Manitoba Ombudsman

REPORT UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2017-0266

WINNIPEG REGIONAL HEALTH AUTHORITY

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 17(1), 17(2)(a), 23(1)(a)(b)(f), 24(a), 27(1)(a)

REPORT ISSUED ON MARCH 15, 2018

SUMMARY: The complainant made a request under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) to the Winnipeg Regional Health Authority (WRHA) for correspondence and other information relating to the coordination or transfer of care of individuals who request medical assistance in dying (MAID) while in a hospital that does not allow medical assistance in dying on its premises. In response, information was provided to the complainant with severing under subsection 17(1) in conjunction with clause 17(2)(a) (disclosure deemed an unreasonable invasion of a third party's privacy), clauses 23(1)(a) and (f) (advice to a public body), clause 24(a) (disclosure harmful to individual or public safety) and clause 27(1)(a) (solicitor-client privilege) of FIPPA. In the course of our investigation, the WRHA advised our office that some information which had been severed under clause 27(1)(a) would instead be severed as allowed under clauses 23(1)(a), (b) and 24(a) of FIPPA. After considering the WRHA's representations and a review of the responsive records, our office concluded that the WRHA had appropriately applied clauses 23(1)(a), (b) and (f) to withhold the information severed under those exceptions. Our office concluded that the exception under clause 24(a) of FIPPA applied to the identification of individual employees; however, our office found that the exception did not apply to information about service delivery sites. Based on an attestation provided by the WRHA, our office also concluded that clause 27(1)(a) of FIPPA applied to information that continued to be withheld

under that provision. Our office determined that subsection 17(1) in conjunction with clause 17(2)(a) of FIPPA had been applied inappropriately in the majority of cases where it was used to withhold information. However, we noted that in conjunction with information that had already been provided to the complainant, the release of any further information could render individuals receiving health care identifiable. As this would contravene the act, we were not able to ask the WRHA to release further information. The complaint about the WRHA's access decision was partly supported.

THE COMPLAINT

On April 7, 2017 the Winnipeg Regional Health Authority (WRHA) received a request made under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to the following information:

> *Records of all correspondence (including but not limited to emails, digital file attachments, faxes, text messages, voicemail messages and mail communications) between representatives of the Winnipeg Regional Health Authority (WRHA) and Manitoba's Department of Health Seniors and Active Living regarding the coordination or transfer of care of individuals who request medical assistance in dying in a hospital or long-term care home that refuses to allow the medical assistance in dying on its premises.*
>
> *All internal records (including but not limited to written reports, email correspondence, presentation slides, meeting notes and text messages) regarding the coordination or transfer of care of individuals who request medical assistance in dying in a hospital or long-term care home that refuses to allow medical assistance in dying on its premises.*
>
> *A record of all hospitals in the Winnipeg health region that have indicated that they will not allow the provision of medical assistance in dying on their premises.*

Subsequent to discussions with the WRHA the request was modified by the complainant to be for the following information:

> *I request on or after June 1, 2016, policies and correspondence between members of the MAID team and the Manitoba's Department of Health Seniors and Active Living, and between members of the MAID team; and between members of the MAID team and WRHA devolved and non-devolved hospitals regarding the coordination or transfer of*

care of individuals who request medical assistance in dying in a hospital or personal care home that refuse to allow the medical assistance in dying on its premises.

A record of all WHRA devolved and non-devolved hospitals that have indicated that they will not allow the provision of medical assistance in dying on their premises.

In response to the revised request, the WRHA issued an estimate of costs payable to search for and prepare responsive records for release. This fee was paid by the complainant. Subsequently (on May 24, 2017), the WRHA extended the time for responding to this request for an additional 30 days as allowed under clause 15(1)(b) of FIPPA:

> ***Extending the time limit for responding***
> ***15(1)*** *The head of a public body may extend the time for responding to a request for up to an additional 30 days, or for a longer period if the Ombudsman agrees, if*
> *(b) a large number of records is requested or must be searched, and responding within the time period set out in section 11 would interfere unreasonably with the operations of the public body;*

The date by which the WRHA was now required to make a response was June 23, 2017 and on that date the WRHA issued its decision regarding access to the requested information, giving access in part. A copy of WRHA Policy 110.000.40 "Medical Assistance in Dying (Interim)" was provided to the complainant. Also provided were 381 pages of email correspondence between the WRHA Medical Assistance in Dying (MAID) Team and Manitoba Health, Seniors and Active Living, between members of the MAID Team [internal correspondence of the MAID Team] and between members of the MAID Team and WRHA devolved[1] and non-devolved hospitals. As indicated on the pages provided to the complainant, information was severed from these records under clause 17(2)(a) (disclosure deemed an unreasonable invasion of a third party's privacy), clauses 23(1)(a) and (f) (advice to a public body), clause 24(a) (disclosure harmful to individual or public safety) and clause 27(1)(a) (solicitor-client privilege) of FIPPA. With regard to a list of all WRHA devolved and non-devolved hospitals that have indicated that they will not allow the provision of medical assistance in dying on their premises, the WRHA explained that it had determined that the disclosure of this information may be harmful to individual or public safety. Therefore access to this information was refused in full under clause 24 (a) of FIPPA (disclosure harmful to individual or public safety).

On July 7, 2017, Manitoba Ombudsman received a complaint regarding the WRHA's decision to refuse access to the requested information in full or in part.

[1] Under the Regional Health Authorities Act (RHA Act), "health corporations" include trustees such as hospitals and personal care homes. Many health corporations have entered into an agreement with an RHA under the RHA Act and transferred governance operations (become part of or devolved to) a regional health authority. Upon entering into a transfer agreement with an RHA, the affected health corporation takes steps to disestablish. Some health corporations geographically located within an RHA have not devolved to the RHA.

POSITION OF THE COMPLAINANT

In making his complaint, the complainant noted that most of the information he had requested had been refused in whole or in part. The complainant explained that, in his view, much of the severing made by the WRHA was unnecessary and inappropriate.

POSITION OF THE PUBLIC BODY

The WRHA took the position that many of the withheld records contained the personal information of a third party which, if disclosed, would constitute an unreasonable invasion of the third party's privacy as described under clause 17(2)(a) of FIPPA:

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

Although not cited by the WRHA, our office notes that, in order to rely on the application of clause 17(2)(a), a public body must cite subsection 17(1) in conjunction with subsection 17(2) of FIPPA. Subsection 17(1) reads:

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

In severing information from access, the WRHA also relied on the following discretionary provisions of FIPPA:

> ***Advice to a public body***
> ***23(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*
>
> *(a) advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body or a minister;*
> *(f) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.*

Disclosure harmful to individual or public safety

24 *The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to*

(a) threaten or harm the mental or physical health or the safety of another person;

Solicitor-client privilege

27(1) *The head of a public body may refuse to disclose to an applicant*

(a) information that is subject to solicitor-client privilege;

In its access decision, the WRHA did not provide the complainant with reasons for the application of the exceptions it cited in refusing access. Our office wrote to the WRHA on July 12, 2017, and asked it to provide our office with representations explaining its reliance on the cited exceptions. As is authorized under subsection 50(2) of FIPPA, our office also asked the WRHA to include with its representations copies of all responsive records that were withheld in whole or in part to facilitate our review of the WRHA's application of the cited exceptions to access.

On July 24, 2017, the WRHA responded. The WRHA explained that the predominant consideration involved the application of clause 17(2)(a) wherever the content involved individual level care discussion. The WRHA noted that the majority of severing was associated with care related discussion and planning.

The WRHA explained that it severed information pertaining to advice, opinions, proposals, recommendations, analyses or policy options developed by or for the public body, or consultations or deliberations involving officers or employees of the public body under section 23 of FIPPA.

The WRHA further explained that the identity of practitioners as well as personnel and sites involved in some capacity for providing or refusing to provide the MAID service was severed under clause 24(a) of FIPPA.

The WRHA stated that clause 27(1)(a) was relied upon where information fell under solicitor-client privilege.

The WRHA clarified that, in reviewing the responsive records prior to providing representations to our office, it reconsidered its access decision, revising the exceptions initially cited in refusing access. In a number of instances the WRHA had cited clause 27(1)(a) to sever the name and contact information for WRHA legal counsel where, it now determined, clause 24(a) would have been more appropriate. The WRHA also explained that there were a further two instances of the

application of clause 27(1)(a) where clause 23(1)(b) of FIPPA would have been more appropriately applied. Clause 23(1)(b) reads:

> ***Advice to a public body***
> ***23(1)*** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to reveal*
> *(b) consultations or deliberations involving officers or employees of the public body or a minister;*

The WRHA indicated these changes on the responsive records provided for our review.

INVESTIGATION AND ANALYSIS

Our office then turned to a review of the exceptions applied to refuse access. In the case of discretionary exceptions, our finding concerning the public body's exercise of discretion follows our analysis.

Did the discretionary exceptions allowed under clauses 23(1)(a), (b) and (f) of FIPPA apply in severing information from access?

The exceptions allowed under subsection 23(1) of FIPPA are intended to maintain and encourage candour in the giving of advice and recommendations in order to assist the public body in making decisions about courses of action to follow or approaches to take. The exception in clause 23(1)(a) protects the free flow of advice, etc. involved in the decision and policy making process of a public body. Clause 23(1)(a) requires the information excepted to fall within the categories of information named in the exception and would not generally apply to background information or facts that are already known.

Clause 23(1)(b) allows a public body to refuse to disclose information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of the public body. With regard to the application of clause 23(1)(b), a consultation is the seeking of information or advice from a person or referral of a matter to a person for advice or an opinion.

The exception in clause 23(1)(f) provides protection for information where its release could lead to a premature disclosure of an anticipated policy or budgetary decision. The anticipated policy or budgetary decision should be identified and described in representations and its anticipated implementation should not be merely speculative.

The foregoing exceptions are class exceptions in that they protect a certain type or kind of information from being disclosed. The exceptions do not contain a reasonable expectation of harm test.

The records provided for our review contained a number of passages where the above mentioned clauses of subsection 23(1) of FIPPA were cited in severing information from access. We considered the application of the foregoing exceptions to this information. Based on our review, we determined that the records did contain the type of information described in the exceptions cited and, in each case, the clause cited was applicable to the withheld information. We found, therefore, that disclosure of the information severed under subsection 23(1) of FIPPA could reasonably be expected to reveal the type of information specified in the exceptions cited.

Did the discretionary exception allowed under clause 24(a) of FIPPA apply in severing information from access?

The WRHA also applied clause 24(a) of FIPPA to withhold information, the disclosure of which it maintained, could reasonably be expected to harm the health or safety of another person. This exception protects the mental or physical health or the safety of any person other than the applicant requesting access to the record. Harm means hurt or damage and can include harassment. The exception allowed under clause 24(a) contains a reasonable expectation of harm test. The public body must determine whether disclosure of the information could "reasonably be expected" to cause the harm described in the provision.

In the records provided for our review, the WRHA has employed this exception to sever the names of all WRHA staff members and the names of any sites involved in some capacity in the provision of MAID including those identified as providing or refusing to provide the MAID service. This information was severed from copies of email communication provided to the complainant, including email communication between members of the MAID team. The WRHA also employed this exception to withhold from access a list of all WRHA devolved and non-devolved hospitals that have indicated that they will not allow the provision of medical assistance in dying on their premises. The WRHA represented to our office that there was a reasonable basis for concern and a potential risk of harm in identifying individuals and sites associated with a health service that remains highly contentious. The WRHA further provided that, in the planning and development of the MAID program, it had made certain assurances of discretion to both sites and providers and that those assurances had helped ensure the availability of the MAID service.

In support of its position, the WRHA referenced the Manitoba court case *Patient v. Attorney General of Canada et al*, 2016 MBQB 63 (CanLII), in particular para 54 which reads:

> *In their affidavit evidence, the applicant's physicians raise concerns that disclosure of their identity could give rise to professional and perhaps personal harm. In the circumstances of this case, while I cannot assess the extent to which those subjective concerns are justified, I can accept the fact of those concerns. In other words, justified or not, those concerns do exist and are truly held by the physicians...it is not necessary in this case to determine whether the evidence adduced by the physicians constitutes sufficiently direct and compelling evidence of a specific harm faced by the physicians. It will suffice to note what I believe is an objectively discernible harm...as a result of sincerely held concerns on the part of the physicians. In that regard, I am in agreement with McEwen J. in* ***A.B. v. Canada****, supra, that it is reasonable to believe that based on their concerns, physicians will be reluctant to assist terminally ill patients if they are publicly identified.*

The WRHA also delivered to our office a copy of a letter received from an unidentified individual as evidence of the type of concerning communications sent by some members of the public and directed towards WRHA employees who are involved in providing the MAID service.

In previous analysis of this provision by our office "could reasonably be expected to" has been interpreted to mean that the likelihood of harm need not be probable or certain but must be more than merely possible. As explained by the Supreme Court of Canada (SCC) in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674:

> *The "reasonable expectation of probable harm" formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm. The "reasonable expectation of probable harm" formulation should be used wherever the phrase "could reasonably be expected to" is used.*

Our office accepted as reasonable the WRHA's representations that personal and/or professional harm could result to individuals from the disclosure of the names of health-care providers and other WRHA employees involved in the provision of MAID services and that it was for this reason that the WRHA promised discretion in order to assure that MAID would continue to be provided.

With regard to the disclosure of the names of the sites (hospitals) which had indicated that MAID would not be provided on their premises, the WRHA submitted that a risk existed for health-care providers on either side of the issue. The WRHA asserted that, in view of its having established that MAID is a contentious topic and there is a risk of harm for service providers, "it stands to reason that some risk may also exist for those who refuse [to provide the service]." Our office

accepted that there is a potential risk of professional harm if an individual health-care provider's personal beliefs about MAID became known.

However, with regard to the list requested by the complainant of all WRHA devolved and non-devolved hospitals that have indicated that they will not allow the provision of MAID on their premises, our office was of the view that the names of those sites were already widely known thus rendering the issue of harm resulting from their identification moot. In requesting representations on the application of this exception, we pointed out to the WRHA that the name of at least one hospital that does not allow the provision of MAID on its premises had already been made public as a result of media reports and we specifically asked the WRHA to speak to this.

The WRHA provided that the decision by some individuals to disclose that hospital's policy and processes to the media did not absolve the WRHA of its obligations associated with the assurances of discretion and anonymity made to service providers and the sites where they work. The WRHA submitted that the disclosure of the requested information may serve to place those sites at risk. The WRHA further maintained that, if information pertaining only to non-providing hospitals was severed from the email communication identified as responsive, this would be sufficient to render them, and possibly individuals[2] receiving care there, identifiable. Thus, the WRHA withheld information regarding all its health-care sites, whether providing MAID or not.

In our view, the WRHA has provided representations which, while not demonstrating that a potential harm from the disclosure of the severed information is a certainty, do establish that the likelihood of harm is beyond mere speculation with regard to the identities of individuals. Our office considers the harm that may result is not just to the WRHA staff involved (on both sides of the issue) but, potentially, to the patients who may have need to rely on the availability of MAID in the future should physicians choose not to provide the MAID service out of fear of exposure. In view of this, our office found, therefore, that clause 24(a) of FIPPA applied to the identities of WRHA employees.

However, it is our view that the WRHA did not provide convincing evidence that identifying facilities where MAID is not provided could reasonably be expected to endanger the life and physical safety of the employees who work there or the security of those buildings. The concerning communication provided by the WRHA in support of the argument for potential harm was directed more at individuals than facilities. In our view such threats made could be construed as applying equally to facilities which allow other controversial procedures (such as pregnancy termination or gender reassignment) on site and the names of those sites are already publicly known.

[2] Analysis of the potential of information about objecting sites leading to the identification of individuals receiving care in those sites will be dealt with in our consideration of the application of the mandatory exception under subsection 17(1) in conjunction with 17(2)(a) of FIPPA which follows.

Further, our office noted the Manitoba Health requirement that those hospitals which do not allow MAID onsite must have a publicly available policy which sets out how patients in those sites will be provided with access to the service. The public posting of such a policy would identify a hospital as not allowing MAID thus refuting the WRHA's argument to withhold the names of those hospitals to prevent the harm which would result from disclosure. Although these policies were not required to be in place at the time the request which is the subject of our complaint investigation was made, this was reasonably foreseeable by the WRHA. For example, the St. Boniface Hospital policy 'Responding to Inquiries and Requests for Medical Assistance in Dying' became effective on June 12, 2017, which was after the request was made but prior to the WRHA issuing its access decision to the complainant.

Our office did not, therefore, find that the WRHA had established a likelihood of harm to the devolved and non-devolved hospitals that have indicated that they will not allow the provision of MAID on their premises from the disclosure of the names of these sites to the complainant. Our office will not however, recommend that the list of devolved and non-devolved hospitals that have indicated that they will not allow MAID on their premises be released as policies on responding to requests have been publicly posted by two Winnipeg hospitals and the names of Winnipeg's faith based hospitals and other facilities (indicating those which allow MAID on their premises and, by inference, those which don't) has already been made public by media.[3]

Did clause 27(1)(a) of FIPPA apply to the information severed from access under this provision?

In making its decision regarding access to the information requested by the complainant, the WRHA applied clause 27(1)(a) of FIPPA to information which it stated was subject to solicitor-client privilege. In Canada, confidential communications between legal counsel and a client related to the seeking, formulating or giving of legal advice are said to be subject to solicitor-client privilege in that legal counsel must preserve the confidentiality of that communication. The expectation of protection for communications between a lawyer and a client applies even where the client is a public body, such as the WRHA, and the legal counsel are on the staff of the public body.

In the context of subsection 27(1) of FIPPA, solicitor-client privilege is interpreted as including both 'legal advice' privilege and 'litigation privilege' in that it also applies to background information created or obtained by the client or the lawyer in anticipation of litigation, whether

[3] See 'Faith-based health facilities obstructing access to assisted death: advocates' in Winnipeg Free Press, 01/1/2018 at https://www.winnipegfreepress.com/local/faith-based-health-facilities-obstructing-access-to-assisted-death-advocates-467571273.html viewed on March 13, 2018 and 'At Death's Locked Door' in Winnipeg Free Press, 24/02/2018 at https://www.winnipegfreepress.com/local/at-deaths-locked-door-474985953.html viewed on March 14, 2018.

existing or contemplated. The protection of litigation privilege ends on the termination of litigation while legal advice privilege pertains indefinitely unless it is considered to have been waived. A lawyer is ethically bound to protect the privileged information of a client; however, solicitor-client privilege may be waived by the client and, further, it does not apply if it can be shown to have been waived. Privilege may be waived by a client making a statement expressly waiving it. A waiver may also be implied if the client is shown to have disclosed the information (for example, to a third party). Clause 27(1)(a) of FIPPA applies to any information that is shown to be subject to solicitor-client privilege, whether pertaining to litigation or to legal advice.

Further to considering the WRHA's reliance on clause 27(1)(a) of FIPPA, our office explained to the WRHA that, as we are mindful of the unique weight given to solicitor-client privilege in law, we do not routinely request the production of records for our review to which the exception for solicitor-client privilege has been applied. We explained to the WRHA that it had the option to provide for our review those items over which it had asserted solicitor-client privilege and it is the position of our office that doing so in the context of an access complaint investigation would not constitute a wider waiver of solicitor-client privilege over this material. We further explained that, should the WRHA choose not to provide for our review those items over which privilege had been asserted, we would consider establishing the application of the exception allowed by clause 27(1)(a) of FIPPA by other means.

We explained to the WRHA that, in the absence of records for review or a sufficiently detailed description of the records severed, it was our position that the legal advice branch of solicitor-client privilege must be evidenced by applying the criteria prescribed in Canada v. Solosky, [1980] 1 S.C.R. 821. Thus, the evidence provided to us by the WRHA must establish for each record that:

- there is a communication between a lawyer and the lawyer's client; and
- the communication entails the giving or seeking of legal advice; and
- the communication was intended to be confidential.

We made it clear to the WRHA that, should it choose not to make available records for our review, the public body must support by written attestation that all three of the criteria set out above apply in respect of every record over which solicitor-client privilege was claimed in refusing access.

The WRHA chose not to provide copies of the information over which it had asserted solicitor-client privilege for our review. Initially, the WRHA also did not provide (as requested in the alternative) a written attestation in order to support the application of the cited exception by means other than a review of the severed records by our office. Our office contacted the WRHA on November 1, 2017, and explained that, in the absence of the requested written attestation or a more complete description of the severed records, we would not have sufficient evidence to

make a finding regarding the application of the exception allowed under clause 27(1)(a) of FIPPA. At the request of the WRHA, our office provided detailed information explaining the statutory authority under which we had requested a written attestation which would affirm for us the privileged nature of the severed information.

The WRHA responded to our office on December 21, 2017, and asked us, by virtue of general counsel's signature to its letter of that date, to accept its representations that the information severed under clause 27(1)(a) was communication between a lawyer and a client, seeking and receiving legal advice and that was intended to be confidential. We note that this was initially requested by our office on July 12, 2017, and it was sufficient to establish the basis for a finding by our office in this matter.

Based on the written attestation provided by the legal counsel for the WRHA our office found, therefore, that clause 27(1)(a) was applied appropriately to withhold information that was subject to solicitor-client privilege.

The Exercise of Discretion by the Public Body

The exceptions allowed under clauses 23(1) (a), (b) and (f), clause 24(a) and clause 27(1)(a) of FIPPA are discretionary exceptions. Discretionary exceptions, such as these, provide the head of a public body with the discretion to disclose information in a record even though it can be shown to fall under the exception. This being the case, further to our investigation of this complaint, our office considered whether the WRHA has demonstrated that it exercised its discretion in a reasonable fashion. A public body may err in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

Our office may ask a public body to reconsider the exercise of discretion if there is evidence that its discretion was not exercised based on proper considerations. Our office may not, however, substitute its own discretion for that of the public body. Although there is no "reasonable expectation of harm test" associated with the exceptions cited under subsection 23(1) and clause 27(1)(a) of FIPPA, consideration of harm from the release of the information in a record may be considered to be a factor in a public body's exercise of discretion.

Our office considered, as evidenced by its representations to our office, whether the WRHA had appropriately exercised its discretion in deciding to withhold rather than to release the information to which the aforementioned discretionary exceptions can be shown to apply. Based on our review, we found that the public body exercised its discretion appropriately.

Did the exception required under subsection 17(1) in conjunction with clause 17(2)(a) of FIPPA apply in severing information withheld from access?

Subsection 17(1) of FIPPA sets out a mandatory exception to disclosure. Under subsection 17(1) of FIPPA a public body must refuse to disclose personal information if the disclosure is shown to be an unreasonable invasion of a third party's privacy. Those circumstances where a disclosure of personal information about a third party is deemed to be an unreasonable invasion of the third party's privacy are set out in clauses 17(2)(a) to (i) of FIPPA. These clauses list types of personal information that are considered to be so sensitive that the disclosure of this information to someone else is considered to be an unreasonable invasion of the personal privacy of the individual the information is about. If an applicant requests access to personal information that is determined to be of a type listed in clauses 17(2)(a) to (i), a public body is required to refuse to disclose this information. It has no discretion to do otherwise. This includes that circumstance where the personal information is personal health information as stated in clause 17(2)(a) of FIPPA.

Although FIPPA does not define personal health information, our office considers the definition found in the Personal Health Information Act (PHIA) to be applicable. 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.

As it explained in its representations to our office, the WRHA applied clause 17(2)(a) to sever any information from the responsive record which it identified as relating to patient care discussions (the provision of health care to individuals). The WRHA maintained that the information severed (including that found in email correspondence) could, if made public, reasonably be expected to risk allowing the identification of individual patients based on the dates of service and other "quasi-identifiers inherent in the care planning discussion." The WRHA related that it had been thorough in severing any information associated with individuals inquiring about or accessing MAID, explaining that this was done in consideration of the small number of individuals having accessed the MAID service. Accordingly, it severed any care-related information that by itself or in combination with other potentially identifiable information could serve to identify the individual being discussed.

Our office observed that the severed information included most of the contents of the 381 pages of email correspondence relating to the process for the provision of MAID in objecting facilities which were provided to the complainant. Our office noted, however, that in spite of its concerns regarding the identification of individuals using the dates around which those individuals had accessed the MAID service, the WRHA did not apply the exception specified by clause 17(2)(a) of FIPPA to sever the dates of the email correspondence provided to the complainant. It is the view of our office that, in the particular circumstances of this complaint, the dates of the emails

in question are recorded information about identifiable individuals that relate to the provision of health care. As the WRHA noted in its representations, the number of individuals accessing MAID is small. We submit that the number attempting to access MAID while receiving health care in an objecting facility is even smaller. In our view, the dates provided to the complainant in conjunction with other publicly available information, could render an individual, about whom the email was written, identifiable as having accessed MAID from an objecting hospital.

In this instance, the publicly available information includes the access to information request. By virtue of their inclusion in the records identified as responsive, the records provided to the complainant have been identified as relating to the coordination or transfer of care of individuals who requested MAID while receiving health care at a hospital that refused to allow the provision of MAID on its premises. In reviewing these emails, we observed that the dates of the correspondence naturally organize themselves around the dates when requests for medical assistance in dying were made. This characteristic, in conjunction with publicly available information such as obituaries and funeral home listings, could potentially allow the identification of individuals who availed themselves of MAID while in an objecting facility. It is our view that the identifying information provided to the complainant (the dates of the emails) should have been severed in this particular case.

In the course of investigation, our office also considered the severed information which was not released to the complainant. In our view the majority of information that was withheld by the WRHA as falling under clause 17(2)(a) of FIPPA was non-identifying information concerning the general process for the provision of MAID in objecting facilities. Our office explained our view to the WRHA. The WRHA explained that it had been told in the past that the date of a communication was information that should be released to an access applicant. Our office explained to the WRHA that each access request is unique, and while dates may not have been identifying information in the case of another request, that was not the case here. The WRHA observed that if it is the position of our office that the dates of emails which discuss patient care may fall under subsection 17(1) in conjunction with clause 17(2)(a) of FIPPA, this may affect its future application of that exception under FIPPA. Our office noted that the circumstances in this case are relatively unusual in that the health service provided would lead to an event (death) that is often marked with public events (such as funerals, memorial services) or public communications (such as obituaries, funeral home listings, social media postings, etc.). In many other cases, these additional sources of publicly available information do not exist. For this reason, we explained that our observations in this case are of limited relevance to other cases and should in no way be taken to suggest that particular types of information (i.e. dates) should be severed (or not severed) in all cases. As explained to the WRHA by our office, the application of exceptions to access must be considered in the unique and specific circumstances of each request including the nature of the record identified as responsive.

Our office concluded that there was non-identifying information regarding the process for delivering MAID in objecting facilities which was severed from the information provided to the complainant that could have been released. Our office observed that the release of this type of information (which would inform the public about an issue of public interest without identifying individual patients) would have been more consistent with the purpose of the act than providing the dates of emails and little else to the complainant. Normally, when our office determines that an exception has been applied to refuse access inappropriately, we will recommend that the inappropriately severed information be released. However, we observed that, once the date of the emails in question had been released, the release of any further information from those emails was no longer possible. This information, in conjunction with the other information available to the applicant as described above, would (in our view) render an individual receiving health care (MAID) identifiable.

Our office also considered other information which was severed under subsection 17(1) in conjunction with clause 17(2)(a) of FIPPA. We noted that there was an instance where a personal care plan was attached to one of the responsive emails. Also, there were some emails that contained specific information (such as about medical care provided during transfer or the identification of the objecting facility where the individual being transferred was receiving care), that, if released, could allow a specific individual to be identified. Our office agreed that this is the sort of information which should be severed in its entirety under clause 17(2)(a).

CONCLUSION

We found that disclosure of the information severed under subsection 23(1) of FIPPA could reasonably be expected to reveal the type of information specified in the exception.

Our office found that disclosure of the information about individual health-care providers severed under clause 24(a) of FIPPA could reasonably be expected to reveal the type of information specified in the exception. Our office found that the exception did not apply to information about service delivery sites.

Our office found that the exception allowed by clause 27(1)(a) had been applied to sever from access information that was subject to solicitor-client privilege.

Our office found that the exception under subsection 17(1) in conjunction with clause 17(2)(a) had been applied appropriately in severing some information from access. We also found this exception did not apply in a number of instances where it had been cited. However, as a result of information (dates) that had already been released to the complainant in the public body's access decision, the ombudsman did not recommend the release of any further information which could render an individual receiving health care identifiable in contravention of the act.

In view of the foregoing, the ombudsman found the complaint of refused access is partly supported.

In accordance with subsection 67(3) of the Freedom of Information and Protection of Privacy Act, the complainant may appeal the Winnipeg Regional Health Authority's decision to refuse access to the Court of Queen's Bench within 30 days of receiving this report.

Manitoba Ombudsman
March 15, 2018