

Manitoba Ombudsman

REPORT WITH RECOMMENDATIONS ISSUED ON OCTOBER 27, 2014

AND

RESPONSE TO THE RECOMMENDATIONS

UNDER *THE PERSONAL HEALTH INFORMATION ACT*

CASE 2013-0419

HEALTH PROFESSIONAL - PSYCHOLOGIST

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 7(1)(a) & (c), 11(1)

CASES CONSIDERED: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138

PUBLICLY RELEASED ON MARCH 3, 2015

SUMMARY OF REPORT WITH RECOMMENDATIONS AND RESPONSE:

Manitoba Ombudsman received a complaint that a registered psychologist and health information trustee had refused access in response to a request from an individual to view and receive copies of the individual's own personal health information as allowed under *The Personal Health Information Act* (PHIA or the act). Our office found that the trustee did not respond to the request as required by subsection 7(1) of PHIA. The trustee did not provide reasons for refusing access relating to the exceptions to access allowed under subsection 11(1) of the act or establish that access to the information contained in the patient file was restricted under another enactment. The ombudsman recommended the release of the records at issue to the complainant.

On November 12, 2014 the trustee provided its response to the ombudsman, refusing to accept the recommendations. On November 19, 2014 the ombudsman referred this matter to the information and privacy adjudicator, requesting a review of the trustee's refusal to act concerning the complainant's request to access her personal health information.

Manitoba Ombudsman

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*THE PERSONAL HEALTH INFORMATION ACT***

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SUMMARY: Manitoba Ombudsman received a complaint that a registered psychologist and health information trustee had refused access in response to a request from an individual to view and receive copies of the individual's own personal health information as allowed under *The Personal Health Information Act* (PHIA or the act). Our office found that the trustee did not respond to the request as required by subsection 7(1) of PHIA. The trustee did not provide reasons for refusing access relating to the exceptions to access allowed under subsection 11(1) of the act or establish that access to the information contained in the patient file was restricted under another enactment. The ombudsman recommended the release of the records at issue to the complainant.

BACKGROUND

The complainant made a request to a health professional (the psychologist or the trustee) for access to her own personal health information. Initially, the complainant did not request to receive a copy as allowed under PHIA. The complainant related to our office that she objected to the conditions on access imposed by the health professional who advised she would provide access by explaining the complainant's test results and answering questions. Additionally, this access would only take place in the presence of a third party. The complainant would not be allowed unmediated access to examine the entire contents of her patient file.

The complainant related that, in view of the conditions of access stipulated by the psychologist, she then made a request for copies of her personal health information as follows:

- 1) *Photocopies of notes made by yourself and psychometrist during the assessment.*
- 2) *Photocopies of paper and pencil tests and photocopies of questionnaires.*
- 3) *All communication between yourself and MPIC.*

The request was made first by email on November 22, 2013. The trustee responded by email that the complainant would have to make her written request by regular mail and the complainant did so by a letter dated November 25, 2013.

On November 29, 2013 the psychologist made a response to the complainant giving access to interview notes made by the psychologist, a Neuropsychological Report in two parts dated November 11 and 15, 2013 and an appointment letter addressed to a Manitoba Public Insurance (MPI) case manager dated June 26, 2013. Psychometrist notes, paper and pencil tests/photocopies of questionnaires and other items received from MPI were not provided to the complainant.

COMPLAINT

Under subsection 39(1) of *The Personal Health Information Act* (PHIA or the act) an individual who has made a request to examine or receive a copy of his or her personal health information may make a complaint to the ombudsman about any decision, act or failure to act of a trustee that relates to a request, including but not limited to a refusal by the trustee to permit the individual to examine or receive a copy of the information. A complaint concerning the psychologist's refusal of access was received in our office on December 10, 2013.

INVESTIGATION

IS THE PSYCHOLOGIST A HEALTH INFORMATION TRUSTEE UNDER PHIA?

As set out in clause 2(a) of PHIA, the purpose of the legislation is to provide individuals in Manitoba with a right to examine and receive a copy of personal health information about themselves maintained by a trustee (subject to limited and specific exceptions set out in the act). Under PHIA, a trustee means a health professional, health care facility, public body, or health services agency that collects or maintains personal health information. A “health professional” is a person who is licensed or registered to provide health care under an act of the Manitoba legislature or who is a member of a class of persons designated as health professionals in the PHIA regulations.

The Psychological Association of Manitoba (PAM or the association) derives its authority from *The Psychologists Registration Act*. PAM establishes qualifications, clinical competencies, experience and other requirements to be met by applicants for certification and registration. In order for a person to practice independently as a psychologist in Manitoba, they must be certified by and registered with the Association. Registered Psychologists are identified by their use of the "C. Psych." professional designation which indicates that they hold a certificate of registration as a psychologist with PAM. The psychologist in this matter holds this designation.

In describing what psychologists do, the Canadian Psychological Association (CPA) website states that psychologists engage in research, practice and teaching across a wide range of topics having to do with how people think, feel and behave. Mental health problems such as depression, anxiety and phobias are one of the topics on which psychologists focus their research and practice. A mental health professional may administer psychological evaluations (various checklists or tests that the patient may complete) in order to establish a diagnosis. Under PHIA “health care” means any care, service or procedure provided to diagnose, treat or maintain an individual’s health.

In view of the foregoing our office has concluded that the psychologist in this matter is a health information trustee as defined by PHIA.

POSITION OF THE TRUSTEE AND OTHER MATTERS

In written correspondence replying to the complainant’s November 25, 2013 written request to receive a copy of her psychometrist notes, paper and pencil tests/photocopies of questionnaires and items received from MPI the psychologist provided the following response:

“...in accordance with the Psychological Association of Manitoba’s Code of Conduct ‘psychological test materials’ are to be protected, and therefore, cannot be released to the

public, which in fact includes patients/clients. However...I am authorized to release this material to another registered psychologist that you have obtained for the purpose of receiving the raw data relating to your assessment...requests for third party documentation or correspondence (e.g. reports by other health care professionals, notes by others, letters to MPIC originated by a third party, MPIC internal communications) *must be made to that party as I am **not authorized** to release this information.*”

[All italics, bold and underline as in the original letter to the complainant.]

In the course of our investigation the psychologist acknowledged that the psychometrist who administered and scored the complainant’s tests did so under the psychologist’s supervision and was, therefore, acting on the trustee’s behalf in this matter. In light of this, the psychometrist’s notes are considered to be under the psychologist’s custody or control for the purposes of PHIA. Once this was explained to the trustee she acknowledged that as the psychometrist’s notes form part of the complainant’s personal health information and as there were no exceptions to access as set out in subsection 11(1) of PHIA that applied, the psychometrist’s notes should be released to the complainant. Therefore, the psychometrist’s notes were no longer at issue in this complaint.

With regard to the records of personal health information the trustee originally received from MPI and which were also maintained in the complainant’s case file at MPI, our office explained the requirements of subsection 8(1) of PHIA to the psychologist. Subsection 8(1) reads:

Transferring a request to another trustee

8(1) Within seven days after receiving a request, a trustee may transfer it to another trustee if

(a) the personal health information is maintained by the other trustee; or

(b) the other trustee was the first to collect the personal health information.

As a Manitoba public body which maintains the personal health information of personal injury compensation claimants, MPI is also a trustee under PHIA. It was explained to our office that MPI provided the psychologist with copies of third party materials that pertained to the complainant and which were created by other health professionals. These items were collected by MPI and were maintained in the complainant’s MPI case file as part of the process of claim administration. As such it was appropriate that the portion of the complainant’s request dealing with these materials be transferred to MPI in accordance with the process set out by clause 8(1)(b) of PHIA.

MPI confirmed to our office on January 22, 2014 that it would make the information in the complainant’s case file available to complainant. As a result, the communication between the psychologist and MPI was no longer considered to be at issue in this complaint.

During our investigation the psychologist explained to our office that she continued to be willing to allow the complainant to view her patient file under the conditions that had been set out in the trustee's response to the complainant's verbal and written requests for access to her personal health information. As the psychologist had explained, the complainant's paper and pencil tests and questionnaires would be released only to another registered psychologist that the complainant would obtain for the purpose of receiving the raw data relating to her assessment and this other health professional would review the complainant's test results with her and answer her questions. The complainant, however, did not want to view her personal health information under these conditions and wished to receive a copy of her patient file as allowed under PHIA. The psychologist reiterated that she would not provide a copy of any psychological test materials including questionnaires and test results directly to the complainant.

Our office asked the psychologist about the possibility of severing the complainant's personal health information from the psychological test materials in the file and providing the complainant with a copy as contemplated by subsection 11(2) of PHIA. The psychologist said that she would not consider this as, in some cases, the answers reveal information about the questions even when the questions are not there. The psychologist further explained that, without the contextual information of the questions the answers alone would be largely meaningless.

At this point in the process and in consideration of the psychologist's representations on severing, it would be normal investigative procedure to review the records at issue. To this end our office requested the trustee to provide a copy of these records for our review as allowed under subsection 29(2) of PHIA. The psychologist responded to our office stating once again that she was "permitted to release these [test] materials, including client responses that form part of the test forms, only to another registered psychologist that has been obtained by the client for the purpose of reviewing the raw data relating to an assessment."

Our office determined that we could not continue the investigation without examining the records remaining at issue. Accordingly a subpoena was served on the psychologist on May 15, 2014 requiring her to attend our offices to answer questions and to bring with her all records of personal health information relating to the complainant. Upon receipt of the subpoena, the psychologist appeared as required and produced copies of the complaint's personal health information for our review.

Records Remaining at Issue

Our office examined the complainant's personal health information as provided for our review and determined that it consisted of the following items:

- 1) The psychologist's Outpatient Neuropsychological Summary (summarizing raw data from assessment testing).
- 2) Various Psychological Test Materials and Test Results as follows:
 - Rey Complex Figure Test and Recognition Trial Test Booklet Cover with Scores, Scoring Sheet, Copy Administration Notes, Immediate and Delayed Recall Administration Notes, recall drawings and multiple choice recall answer sheets;
 - Personality Assessment Inventory Software Module Item and Response Booklet with multiple choice answer sheets, Clinical Interpretive Report (including profiles and additional profile information), PAI Item Responses;
 - Logical Memory I and II answer sheets and written responses;
 - WMS-IV Score Report (including score profile and raw scores);
 - Digit Span answer sheets;
 - AIS-IV score profiles and raw scores;
 - TOMM Score Sheets;
 - BDI [Beck Depression Inventory]-II completed questionnaires
 - Computerized Assessment of Response Bias (Summary, Scores, Score Details, Interpretation);
 - Test of Premorbid Functioning answer sheet and score report;
 - WASI-II Record Form, Block Design, Vocabulary, Matrix Reasoning answer sheet;
 - Neuropsychology Interview question sheet with brief notes;
- 3) Psychologist's Notes.
- 4) Psychometrist's Notes.
- 5) Neuropsychological Report Part 1.
- 6) Neuropsychological Report Part 2.
- 7) Raw data from a previous assessment done at the request of MPI.
- 8) Items received from MPI and contained in MPI claim file.

The psychologist had already provided copies of items 3, 5, and 6 to the complainant and did not object to providing the complainant with a copy of item 4. MPI had agreed to provide the complainant with copies of materials described as item 8. Accordingly, these records were no longer at issue.

At this point in our investigation, the psychologist stated that she would agree to allow the complainant to view the copies of her personal health information provided to our office under the supervision of our investigator. However, the trustee would still not provide the complainant

with a copy as required under clause 7(1)(a) of PHIA. Our office considered this offer in light of subsection 40(2) of PHIA which states:

Informal resolution

40(2) *The Ombudsman may take any steps the Ombudsman considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of this Act.*

However, our office concluded that it would not be appropriate for us to act as the trustee's agent in providing access to the complainant's personal health information. Further, the complainant had made her request to receive a copy of her personal health information clear. Our investigation then turned to an analysis of the issues raised.

ISSUES CONSIDERED

Are the records remaining at issue the personal health information of the complainant as defined by PHIA?

Under PHIA personal health information is defined as recorded information about an identifiable individual that relates to health or health care history as well as the provision of health care to the individual. Health is defined as the condition of being sound in mind, body and spirit and thus includes mental as well as physical health. "Health care" means any care, service or procedure provided to diagnose, treat or maintain an individual's health.

Our review of the complainant's patient file determined that it contained records of personal health information created as a part of the process of administering a diagnostic procedure (psychological assessment) to the complainant. Under PHIA, making a diagnosis is viewed as part of providing health care. Our office concluded that the patient file contained the personal health information of the complainant and the psychologist agreed with this conclusion.

Did the psychologist respond to the complainant's requests to view and receive a copy of her personal health information as required under PHIA?

Section 7 of PHIA sets out how a trustee shall respond to a request from an individual to examine and receive a copy of his or her personal health information. This includes subsection 7(1) which states:

Trustee's response

7(1) *In responding to a request, a trustee shall do one of the following:*

- (a) make the personal health information available for examination and provide a copy, if requested, to the individual;*
- (b) inform the individual in writing if the information does not exist or cannot be found;*
or
- (c) inform the individual in writing that the request is refused, in whole or in part, for a specified reason described in section 11, and advise the individual of the right to make a complaint about the refusal under Part 5.*

The use of the word “shall” rather than the word “may” in the first line of subsection 7(1) indicates that the requirements for trustees contained in clauses (a) to (c) are mandatory; there is no discretion for a trustee to do otherwise. Our office found that the psychologist did not respond to the complainant in compliance with clause 7(1)(a) of PHIA even after the statutory requirements were explained to her. She failed to identify a reason for refusal as set out in section 11 and did not advise the complainant of her right to make a complaint to the ombudsman about the refusal as required by clause 7(1)(c).

Does an exception to access as allowed under section 11 of PHIA apply to the personal health information of the complainant?

Under PHIA an individual has a right to examine and receive a copy of his or her personal health information maintained by a trustee. A trustee may only refuse access for a specified reason as set out in subsection 11(1) of PHIA, which reads:

Reasons for refusing access

11(1) A trustee is not required to permit an individual to examine or copy his or her personal health information under this Part if

- (a) knowledge of the information could reasonably be expected to endanger the health or safety of the individual or another person;*
- (b) disclosure of the information would reveal personal health information about another person who has not consented to the disclosure;*
- (c) disclosure of the information could reasonably be expected to identify a third party, other than another trustee, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected;*
- (d) the information was compiled and is used solely*
 - (i) for the purpose of peer review by health professionals,*
 - (ii) for the purpose of review by a standards committee established to study or evaluate health care practice in a health care facility or health services agency,*
 - (iii) for the purpose of a body with statutory responsibility for the discipline of health professionals or for the quality or standards of professional services provided by health professionals, or*

(iv) for the purpose of risk management assessment; or
 (e) the information was compiled principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding.

Our office notes that the psychologist did respond to the complainant in writing and did explain her refusal to allow the complainant to view and receive a copy of her patient file. However, the psychologist did not provide a specified reason or reasons as described in subsection 11(1) of PHIA as stipulated by subsection 7(1) of the act. Our office discussed this provision with the psychologist and she could not identify any basis under subsection 11(1) for refusing access. The psychologist stated without equivocation that no exception applied. Our office found that no exception to access as allowed under subsection 11(1) of PHIA applied to the complainant's patient file.

Is the disclosure of the complainant's personal health information prohibited or restricted by provisions of the *Copyright Act* (Canada)?

In verbal representations to our office the psychologist explained that the psychological test materials remaining at issue were copyrighted by the companies which develop and market them. The psychologist asserted that she was contractually bound not to violate that copyright by copying or distributing the tests outside the uses approved by the test owners. The psychologist further explained that psychological test materials are expensive and time consuming to develop. If the test questions became widely known, the validity of the tests could be compromised and their value to the test providers significantly reduced. Copyright legislation grants the test developers the exclusive right to the use and distribution of the tests they have created thus preserving their value for the developers and their validity for test users.

Manitoba has no equivalent to the federal *Copyright Act* and, under the *Constitution Act, 1867* the power to enact legislation with relation to copyrights is an exclusive federal power. Manitoba's *Personal Health Information Act* is a provincial statute which provides individuals with a right of access to their own personal health information. Where there is a conflict between provincial and federal laws in Canada, the doctrine of paramountcy establishes that the federal law will prevail.

In light of this our office considered the provisions of the *Copyright Act*. We found clause 32.1(1)(a) of the *Copyright Act* to be relevant in this matter. It reads:

Statutory Obligations

No infringement

32.1 (1) It is not an infringement of copyright for any person

(a) to disclose, pursuant to the Access to Information Act, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;

Our office notes that Manitoba's *Personal Health Information Act* is an Act like Canada's *Access to Information Act* in that the purpose of each act is to provide a right of access (in the case of PHIA to examine and receive a copy) to records subject to limited and specific exceptions. Our office considers PHIA to be an act like the *Access to Information Act* within the meaning of clause 32.1(1)(a) of the *Copyright Act*.

After considering clause 32.1(1)(a) of the *Copyright Act* our office concluded that it is not an infringement of copyright to allow the complainant to view and receive a copy of personal health information as allowed within the meaning of PHIA. The psychologist did not make representations concerning any other enactment that would apply in refusing to allow the complainant to receive a copy of personal health information.

Representations provided by the psychologist spoke to her contractual obligations to the test developers only in the most general terms and did not address specific constraints. Also, we note that the psychologist did not provide our office with a copy of the contract(s) under which she acquired the rights to administer the tests in question. Thus any arguments that may be made concerning the contractual obligations of psychologists with regard to test materials have not been presented here and are reserved for consideration in future cases where they are squarely raised.

ANALYSIS AND FINDINGS

Once it is found that the records at issue contain the personal health information of the complainant and that no exceptions to access as allowed under PHIA or another enactment apply, it follows that there is no authorization to refuse to allow the complainant to view and receive a copy of the personal health information in the patient file.

As part of our investigation, our office considered whether or not the complainant's personal health information (test responses) could be severed from the test questions and a copy provided to the complainant in a manner that would not violate the contractual restrictions asserted by the trustee. The psychologist provided further written representations in this regard:

Although this is a possibility, I believe we agreed that providing only responses to questions without any context would essentially render meaningless information to all concerned. Another issue is the fact that the psychometric data used in the scoring and the results, as

well as the use of abbreviations and psychological jargon that form part of the tests and the results, would likely make it difficult for patients to understand the test material.

As part of our investigation, our office considered previous decisions relating to requests for access to personal health information in other provinces as well as the Supreme Court of Canada in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, on which those decisions strongly depend. As explained in the judgment in *McInerney v. MacDonald*,

Information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. While the doctor is the owner of the actual record, the information is held in a fashion somewhat akin to a trust and is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue. The trust-like "beneficial interest" of the patient in the information indicates that, as a general rule, she should have a right of access to the information and that the physician should have a corresponding obligation to provide it...The arguments that the records may be meaningless or that they may be misinterpreted do not justify non-disclosure in the ordinary case. If the records are, in fact, meaningless, they will not help the patient but neither will they cause harm. It is always open to the patient to obtain assistance in understanding the file... If it is possible that the patient will misconstrue the information in the record (for example, misinterpret the relevance of a particular laboratory test), the doctor may wish to advise the patient that the medical record should be explained and interpreted by a competent health-care professional.

Our office notes that the psychologist has offered to give the complainant access to view her tests and their results (albeit with conditions), and to answer any questions. The psychologist has also offered to provide a copy of the patient file to another certified psychologist should the complainant retain one for the purpose of interpreting the test results. While the psychologist's attempts at accommodating the complainant are to be commended, they fall short of the rights set out in *McInerney v. MacDonald* and in subsection 5(1) of PHIA of an individual to examine and receive a copy of personal health information.

Our office considered that if the complainant's request related to any other sort of medical tests, such as a blood test, there would be no question that the complainant would receive not only the raw 'test results' but that those results would be entered on a lab test report form indicating what sort of tests had been performed as well as the results. Without the lab test report form, the raw test results would be truly meaningless and the intention of allowing access to the personal health information would be subverted. The difference here is that the psychologist has raised the issue of copyright with regard to the test questions and answer forms which give the answers meaning. As already noted, our office found that it is not an infringement of copyright to allow the

complainant to view and receive a copy of personal health information as allowed within the meaning of PHIA.

Our office considered that the reasonable application of the right to view and receive a copy of one's own personal health information may require balancing the rights of the individual against the rights of the many. There may be other patients for whom the future use of the same standardized diagnostic tests found in the complainant's patient file may be compromised if the complainant made copies of testing materials received as part of her personal health information widely known. In considering this matter, our office surveyed statutes similar to PHIA in other provincial jurisdictions. Our office notes that in the majority of cases, psychological test materials are either specifically excluded from the application of the statutes or an exception to access would apply. However, in Manitoba there is no statutory authority under PHIA to support the psychologist's refusal to allow the complainant to view and receive a copy of her personal health information record containing psychological test materials.

In the absence of representations concerning any other reasons for refusing access, our office finds that the psychologist's refusal to allow the complainant to receive a copy of her patient file, specifically including psychological assessment test results, is not authorized under PHIA. Our office also finds (and the psychologist agreed) that separating the psychological assessment test results from the testing materials to which they are attached in the patient file would not produce meaningful information for the complainant. Therefore, to comply with the complainant's right to view and receive a copy of personal health information as set out in PHIA, our office also finds that the complainant has a right to view and receive a copy of her entire patient file including the questionnaires containing both the test results and the test questions to which they are related and without which the psychological assessment test results would have no meaning.

In representations to our office the psychologist pointed out that copyrighted test materials may only be protected by controlling the distribution of copies and that, if a copy of the entire patient file was provided to the complainant, there could be no control over what use the complainant made of the information including posting testing materials to the Internet or publishing it by some other means. Our office would highlight subsection 32.1(2) of the *Copyright Act* in this regard:

Limitation

(2) Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright in the record, personal information or like information, as the case may be, has a right to do.

By virtue of a contractual arrangement with the psychological assessment test developers, the psychologist has obtained the right to use those tests in her practice. Providing a copy of those materials as part of a patient file to the complainant in response to a request made under PHIA does not violate copyright. However, the right to view and receive a copy does not confer on the complainant a right to use those test materials in any way that only the copyright holders (or those with whom they have entered into a contractual arrangement) have a right to do. If the complainant moved to exercise rights belonging only to the copyright holder, such as publishing or distributing the test materials, any legal remedy arising from the violation of that copyright could be applied.

SUMMARY OF FINDINGS

- 1) Our office found that the psychologist did not respond to a request by the complainant to view and receive a copy of personal health information as is required by PHIA subsection 7(1).
- 2) Our office found that the patient file contained the personal health information of the complainant.
- 3) Our office found that it is not an infringement of copyright to allow the complainant to view and receive a copy of personal health information as allowed under PHIA.
- 4) Our office found that the psychologist's refusal to allow the complainant to receive a copy of her patient file is not authorized under PHIA or the *Copyright Act*. Accordingly, the complaint of refused access is justified.

RECOMMENDATIONS

Based on our findings, the ombudsman recommends the following:

- 1) In view of the finding that the psychologist's refusal to allow the complainant to receive a copy of her patient file is not authorized under PHIA or the *Copyright Act*, our office recommends that the psychologist provide the complainant with a copy of those records still at issue in her patient file, specifically those records described under Items 1, 2 and 7 under "Records Remaining at Issue" elsewhere in this report.
- 2) In providing the complainant with a copy of the records still at issue in her patient file, our office recommends that the psychologist make the complainant aware of the restrictions on the use of her personal health information file insofar as it contains materials that are subject to copyright as set out in subsection 32.1(2) of the *Copyright Act*.

TRUSTEE'S RESPONSE TO RECOMMENDATIONS

Under subsection 48(4) of PHIA, the psychologist must respond to the ombudsman's report in writing within 14 days of receiving this report. As this report is being sent to the psychologist on this date, the psychologist shall respond to the ombudsman by November 10, 2014. The psychologist's response must contain the following information:

Trustee's response to the report

48(4) If the report contains recommendations, the trustee shall, within 14 days after receiving it, send the Ombudsman a written response indicating

(a) that the trustee accepts the recommendations and describing any action the trustee has taken or proposes to take to implement them; or

(b) the reasons why the trustee refuses to take action to implement the recommendations.

OMBUDSMAN TO NOTIFY

Under subsection 48(5), the ombudsman shall notify the complainant of the psychologist's response to the recommendations without delay.

TRUSTEE'S COMPLIANCE

If the psychologist accepts the ombudsman's recommendations, subsection 48(6) of PHIA requires that the psychologist comply with the recommendations within 15 days of accepting the recommendations or within an additional period if the ombudsman considers it reasonable.

Accordingly, the psychologist should provide written notice to the ombudsman and any other supporting information to demonstrate that she has complied with the recommendations and has done so within the time period specified in the act.

If the psychologist refuses to take action to implement the ombudsman's recommendations, does not take action to implement the ombudsman's recommendations within the required time or fails to respond to the ombudsman as required by subsection 48(4), the ombudsman may ask the information and privacy adjudicator to review the matter as described in subsection 48.1(2) of PHIA.

Mel Holley
A/Manitoba Ombudsman
October 27, 2014

Manitoba Ombudsman

RESPONSE TO THE RECOMMENDATIONS UNDER

THE PERSONAL HEALTH INFORMATION ACT

CASE 2013-0419

HEALTH PROFESSIONAL - PSYCHOLOGIST

**ACCESS COMPLAINT:
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PROVISIONS CONSIDERED: 7(1)(a) & (c), 11(1)

CASES CONSIDERED:

McInerney v. MacDonald, [1992] 2 S.C.R. 138

RESPONSE ISSUED ON NOVEMBER 19, 2014

SUMMARY: On November 12, 2014 the trustee provided its response to the ombudsman, refusing to accept the recommendations. On November 19, 2014 the ombudsman referred this matter to the information and privacy adjudicator, requesting a review of the trustee's refusal to act concerning the complainant's request to access her personal health information.

RESPONSE TO THE RECOMMENDATIONS

The ombudsman's report with recommendations in this matter was sent to the trustee by courier on October 27, 2014. Under subsection 48(4) of *The Personal Health Information Act* (PHIA), the trustee was required to respond to the ombudsman's report in writing within 14 days of receiving the report. As the deadline would be reached on a day on which our office was closed, the trustee's response was required by November 12, 2014, the next business day.

Under PHIA, the trustee's response was to contain the following:

Trustee's response to the report

48(4) *If the report contains recommendations, the trustee shall, within 14 days after receiving it, send the Ombudsman a written response indicating*

- (a) that the trustee accepts the recommendations and describing any action the trustee has taken or proposes to take to implement them; or*
- (b) the reasons why the trustee refuses to take action to implement the recommendations.*

The trustee responded to the ombudsman on November 12, 2014, indicating a refusal to take action to implement the recommendations made in our report:

- 1) In view of the finding that the psychologist's refusal to allow the complainant to receive a copy of her patient file is not authorized under PHIA or the *Copyright Act*, our office recommends that the psychologist provide the complainant with a copy of those records still at issue in her patient file, specifically those records described under Items 1, 2 and 7 under "Records Remaining at Issue" elsewhere in this report.
- 2) In providing the complainant with a copy of the records still at issue in her patient file, our office recommends that the psychologist make the complainant aware of the restrictions on the use of her personal health information file insofar as it contains materials that are subject to copyright as set out in subsection 32.1(2) of the *Copyright Act*.

As the ombudsman felt that the complaint raised important issues concerning the rights of individuals to access their personal health information, the ombudsman decided to request that the information and privacy adjudicator review the trustee's failure to act concerning the complainant's request. On November 19, 2014, in accordance with subsections 48.1(1) to 48.1(3) the ombudsman referred the matter to the information and privacy adjudicator and notified the complainant and the trustee of the request for review.

Mel Holley
A/Manitoba Ombudsman
November 19, 2014