



Manitoba Ombudsman

2011 Annual Report under **The Freedom of Information and Protection of Privacy Act** and **The Personal Health Information Act**

Upholding your Access and Privacy Rights in Manitoba

The Honourable Daryl Reid
Speaker of the Legislative Assembly
Province of Manitoba
Room 244 Legislative Building
Winnipeg, MB R3C 0V8

Dear Mr. Speaker:

In accordance with subsection 58(1) of *The Freedom of Information and Protection of Privacy Act* and subsection 37(1) of *The Personal Health Information Act*, I am pleased to submit the Annual Report of the Ombudsman for the calendar year January 1, 2011 to December 31, 2011.

Yours truly,

Mel Holley
Acting Manitoba Ombudsman

About the office

Manitoba Ombudsman is an independent office of the Legislative Assembly and is not part of any government department, board or agency. The office has a combined intake services team and two operational divisions - the Ombudsman Division and the Access and Privacy Division.

Under *The Freedom of Information and Protection of Privacy Act* (FIPPA) and *The Personal Health Information Act* (PHIA), the Access and Privacy Division investigates complaints from people about any decision, act or failure to act relating to their requests for information from public bodies or trustees, and privacy concerns about the way their personal information or personal health information has been handled. "Public bodies" include provincial government departments and agencies, municipalities, regional health authorities, school divisions, universities and colleges. "Trustees" include public bodies and additional entities such as health professionals, medical clinics, laboratories and CancerCare Manitoba. Our office has additional powers and duties under FIPPA and PHIA, including auditing to monitor and ensure compliance with these Acts, informing the public about the Acts and commenting on the implication of proposed legislation, programs or practices of public bodies and trustees on access to information and privacy.

Under *The Ombudsman Act*, the Ombudsman Division investigates complaints from people who feel they have been treated unfairly by government, including provincial government departments, crown corporations, municipalities, and other government bodies such as regional health authorities, planning districts and conservation districts. The Ombudsman Division also investigates disclosures of wrongdoing under *The Public Interest Disclosure (Whistleblower Protection) Act* (PIDA). Under PIDA, a wrongdoing is a very serious act or omission that is an offence under another law, an act that creates a specific and substantial danger to the life, health, or safety of persons or the environment, or gross mismanagement, including the mismanagement of public funds or government property.

Message from the Ombudsman



Access to information and privacy laws affect all Manitobans by giving us a right of access to our personal health information or other information about us held by public bodies or our health care providers, while also setting out rules to protect the privacy of that information. The laws give us a right of access to

general information held by government and other public bodies, which helps to provide transparency and accountability about matters that affect us. The laws also establish the right to challenge access and privacy decisions through complaints to the Ombudsman.

The role of the Ombudsman is to uphold access and privacy rights and hold public bodies and trustees accountable for their decisions that affect our rights. The Access and Privacy Division does this by:

- investigating complaints about access decisions, such as delays in responding to access requests, fees for access, or being refused access;
- investigating complaints that the privacy of our information has been violated through the collection, use or disclosure of this information;
- auditing the practices and performance of public bodies and trustees subject to FIPPA and PHIA;
- commenting on the implications on access to information and privacy of proposed legislation, programs, practices and technology; and
- reviewing significant privacy breaches where personal or personal health information has been compromised, such as through inadvertent disclosure or loss, to ensure that proper steps are taken to address the breach and to prevent a recurrence.

During Irene Hamilton's tenure as Ombudsman, a position was dedicated in the Access and Privacy Division to fulfill our statutory mandate to audit and ensure compliance with the Act and the Regulations. In 2011, the Division's systemic investigations and audits area completed six major initiatives: access practices reassessments of Manitoba Justice, Manitoba Hydro, the University of Manitoba, and Manitoba Innovation, Energy and Mines; an access practices assessment of the City of Winnipeg; and a timeliness follow-up of Manitoba Public Insurance Corporation. These audits assess the strengths and weaknesses of various components of a public body's processing of an Application

for Access but do not assess the correctness of the access decision. As such, these audits complement and balance the Division's FIPPA access complaint investigations where the correctness of an access decision is determined. These audits measure compliance that cannot be assessed on the basis of individual complaints alone.

On a broader scale, our office contributes to discussions and adopts positions with the other information and privacy commissioners and ombudsmen in Canada on issues of common concern to all Canadians.

In 2011, our national efforts included work on the unprecedented and challenging privacy issues raised by the development of electronic health records in Manitoba and other jurisdictions across Canada. Also in 2011, Ombudsman Irene Hamilton co-signed a resolution with her Canadian counterparts, endorsing and promoting open government at the federal, provincial and territorial levels. The Ombudsman also joined the other commissioners and information privacy ombudsmen in signing a letter to the federal government on what was then Bill C-52, the legislative initiative that would require internet service providers to have an infrastructure to allow law enforcement to intercept their customers' internet communications and provide basic information about their customers to law enforcement (this information collection without a warrant is sometimes referred to as "lawful access"). Bill C-52 died on the order paper earlier in 2011 and, at the time of writing this report, "lawful access" is the subject of the new Bill C-30 and again the subject of concern among information privacy commissioners and ombudsmen.

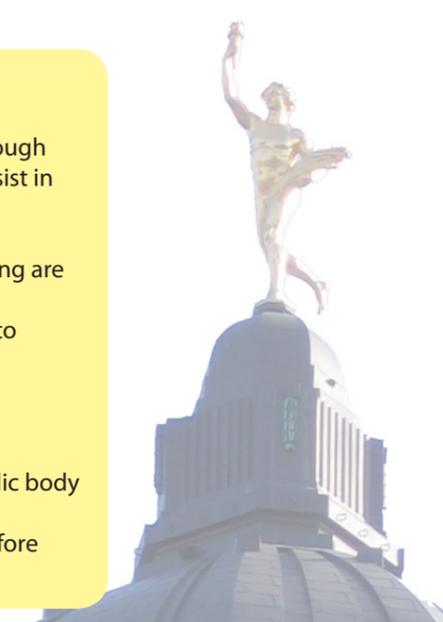
From an access perspective, throughout her seven years as Ombudsman, Ms Hamilton took the view that public bodies who commit to providing information through active release strategies can more cost-effectively provide information to the public and relieve pressure on FIPPA resources. These efforts to encourage active release will continue.

From a privacy perspective, Ms Hamilton continued to be concerned about the impact of rapidly advancing technology on our privacy rights. She felt that decisions about our privacy rights continue to be made without the necessary robust public debate, making public awareness of privacy matters an ongoing priority for our office.

In our view

A robust FIPPA infrastructure is anchored by public bodies who make timely, thorough and accountable decisions. Users of the Act can support this infrastructure and assist in the FIPPA process by:

- determining, before making a formal request, that the records they are seeking are not already available outside of FIPPA;
- providing as much direction and clarity as possible to enable a public body to search for records when completing an Application for Access;
- requesting records rather than posing questions;
- responding promptly when public bodies make inquiries for clarification or additional information;
- exercising reasonableness in the number of applications submitted to a public body at one time or within a short period of time; and
- ensuring that a response under FIPPA has not been sent by a public body before complaining to the Ombudsman about a failure to respond.



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www.ombudsman.mb.ca

Cases

In 2011, we opened 320 new cases under FIPPA and PHIA. Of these, 290 were complaints that we received from the public. Most complaints were about access to information issues, particularly decisions to refuse access under FIPPA.

In addition to the complaints, we opened 30 cases to investigate, audit, monitor or comment on compliance with the Acts. Some of these cases related to requests to the Ombudsman from public bodies seeking an extension longer than 30 days for responding to access applications

under FIPPA. We also conducted audits of access practices under FIPPA.

Our total caseload in 2011, which included 133 cases carried forward from 2010, was 453 cases. This was similar to our caseload in 2010 (465 cases). In 2011, we closed 388 of the 453 cases, and carried over 65 cases into 2012.

In addition, our office provided several comments to public bodies and trustees about the privacy implications of their activities.

Recommendations made about complaints

The Ombudsman may make any recommendations considered appropriate in a report about a complaint investigated under FIPPA or PHIA. In 2011, the Ombudsman made recommendations regarding eight complaints. Seven of these complaints concerned access decisions under FIPPA. In the remaining case, the Ombudsman had initiated a complaint about a privacy matter under PHIA.

In all eight cases noted above, the Ombudsman's recommendations were accepted and implemented. Accordingly, the Ombudsman did

not ask the Information and Privacy Adjudicator to conduct any reviews.

As of 2011, amendments to the Acts require the Ombudsman to make recommendations available to the public and this may be done by publishing them on a website. In September 2011, we began publishing our investigation reports containing recommendations on our website. Additionally, we have published summaries of the responses to the recommendations, to explain the outcome of these cases.

Court appeals

In cases where a complaint about a refusal of access under FIPPA or PHIA has not resulted in all information being released, the complainant has a right to appeal the public body's or trustee's refusal to the Court of Queen's Bench. In 2011, one appeal was initiated concerning the City of Winnipeg (Winnipeg Fire and Paramedic Service). This case is still before the court.

Judgments were issued in 2011 relating to two appeals under FIPPA: one that was initiated in 2008 concerning Manitoba Labour and Immigration as well as one initiated in 2010 concerning Manitoba Family Services and Consumer Affairs (Residential Tenancies). The Court ordered that additional information be released in the first of these cases, but upheld the

public body's decision in the second.

Several appeals under FIPPA that had been made prior to 2011 were pending at the end of 2011. Appeals initiated in 2008, 2009 and 2010 concerning the City of Winnipeg have not been concluded. Also still pending at the end of 2011 was an appeal concerning the Winnipeg Regional Health Authority as well as an appeal concerning Manitoba Labour and Immigration.

To obtain more information about these appeals, the related Court Files are: CI08-01-58184, CI08-01-59380, CI09-01-63160, CI10-01-64614, CI10-01-667093, CI10-01-68945, CI10-01-69768 and CI11-01-70787.

Brown bag talks and practice notes

We offered seven Brown Bag Talks for access and privacy personnel from public bodies and trustees. These talks are informal discussions about access and privacy issues of interest led by Manitoba Ombudsman staff with participation by attendees. In 2011, the talks covered a range of issues, including recent amendments to FIPPA, timeliness in responding to access applicants, and dealing with recommendations from the Ombudsman.

On our website, we have Practice Notes that assist public bodies and trustees in applying access and privacy provisions of the Acts and promote best practices.

FIPPA sessions for local public bodies

During 2011, we participated in introductory sessions about FIPPA that were offered to local public bodies by the Information and Privacy Policy Secretariat of Manitoba Culture, Heritage and Tourism, the department responsible for the administration of FIPPA. Personnel from local public bodies representing educational bodies, local government bodies and health care bodies participated in these half-day sessions.

Privacy language: "Confidentiality" refers to someone keeping another individual's personal information secret or limited to certain other people, like your doctor sharing minimum amounts of your personal health information with your other health professionals who need it to provide you with health care. "Security" is how an individual's information is kept safe, using a range of techniques like a locked door and filing cabinet (physical), computer password, screen turn-off and firewall (technical) and strong staff policies and training (administrative). "Information Privacy" is a fundamental human right where an individual has the right to some control over what happens to his or her personal information. Privacy protection includes confidentiality and security, and features the individual's right to see his or her own personal information, seek a correction to that information and make a complaint about the handling of his or her personal information to an oversight body like the Manitoba Ombudsman.

Is there any record the Ombudsman cannot see?

Under FIPPA and PHIA, the Ombudsman may examine any record despite any other law or "any privilege of the law of evidence" if he or she considers the record relevant to the investigation and it is in the control of an entity he or she can investigate.

During a 2011 FIPPA investigation, Manitoba Public Insurance (MPI) took the position that the Supreme Court of Canada decision, *Privacy Commissioner of Canada v. Blood Tribe* prevented the Ombudsman from reviewing records where solicitor-client privilege was claimed.

Initially, MPI declined to make the records available to our office for reason of the solicitor-client privilege exception. As a result, the Ombudsman recommended release of most of these records because there was insufficient evidence to conclude the solicitor-client privilege exception applied.

In her report with recommendations, the Ombudsman observed that the Supreme Court made findings in *Blood Tribe* specific to Canada's Privacy Commissioner acting under the federal law concerning private sector entities handling personal information in the course of commercial activity (the *Personal Information Protection and Electronic Documents Act*). She noted the Court had said the Commissioner's powers under PIPEDA and the *Privacy Act* are different. The federal *Privacy Act*, like FIPPA, sets out how public bodies entrusted with individuals' personal information handle that information. The Ombudsman also noted that unlike PIPEDA, FIPPA contains explicit language requiring a public body to make information available to the Ombudsman. Additionally, she pointed out that FIPPA has protections for information the Ombudsman has examined, including that the Ombudsman investigates in private, is restricted in disclosing the information, and she and her staff are not compellable as witnesses in court respecting information coming to their knowledge in their work.

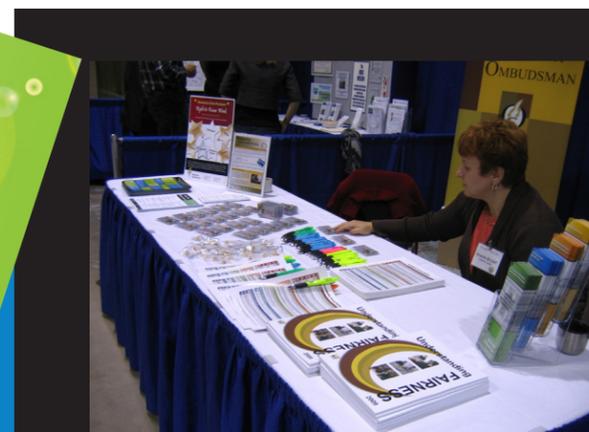
The head of MPI agreed that, for the purposes of the investigation, the Ombudsman's powers under FIPPA are more like the Privacy Commissioner's under the *Privacy Act* than PIPEDA, and made the records available to the Ombudsman investigator. At the conclusion of our investigation, MPI released most of the records to the requester.

2011 Statistical Overview of the Office

General Inquiries responded to by administration staff (caller was assisted, without need for referral to Intake Services)	1448
Inquiries responded to by Intake Services (information supplied or assistance provided)	264
Concerns handled by Intake Services under FIPPA, Ombudsman Act, PHIA and PIDA	1615
Cases opened for investigation under Part 5 of The Freedom of Information and Protection of Privacy Act	268
Cases opened for investigation under Part 5 of The Personal Health Information Act (PHIA)	22
Cases opened under Part 4 of FIPPA and PHIA	30
Cases opened for investigation under The Ombudsman Act	106
Cases opened for investigation under The Public Interest Disclosure (Whistleblower Protection) Act	1
Cases opened for investigation under The Fatality Inquiries Act	9
Total Contacts	3763

2011/12 Office Budget

Total salaries and employee benefits for 31 positions	\$2,537,000
Positions allocated by division are:	
Ombudsman Division 12	
Access and Privacy Division 8	
General 11	
Other expenditures	\$505,000
Total Budget	\$3,042,000



Take charge of your information on eChart

Elements of your demographic and health information are available to authorized health care providers (users) on eChart Manitoba, even if you have never received health care at one of the sites where authorized users can enter the system.

Did You Know?

EChart Manitoba is the large government-funded electronic health record (EHR) system that draws together your key health information from different points of care in Manitoba (like pharmacies, clinics and labs), and is available to authorized users. It also shows your key demographic information.

EChart Manitoba makes available to authorized users:

- **Your** name; date of birth; gender; age; home address; home and work telephone number; Personal Health Identification Number (PHIN); family registration number; and medical record numbers;
- **Your** prescriptions filled at retail pharmacies in Manitoba, including historical data since April 2010;
- **Your** immunization information, including historical data on child immunization since 1980 and on adult immunization since 2000;
- **Your** laboratory test results from some laboratory sites since various dates in 2010 and 2011;
- **Your** diagnostic image reports from some hospitals and other publicly funded facilities since November 2011; and
- **Your** administrative information concerning visits to St. Boniface General Hospital, including admission/discharge dates, type of visit and the reason for these encounters, since November 2011.

More personal information of all Manitobans will become available to more authorized users over time.

It simply makes good sense to know who has seen your electronic personal information

Compared to paper records, electronic health records make it easier for users to see more information (not just needed information) on more individuals (not just a user's patients). An advantage of electronic health records is that encounters on the system are recorded so it is possible to determine who has seen what specific information and when.

Did You Know?

In 2011, the availability of eChart Manitoba grew from 3 sites around the province to 33. There were over 1,000 user accounts by the end of 2011. The system does not have the technical ability to limit users to viewing only their patients' information and so, potentially, personal information on all Manitobans can be viewed by authorized users, specifically demographic information and (unless an individual takes measures to "mask" health information) possibly health information, too.

The media has been reporting, worldwide, on cases of some health care providers improperly using computers to "snoop" into individuals' personal information. Sometimes the victim is someone famous; often the victim is a family member or former friend of the snooper. A common detail of snooping cases is that the victim suspected the breach of their privacy by a health care provider known to them and asked for a review of the electronic audit logs.

You can do this too, and you do not need a reason. It just makes sense to be sure. You can request an audit log to see who has viewed your personal information on eChart. Obtain the form called "Request Record of User Access in eChart Manitoba" at www.connectedcare.ca/echartmanitoba or by phoning eChart Manitoba Services, 1-855-203-4528.

Other ways to take charge of your eChart privacy

You can also ask to see what information about you is available on eChart. You can arrange to have your health information hidden (masked) on eChart and it will only be unmasked with your consent or in an emergency. Your demographic information cannot be masked. You can talk to eChart Manitoba about other possible ways to hide your demographic information. See the above eChart contact information for the necessary forms and arrangements. If you have a complaint, contact the Ombudsman. Also see:

- 10 Points to Know about eChart Manitoba, Ombudsman fact sheet and news release (Dec 6, 2011)
- Update on eChart Manitoba, OmbudsNews 2011-2 (June 2011)
- EChart Manitoba Update, OmbudsNews 2011-3 (Nov 2011)
- Alberta Privacy Breach Underscores the Value of Seeing Who has Viewed Your Records in the Provincial Electronic Health Record (EHR) System, OmbudsNews 2011-4 (Dec 2011)

Manitoba's former Ombudsman Irene Hamilton joined Brandon Mayor Shari Decter Hirst when she signed Brandon's Right to Know Week Proclamation. "Right to Know" acknowledges an individual's democratic right of access to government-held information and promotes the benefits of open, accessible, and transparent government. In 2011, the Province of Manitoba and the cities of Brandon, Dauphin, Flin Flon, Portage la Prairie, Selkirk, Thompson, and Winkler made proclamations.



Systemic Investigations and Audits

Access Practices Assessments

The access practices assessment is an audit that focuses on a public body's processing of FIPPA applications for access from the perspectives of compliance and best practices. We began conducting these audits in 2010. Each year for the next several years, different public bodies will be audited. Essentially, the audit evaluates the public body's performance from the point of receiving an Application for Access to the issuance of the response letter to an applicant. The audit does not assess the correctness of the access decision.

Through a review of the contents of a public body's completed FIPPA files from the previous year where decisions were made to refuse access to records in full or in part, or where records do not exist or cannot be located, the strengths and weaknesses of the process are identified. Where weaknesses are found, recommendations are made to improve the specific weakness that was identified. If recommendations are made, a follow-up audit is done the next year.

We do these audits because responding to an Application for Access can be an intricate

process involving numerous staff and a series of complex decisions. To ensure an efficient, thorough, and accountable access decision for each applicant, the audit focuses on four key components of the processing of an application: (1) compliance with time requirements of FIPPA to respond to a request; (2) compliance with the requirements of a response to an applicant as set out in section 12 of FIPPA; (3) adequacy of the contents of the FIPPA file; and, (4) adequacy of records preparation. Section 12 compliance and compliance with time requirements are mandatory provisions under the Act, therefore recommendations are made if compliance is not 100%. Recommendations for the adequacy of records preparation and file documentation may be made if performance is less than 90%.

Timeliness Audits

The timeliness audit is an assessment of a public body's performance in meeting the mandatory time requirements under FIPPA to respond to applications for access. We began to do this type of audit in 2010 and intend to conduct them on an occasional basis.

FIPPA Access Practices Assessment of the City of Winnipeg

An audit of the City of Winnipeg's access practices was conducted in the summer of 2011. Eleven departments were audited. The Winnipeg Police Service was not included and will be done in 2012.

Based on a review of 150 City FIPPA files, we found the following:

- Compliance with section 12 - an average of 61% of the files reviewed were compliant
- Compliance with time requirements - an average of 94% of the files reviewed were compliant
- Adequacy of records preparation - an average of 85% of the files reviewed were adequate
- Adequacy of the contents of the FIPPA file - an average of 74% of the files reviewed were adequate
- Overall average 79%

We found that all departments were outstanding performers in some key component categories, and that there were a range of strengths and weaknesses across the City. Twenty-one recommendations were made to the City to address weaknesses that were identified through the audit. All recommendations were accepted. We also made suggestions to deal with some systemic weaknesses that were observed. The City has advised the Ombudsman that it is committed to addressing all the systemic weaknesses that were identified.

FIPPA Access Practices Reassessment of Four Public Bodies: Manitoba Justice, Manitoba Hydro, the University of Manitoba, and Manitoba Innovation, Energy and Mines

In 2010, we assessed the access practices of five public bodies. Four of the five public bodies received recommendations to address weaknesses that were identified. In 2011, we reassessed these same four public bodies in relation to the recommendations that were made in 2010. The reassessments indicated that generally, each of the public bodies improved significantly. Although some improvements are still needed with three of the four public bodies in some component areas that were reassessed, we were satisfied with the implementation of the recommendations.

2011 Timeliness Follow-up Audit of Manitoba Public Insurance

In 2011 we conducted a follow-up audit on the timeliness of MPI's responses to applicants under FIPPA. This audit was a follow-up to the timeliness audit we conducted in 2010 in which the Ombudsman made two recommendations to MPI to ensure timely responses. The follow-up audit was a check-up, not an exhaustive review. While MPI's performance improved, we noted there were still challenges in responding to requests on time when spikes in volume occurred. The Ombudsman requested that MPI provide our office with a plan for ensuring timely responses, particularly when spikes in volume occur. In response to this request, MPI provided the Ombudsman with a reasonable plan that it intends to implement.

E-language: The term "electronic health record (EHR)" is often used for a large system that brings together key, current information about a person's health, drawn from different computer databases, like those containing retail prescriptions, immunizations and lab results. In our province, this type of system is called eChart Manitoba which became operational and available for viewing by some authorized health care providers in December 2010. EChart will have more personal information and more users over time. This is different from the computer screen you may have seen at your doctor's office for many years now. That is an "electronic medical record (EMR)", the charting of your personal health information by your doctor on his or her office computer. You might also encounter an "electronic patient record (EPR)" at the hospital, an in-house hospital record that electronically tracks your care there.

