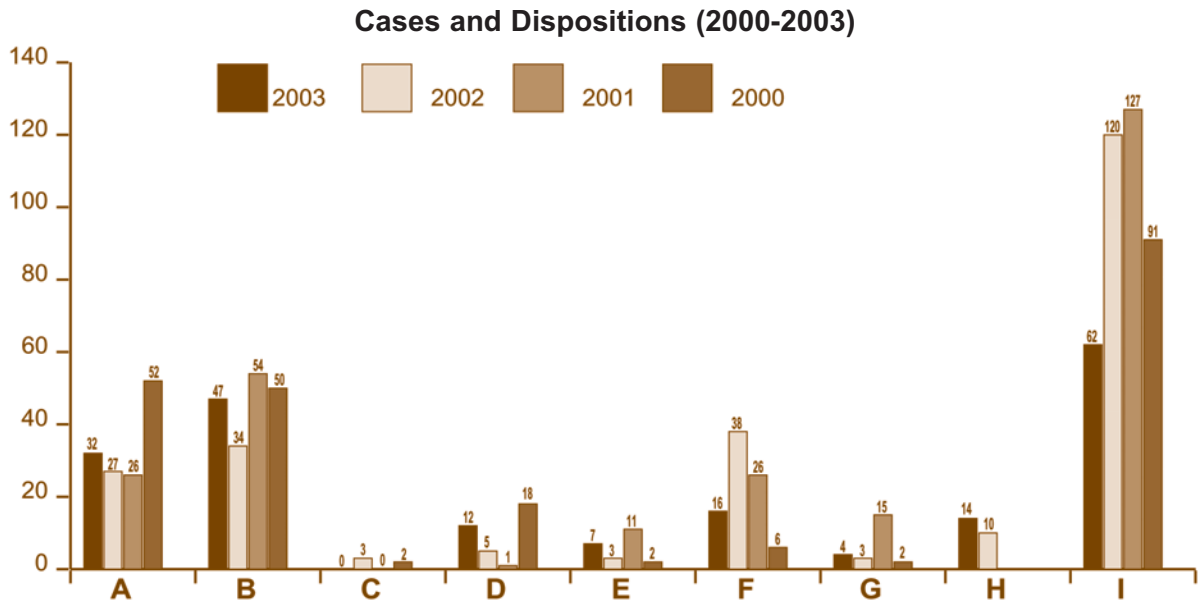
Statistical Information



Cases and Dispositions in 2003

One hundred and ninety-four access and privacy cases were opened by our office in 2003. Of these, 132 were closed and 62 were carried forward to 2004. Our office also closed 9 cases from 1999, 9 cases from 2000, 28 from 2001 and 73 carried over from 2002. In total, 251 cases were closed in 2003.

The disposition of the 194 access and privacy cases received in 2003 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/Information Supplied

Cases conducted under *The Ombudsman Act* or Part 4 of *The Freedom of Information and Protection of Privacy Act* or *The Personal Health Information Act* which resulted in assistance or information (not requested records) being provided.

H = Completed

Cases conducted since 2002, under Part 4 of *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* where the task of auditing, monitoring, informing, or commenting has been concluded.

I = Pending

Complaint still under investigation as of January 1, 2004.

Source of Complaints

Community	Number
Anonymized Communities*	3
Brandon	3
Camp Morton	1
Dugald	3
East St. Paul	1
Eriksdale	1
Gimli	2
Melita	1
Neepawa	2
Pinawa	2
Rapid City	1
Selkirk	6
St. Andrews	1
St. Norbert	1
St. Pierre-Jolys	2
Ste. Rose du Lac	3
Ste. Anne	1
Steinbach	1
Swan River	2
Winnipeg	126
Calgary (Alberta)	1
Moose Jaw (Saskatchewan)	1
Thunder Bay (Ontario)	1
Toronto (Ontario)	4
TOTAL	170**

*Naming these small communities could inappropriately identify the complainants.

**This statistic concerns access and privacy complaints received or initiated by the Ombudsman under Part 5 of *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* and also *The Ombudsman Act*. It does not include the 24 cases initiated in 2003 by the Ombudsman under Part 4 of FIPPA and PHIA.

Complaints opened in 2003 by Category and Disposition under *The Freedom of Information and Protection of Privacy Act*

DEPARTMENT OR CATEGORY	Total	Declined	Discont. (Client)	Discont. (Omb.)	Not Supported	Supported or Part. Supported	Recomm.	Pending
Public Body								
Aboriginal and Northern Affairs	2	-	-	-	1	-	-	1
Advanced Education and Training	1	-	-	-	-	-	-	1
Agriculture and Food	3	-	-	-	2	-	-	1
Conservation*	17	-	-	-	5	8	-	4
Education and Youth	2	-	-	-	2	-	-	-
Energy Science and Technology	1	-	-	-	-	-	-	1
Executive Council	1	-	-	-	-	-	-	1
Family Services and Housing	11	-	-	-	8	1	-	2
Child and Family Services	1	1	-	-	-	-	-	-
Finance	2	-	-	-	1	1	-	-
Industry, Trade and Mines**	3	1	-	-	1	-	-	1
Industry, Economic Development and Mines	2	-	-	-	-	-	-	2
Intergovernmental Affairs	3	-	-	-	2	-	-	1
Justice	6	-	-	-	1	1	-	4
Labour and Immigration	4	-	1	-	1	-	-	2
Manitoba Health	3	-	-	-	1	-	-	2
Manitoba Hydro	8	-	2	1	2	2	-	1
Manitoba Liquor Control Commission	1	-	-	-	-	-	-	1
Manitoba Public Insurance	13	2	-	6	-	1	-	4
Transportation and Government Services	4	-	-	-	2	-	-	2
Workers Compensation Board	4	-	-	-	-	-	-	4
Local Public Body								
City of Winnipeg	17	1	1	-	7	3	-	5
Town of Hamiota	2	-	-	-	-	2	-	-
Town of Hartney	1	-	-	-	-	1	-	-
Town of Manitou	1	-	-	-	1	-	-	-
Town of Stonewall	2	-	-	-	2	-	-	-
Village of Bowsman	1	-	-	-	1	-	-	-
Village of Ethelbert	1	-	-	-	-	1	-	-
Pikwitonei Community Council	1	-	-	-	-	1	-	-
R.M. of Kelsey	1	-	-	-	1	-	-	-
R.M. of Morton	1	-	-	-	-	1	-	-
R.M. of Victoria Beach	1	-	-	-	1	-	-	-
Brandon School Division	1	-	-	-	-	-	-	1
Louis Riel School Division	2	-	-	-	1	1	-	-
Park West School Division	1	-	1	-	-	-	-	-
Seven Oaks School Division	1	-	-	-	-	-	-	1
St. James Assiniboina School Division	1	1	-	-	-	-	-	-
School District of Whiteshell	2	-	-	-	-	-	-	2
Winnipeg School Division	2	-	-	-	2	-	-	-
University of Winnipeg	3	-	-	-	-	-	-	3
University of Manitoba	2	-	-	-	-	1	-	1
Brandon Regional Health Authority	2	-	-	-	-	-	-	2
Winnipeg Regional Health Authority	1	-	-	-	-	-	-	1
Not a Public Body	5	2	-	3	-	-	-	-
Total	144	8	5	10	45	25	-	51

*Note: Of the 17 complaints, 10 were filed by one individual.

***"Industry, Trade and Mines" and "Industry, Economic Development and Mines" are the same department, the name having changed late in the year.

Complaints opened in 2003 by Category and Disposition under *The Personal Health Information Act*

TRUSTEE	Total	Declined	Discont. (Client)	Discont. (Omb.)	Not Supported	Supported or Part. Supported	Recomm.	Pending
Public Body								
Manitoba Public Insurance	1	-	-	-	-	1	-	-
Workers Compensation Board	1	-	-	-	-	1	-	-
Local Public Body								
Brandon School Division	1	-	-	-	-	-	-	1
Brandon Regional Health Authority	2	-	-	-	1	1	-	-
City of Winnipeg	1	-	-	-	-	-	-	1
Winnipeg Regional Health Authority	2	2	-	-	-	-	-	-
University of Manitoba	4	4	-	-	-	-	-	-
Health Care Facility								
McGregor Medical Clinic	1	-	1	-	-	-	-	-
St. Pierre Medical Clinic	1	-	1	-	-	-	-	-
Health Professional								
Medical Doctor	4	-	-	1	-	3	-	-
Health Service Agency								
Victorian Order of Nurses	2	-	-	-	1	1	-	-
Not a Public Body	2	2	-	-	-	-	-	-
Total	22	8	2	1	2	7	-	2

Complaints opened by The Access and Privacy Division in 2003 by Category and Disposition under *The Ombudsman Act*

DEPARTMENT OR CATEGORY	Total	Assist. Rendered	Declined	Discont. (Client)	Discont. (Omb.)	Info Supported	Not Supported	Supported or Part. Supported	Recomm.	Pending
Public Body										
Conservation	1	-	-	-	-	1	-	-	-	-
Family Services and Housing	1	-	-	-	-	1	-	-	-	-
Local Public Body										
City of Winnipeg	1	-	-	-	-	1	-	-	-	-
Not a Public Body	1	-	-	-	-	1	-	-	-	-
Total	4	-	-	-	-	4	-	-	-	-

Complaints opened by The Access and Privacy Division in 2003 by Category and Disposition under Part 4 of FIPPA and PHIA (auditing, monitoring, informing and commenting)

DEPARTMENT OR CATEGORY	Total	Assist. Rendered	Declined	Discont. (Client)	Discont. (Omb.)	Info Supported	Not Supported	Supported or Part. Supported	Recomm.	Pending
Conservation	2	-	-	-	-	-	-	-	-	2
Manitoba Public Insurance	1	-	-	-	-	-	-	-	-	
Transportation and Government Services	2	-	-	-	-	-	-	-	-	2
City of Dauphin	1	-	-	-	-	-	-	-	-	1
City of Winnipeg	2	-	-	-	-	-	-	-	1	1
Winnipeg Regional Housing Authority	1	-	-	-	-	-	-	-	-	1
University of Winnipeg	1	-	-	-	-	-	-	-	1	1
Anonymous	1	-	-	-	1	-	-	-	-	-
Private Retailer	1	-	-	-	-	-	-	-	1	-
Birchwood Medical Clinic	1	-	-	-	-	-	-	-	-	1
Comment	5	-	-	-	-	-	-	-	5	-
Informing the Public	6	-	-	-	-	-	-	-	6	-
TOTAL	24	-	-	-	1	-	-	-	14	9

Cases carried over from Previous Years by Category and Disposition

There were 120 access and privacy cases carried over to 2003 from 2002, 64 from 2001, 14 from 2000, 10 from 1999 and 1 from 1998. Of these 209 cases, 90 were carried over to 2004 and 119 were concluded as follows.

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT	Total	Declined	Discont. (Client)	Discont. (Omb.)	Not Supported	Supported or Part. Supported	Recomm.	Completed	Assist. Rendered /Info Supp	Pending
Public Body										
Conservation	4	-	-	-	-	1	-	-		3
(2001) Conservation	2	-	-	-	-	-	-	-		2
Consumer and Corporate Affairs	1	-	1	-	-	-	-	-	-	-
(2001) Consumer and Corporate Affairs	1	-	-	-	-	-	-	-	-	1
(1998) Consumer and Corporate Affairs	1	-	-	-	-	-	-	-	-	1
(2001) Culture, Heritage and Tourism	1	-	-	-	-	-	-	-	-	1
Education, Training and Youth	1	-	1	-	-	-	-	-	-	-
(2001) Education, Training and Youth	1	-	1	-	-	-	-	-	-	-
Energy, Science and Technology	1	-	-	-	-	-	-	-	-	1
(1999) Environment	1	-	-	-	1	-	-	-	-	-
Executive Council	1	-	-	-	1	-	-	-	-	-
Family Services and Housing	5	-	-	-	4	-	-	-	-	1
(2001) Family Services and Housing	3	-	-	-	1	2	-	-	-	-
(2000) Family Services and Housing	3	-	1	-	-	2	-	-	-	-
(1999) Family Services and Housing	3	-	-	1	-	2	-	-	-	-
Finance	2	-	-	-	2	-	-	-	-	-
Health	3	2	-	-	-	-	-	-	-	1
(2001) Health	1	-	-	-	-	-	-	-	-	1
(1999) Highways and Transportation	1	-	-	-	-	1	-	-	-	-
Industry, Trade and Mines	2	-	-	-	2	-	-	-	-	-
(2001) Industry, Trade and Mines	2	-	1	-	-	-	-	-	-	1
(2000) Intergovernmental Affairs	2	-	-	-	-	-	-	-	-	2
Justice	13	1	-	-	6	1	-	-	-	5
(2001) Justice	2	-	-	-	1	-	-	-	-	1
(2000) Justice	2	-	-	1	-	1	-	-	-	-
(1999) Justice	2	-	-	1	-	1	-	-	-	-
Labour and Immigration	2	-	-	-	2	-	-	-	-	-
(2001) Labour and Immigration	3	-	-	-	1	-	-	-	-	2
Manitoba Hydro	5	-	-	-	1	3	-	-	-	1
(2001) Manitoba Hydro	2	-	-	-	-	-	-	-	-	2
(2001) Manitoba Liquor Control Commission	1	-	-	-	-	-	-	-	-	1
(2001) Manitoba Lotteries Corporation	1	-	-	-	-	-	-	-	-	1
Manitoba Public Insurance	14	-	1	-	-	-	-	-	-	13
(1999) Natural Resources	2	-	-	-	1	-	-	-	-	1
Transportation and Government Services	3	-	1	-	2	-	-	-	-	-
(2001) Transportation and Government Services	2	-	-	-	2	-	-	-	-	-
Workers Compensation Board	5	-	-	-	2	1	-	-	-	2
(2001) Workers Compensation Board	8	-	-	-	4	-	-	-	1	3
(2000) Workers Compensation Board	2	-	-	-	-	-	-	-	-	2
Local Public Body										
(2001) City of Brandon	1	-	1	-	-	-	-	-	-	-
City of Winnipeg	7	-	-	-	4	1	-	-	-	2
(2001) City of Winnipeg	7	-	-	-	1	1	-	-	-	5
Anonymized Rural Municipality*	1	-	-	-	-	-	1	-	-	-
R.M. of Miniota	1	-	-	-	1	-	-	-	-	-
R.M. of Tache	7	-	-	-	7	-	-	-	-	-
Anonymized School Division*	1	-	-	-	-	-	1	-	-	-
Brandon School Division	1	-	-	-	-	-	-	-	-	1

Cases carried over from Previous Years by Category and Disposition *cont'd*

Interlake School Division	1	-	-	-	-	-	-	-	-	1
Morris MacDonald School Division	1	-	-	-	-	1	-	-	-	-
(2000) Seven Oaks School Division	1	-	-	-	-	-	-	-	-	1
University of Manitoba	2	-	-	-	-	2	-	-	-	-
(2001) University of Manitoba	13	-	-	4	-	2	-	-	-	7
Misericordia Hospital	1	-	-	-	1	-	-	-	-	-
Brandon Regional Health Authority	1	-	-	-	1	-	-	-	-	-
Nor-Man Regional Health Authority	1	-	-	-	-	-	-	-	-	1
Winnipeg Regional Health Authority	2	-	-	-	2	-	-	-	-	-
(2001) Winnipeg Regional Health Authority	1	-	-	-	-	-	-	-	-	1
The Personal Health Information Act										
(2001) Family Services and Housing	1	-	-	-	-	-	-	-	-	1
Health	1	-	-	-	-	-	-	-	-	1
Justice	1	-	-	-	-	-	-	-	-	1
Manitoba Public Insurance	1	-	-	-	-	1	-	-	-	-
(2001) Manitoba Public Insurance	1	-	-	-	-	-	-	-	-	1
Local Public Body										
(1999) City of Winnipeg	1	-	-	1	-	-	-	-	-	-
Brandon Regional Health Authority	1	-	-	-	-	1	-	-	-	-
Interlake Regional Health Authority	1	-	-	-	-	-	-	-	-	1
(2001) Interlake Regional Health Authority	1	-	-	-	-	1	-	-	-	-
Health Care Facility										
Assiniboine Clinic	1	-	-	-	-	-	-	-	-	1
Deer Lodge Centre	1	-	-	-	1	-	-	-	-	-
Health Sciences Centre	2	-	-	-	1	1	-	-	-	-
(2001) Health Sciences Centre	1	-	-	-	-	1	-	-	-	-
Seven Oaks General Hospital	1	-	-	-	-	-	-	-	-	1
(2001) Seven Oaks General Hospital	2	-	-	-	-	-	-	-	-	2
Souris Medical Associates	1	-	-	-	-	1	-	-	-	-
St. Boniface General Hospital	1	-	-	-	-	-	-	-	-	1
Health Professional										
(2000) Chiropractor	3	-	-	3	-	-	-	-	-	-
Medical Doctor	1	-	-	-	-	-	-	-	-	1
(2001) Medical Doctor	2	-	-	1	-	-	-	-	-	1
(2000) Optometrist Keith Mondesir**	1	-	-	-	-	-	1	-	-	-
Psychologist	1	-	-	-	1	-	-	-	-	-
(2001) Psychologist	1	-	-	-	1	-	-	-	-	-
Health Service Agency										
Victorian Order of Nurses	1	-	-	-	-	1	-	-	-	-
Part 4 of FIPPA and PHIA										
(2001) Consumer and Corporate Affairs	1	-	-	-	-	-	-	-	-	1
(2001) Finance	1	-	-	-	-	-	-	-	-	1
Garden Valley School Division	1	-	-	-	-	-	-	1	-	-
Health Sciences Centre	1	-	-	-	-	-	-	-	-	1
Souris Medical Associates	1	-	-	-	-	1	-	-	-	-
Transportation and Government Services	1	-	-	-	-	-	-	-	-	1
Comment	5	-	-	-	1	1	-	1	-	2
Informing the Public	5	-	-	-	-	-	-	3	-	2
The Ombudsman Act										
Education Training and Youth	1	-	-	-	-	-	-	-	-	1
Workers Compensation Board	1	-	-	-	-	-	-	-	-	1
Not a public body	1	-	-	-	-	1	-	-	-	-
Total	209	3	8	12	55	32	3	5	1	90

*Naming these entities could inappropriately identify the complainants.

**The name of this trustee has been made public as the subject of Court proceedings relating to the PHIA issues addressed in this case.

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 structure of the Office reflects its two operational divisions:

- **Access and Privacy Division**, which investigates complaints and reviews compliance under *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act*.
- Ombudsman Division, which investigates complaints under *The Ombudsman Act* concerning any act, decision, recommendation or omission related to a matter of administration, by any department or agency of the provincial government or a municipal government.

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