

Manitoba Ombudsman

REPORT WITH RECOMMENDATIONS ISSUED ON JUNE 6, 2011

AND

RESPONSE TO THE RECOMMENDATIONS ISSUED ON SEPTEMBER 19, 2011

UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2010-0332

MANITOBA PUBLIC INSURANCE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 27(1)(a), (b) and (c)

PUBLICLY RELEASED ON SEPTEMBER 26, 2011

SUMMARY OF REPORT WITH RECOMMENDATIONS AND RESPONSE

The complainant applied for access to records contained in a Special Investigation Unit (SIU) file about her and complained to our office when Manitoba Public Insurance (MPI) refused access to the records under subsection 27(1) of *The Freedom of Information and Protection of Privacy Act* (FIPPA). During the investigation, MPI refused to permit the Ombudsman to review the records and provided limited evidence to support its reliance on subsection 27(1) of FIPPA. The Ombudsman found that clause 27(1)(a) of FIPPA applied to one of the records but, due to the limited evidence provided, was unable to conclude whether the exceptions applied to the remainder of the records or if severing could reasonably have been applied. The Ombudsman recommended that, but for the one document where clause 27(1)(a) of FIPPA was found to apply, MPI release the records to the complainant.

On June 20, 2011 MPI responded to each recommendation by indicating it would be making the records available to the Ombudsman for review. On June 27, 2011 MPI advised that it would grant the complainant full access to seven pages of records. On August 25, 2011, following our review of the remaining withheld records, MPI advised that it had decided to accept all four recommendations made by the Ombudsman and it forwarded copies of the remaining withheld records to the complainant on August 26, 2011.

Manitoba mbudsman

REPORT WITH RECOMMENDATIONS UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2010-0332

MANITOBA PUBLIC INSURANCE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 27(1)(a), (b) and (c)

REPORT ISSUED ON JUNE 6, 2011

SUMMARY: The complainant made an application for access to Manitoba Public Insurance (MPI) for records contained in a Special Investigation Unit (SIU) file about her. MPI refused access to the records under the exceptions contained in subsection 27(1) of *The Freedom of Information and Protection of Privacy Act* (FIPPA). During the investigation of the complaint, MPI refused to permit the Ombudsman to review the records and provided limited evidence to support its reliance on the exceptions contained in subsection 27(1) of FIPPA. The Ombudsman found that clause 27(1)(a) of FIPPA applied to one of the records. The Ombudsman was unable to conclude whether the exceptions cited applied to the remainder of the records or if severing could reasonably have been applied to information in the records due to the limited evidence provided by MPI. The Ombudsman recommended that, but for the one document where clause 27(1)(a) of FIPPA was found to apply, MPI release the records to the complainant.

THE COMPLAINT

On July 23, 2010, Manitoba Public Insurance (MPI) received a request for access under *The Freedom of Information and Protection of Privacy Act* (FIPPA) to the following records:

- Manitoba Public Insurance Special Investigations File -- Claim # [number]:*
- All notes and correspondence in file including all notes from interview with [the complainant] and all other parties
 - All pictures and video surveillance tapes
 - All information in the Special Investigations file on [the complainant]

MPI responded to the request by letter dated August 23, 2010 and said, in part:

The bulk of the SIU file documentation consists of records that are included in your claim file...copies of these materials have already been provided to you, either directly or through the Claimant Advisor Office, and by MPI, by AICAC [the Automobile Injury Compensation Appeal Commission], or by both. You are therefore denied further access to these materials pursuant to Section 13(1) of FIPPA [Repetitive or incomprehensible request].

You are denied access to the remaining records relating to the SIU investigation, including the VHS video cassette, pursuant to Sections 23(1)(a), 23(1)(b) [Advice to public body], 25(1)(n) [Disclosure harmful to law enforcement or legal proceedings], and 27(1)(a), (b) and (c) [Solicitor-client privilege] of FIPPA. These records contain evidence of the discussions among various MPI staff, including lawyers, with respect to the assessment of coverage for your claim. The information is also exempt from disclosure as it is subject to solicitor-client privilege and because its disclosure may be injurious to the conduct of existing or anticipated legal proceedings.

The complaint about refused access to the requested records was received by our office on August 31, 2010. The complainant took issue with MPI's position concerning the records to which she had not before received access. These records are the subject records of this report.

POSITION OF MANITOBA PUBLIC INSURANCE

In the course of the review by our office, MPI dropped its reliance on clauses 23(1)(a), 23(1)(b) and 25(1)(n) of FIPPA. Therefore, the exceptions that are under consideration for each record are one or more provisions of subsection 27(1).

In a September 16, 2010 letter providing clarification to our office, MPI described the records under consideration as:

those which were generated in connection with a Special Investigations Unit ('SIU') investigation into [the complainant's] claim. [Note: These records include a Referral for Legal Services addressed to the then Director of Legal Services, his direction to SIU to conduct an investigation, and the Report to Legal Counsel prepared by SIU. Also included are the video and written materials produced by the private investigation firm, and records of internal deliberations with respect to the further handling of the claim.]

and

...I can advise...that, in the Referral for Legal Services, the case manager identified a specific concern that had arisen, and that she specifically requested legal advice with respect to the further handling of the claim.

MPI also said:

The records...are subject to solicitor-client privilege and, therefore, exempt from disclosure pursuant to all three subsections of Section 27(1) of The Freedom of Information and Protection of Privacy Act ('FIPPA').

Subsection 27(1)(b) applies to the communications involving the lawyer, the case manager, and the...[SIU]. Subsection 27(1)(c) applies to the communications between SIU and the private investigation firm retained to assist with the evidence-gathering process. Subsection 27(1)(a) applies to all of the investigative material generated at the behest of, and under the supervision of, the lawyer.

In a March 24, 2011 letter responding to questions posed by our office, MPI added this to its representations:

The video and written materials/notes of surveillance produced by the private investigator were obtained under the supervision of, and pursuant to directives provided by, the Director of Legal Services. This brings those materials, in their entirety, under the umbrella of solicitor-client privilege.

and

The records of internal deliberations were created during the course of seeking, and providing, legal advice with respect to the further handling of the claim. The legal advice given specifically took into account the results of the surveillance.

Ultimately, MPI advised us that clause 27(1)(a) of FIPPA applies to all of the withheld records. We therefore understand that the records and MPI's position with respect to them are:

- (1) Referral for Legal Services from the Case Manager, addressed to the then Director of Legal Services, where the Case Manager identified a specific concern that had arisen, and specifically requested legal advice with respect to the further handling of the claim, - 27(1)(a) and 27(1)(b);
- (2) direction from the Director of Legal Services to SIU to conduct an investigation, - 27(1)(a), and 27(1)(b);
- (3) report to Legal Counsel prepared by SIU, - 27(1)(a) and 27(1)(b);
- (4) records of internal deliberations involving the lawyer, the Case Manager and SIU, created during the course of seeking, and providing legal advice with respect to the further handling of the claim, the legal advice given having specifically taken into account the results of the surveillance, - 27(1)(a) and 27(1)(b);
- (5) communications between SIU and the private investigation firm retained to assist with the evidence-gathering process, - 27(1)(a) and 27(1)(c); and
- (6) video and written materials/notes produced by the private investigation firm, obtained under the supervision of, and pursuant to directives provided by, the Director of Legal Services, bringing those materials, in their entirety, under the umbrella of solicitor-client privilege; [also referred to as] all investigative material generated at the behest of, and under the supervision of the lawyer, - 27(1)(a).

Clauses 27(1)(a), (b) and (c) of FIPPA provide as follows:

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;

(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence;

(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney-General or the public body and any other person in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence.

MPI has not made the records available for our review. MPI has taken the position that it will not produce to the Ombudsman records for which a claim of privilege has been made in the course of an investigation into a "denial of access" complaint. The Corporation's Director, Information and Litigation said:

Although the oversight regimes created by the Personal Information Protection and Electronic Documents Act (Canada) [PIPEDA] and by The Freedom of Information and Protection of Privacy Act (Manitoba) are not identical, I respectfully submit that the principles set out in the Blood Tribe and State Farm Mutual cases apply with equal force [to this case].

The Director cited the passage in *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, where the Supreme Court of Canada, referencing the Privacy Commissioner's powers under s 12 of PIPEDA, found that she does not have the independence and authority of a court for the purpose of reviewing documents to which solicitor-client privilege is said to attach. The Director also noted from *Blood Tribe* that solicitor-client privilege is broader than a privilege of the law of evidence, and the finding that for a statute to override the privilege, the language must be clear, precise and unequivocal before it will be interpreted as displacing the courts' function of determining the validity of solicitor-client privilege.

The Director of Information and Litigation also quoted from *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, where the Federal Court - Trial Division noted:

...I note that the principles applicable to the solicitor-client privilege raised pursuant to a complaint under PIPEDA also extend to a litigation privilege which is raised within the context of such a complaint...

PRELIMINARY MATTERS

In *Blood Tribe*, the Supreme Court made findings about the powers of the Privacy Commissioner of Canada and her ability to determine the validity of solicitor-client privilege where it is claimed for a record under the *Personal Information Protection and Electronic Documents Act (Canada)*. PIPEDA is the federal law that promotes consumer confidence by setting out how private sector entities are to collect, use or disclose personal information in the course of commercial activity, and sets out a way for individuals to access their personal information held by entities in that context. While the Supreme Court found that the Privacy Commissioner did not have the powers to make the determination of whether solicitor-client privilege attaches to information under PIPEDA, the Court clearly set out the narrowness of its ruling.

The Court explicitly stated in *Blood Tribe* that the powers of the Privacy Commissioner under the *Privacy Act* are different from her powers under PIPEDA. The *Privacy Act*, like FIPPA, recognizes that public bodies hold an individual's information in trust and sets out how it is to be collected, used or disclosed when held by public bodies and sets out a way for an individual to access their own personal information (FIPPA also provides for access to other information held by public bodies). The Court in *Blood Tribe* said:

[28] ... the powers of the Privacy Commissioner under PIPEDA and the Privacy Act are not the same. For present purposes, as observed by the Federal Court of Appeal, it is sufficient to note that PIPEDA does not contain explicit language granting access to confidences such as is found in s. 34(2) of the Privacy Act [which states]...

Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution...and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds. [the Court's emphasis]

FIPPA, unlike PIPEDA, contains explicit language requiring a public body to make information available to the Ombudsman:

Records to be produced within 14 days

50(3) A public body shall produce to the Ombudsman within 14 days any record or a copy of a record required under this section, despite any other enactment or any privilege of the law of evidence.

Right of entry

51 Despite any other enactment or any privilege of the law of evidence, in exercising powers or performing duties under this Act, the Ombudsman has the right
(a) to enter any office of the public body and examine and make copies of any record in the custody of the public body; and
(b) to converse in private with any officer or employee of a public body. [emphasis added]

FIPPA is law in Manitoba. It applies to public bodies and the records under their custody or control. MPI, as a public body under FIPPA, is bound by subsection 50(3) and section 51 to make records available to the Ombudsman for her investigation despite any other enactment or any privilege of the law of evidence.

Even if the position of MPI were correct in relation to the Ombudsman's ability to review records for which a claim of solicitor-client privilege is made, a position the Ombudsman does not accept, it is the client's privilege to waive. MPI can waive the privilege for the limited purpose of the Ombudsman's review and those records when produced to the Ombudsman, have the protections afforded under FIPPA.

The Ombudsman and public bodies, like MPI, have obligations under FIPPA.

An applicant has a right of access to any record in the custody or under the control the public body subject to the Act. The applicant can make a complaint to the Ombudsman about the refusal of access. Under subsection 62(1) of FIPPA, upon receiving a complaint the Ombudsman shall investigate it.

As set out above, FIPPA provides that a public body shall produce to the Ombudsman any record or copy of a record that the Ombudsman requires for her investigation despite any other enactment or any privilege of the law of evidence (subsection 50(3)). The Ombudsman is entitled to have produced to her any records relevant to an investigation, either by obtaining a copy or by examining the originals or a copy on site at the public body's office:

Evidence Act powers

50(1) The Ombudsman has all the powers and protections of a commissioner under Part V of The Manitoba Evidence Act when conducting an investigation under this Act.

Production of records

50(2) The Ombudsman may require any record in the custody or under the control of a public body that the Ombudsman considers relevant to an investigation to be produced to the Ombudsman and may examine any information in a record, including personal information.

Under subsection 64(1), the Ombudsman shall give the complainant and the head of the public body concerned an opportunity to make representations.

All of this evidence is required so that the Ombudsman can discharge her duty to investigate the complaint. Under subsection 66(1) of FIPPA, on completing an investigation of a complaint, the Ombudsman shall prepare a report containing the Ombudsman's findings about the complaint and any recommendations the Ombudsman considers appropriate respecting the complaint.

The Ombudsman investigates in private and in conducting investigations and exercising any other powers, including reporting, is restricted from disclosing information:

Investigation in private

52 The Ombudsman shall conduct every investigation in private.

Statements and reports not admissible in evidence

53(1) A statement made or an answer given by a person during an investigation by the Ombudsman, and a report or recommendation of the Ombudsman, is inadmissible in evidence in a court or in any other proceeding, except

(a) in a prosecution for perjury in respect of sworn testimony;

(b) in a prosecution for an offence under this Act;

(c) in a review conducted by the adjudicator under this Act when the Ombudsman is a party; or

(d) in an application for judicial review of an adjudicator's order under this Act.

Not compellable as witness

53(2) The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not be required to give evidence in a court or in any other proceeding about information that comes to the knowledge of the Ombudsman in performing duties or exercising powers under this Act.

Information provided under qualified privilege

54 Anything said, any information supplied, and any record produced by a person during an investigation by the Ombudsman under this Act is privileged in the same manner as if it were said, supplied or produced in a proceeding in a court.

Ombudsman restricted as to disclosure of information

55(1) The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).

When disclosure permitted

55(2) The Ombudsman may disclose, or may authorize anyone acting for or under the direction of the Ombudsman to disclose, information that is necessary to

(a) perform a duty or exercise a power of the Ombudsman under this Act; or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

Reasonable precautions to avoid disclosure

55(3) In conducting an investigation and in performing any other duty or exercising any power under this Act, the Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall take every reasonable precaution to avoid disclosing and shall not disclose

(a) any information the head of a public body is authorized or required to refuse to disclose under Part 2; ...

In this case, in our letter of notification of the complaint, our office requested from MPI a written response with any relevant supporting documents attached, clarifying MPI's decision to refuse access. For reference we included our Practice Note, "Responding to a Complaint about a Refusal of Access under *The Freedom of Information and Protection of Privacy Act (FIPPA)*".

The Ombudsman's Practice Note includes the following information:

Under the Act, the Ombudsman is entitled to have access to any records relevant to an investigation, either by obtaining a copy or by examining the originals or a copy on site at the public body's office (section 50). The Act provides the Ombudsman with authority to obtain and examine any records despite any other act or legal privilege (subsection 50(3)). The Ombudsman does not release information from withheld records to the applicant and such disclosure is prohibited under subsection 55(3).

...

Each exception under the Act has certain requirements that must be satisfied. It is important that a public body addresses each component part.

If representations are too general or if the necessary connections between the exception and the withheld information are not clearly made, the representation will not establish that the exception applies.

...

Where an exception states that a record was prepared for a particular purpose, provide facts to support this claim. Some examples are...solicitor-client privilege under subsection 27(1).

With respect to this case specifically, a comment must be made about the limited nature and extent of the evidence provided by MPI to the Ombudsman. Findings have been made in this case based on the minimal amount of information provided by MPI in support of its position. The Ombudsman has been required to make findings without reviewing the records at issue because MPI has refused to provide them and has provided insufficient descriptions of those records.

ANALYSIS OF ISSUES AND FINDINGS

1. Do clauses 27(1)(a) and (b) apply to the information described under headings 1, 2, 3, and 4?

MPI has claimed clauses 27(1)(a) and (b) for what it has described to be the following records:

- (1) *Referral for Legal Services from the Case Manager, addressed to the then Director of Legal Services, where the Case Manager identified a specific concern that had arisen, and specifically requested legal advice with respect to the further handling of the claim;*
- (2) *direction from the Director of Legal Services to SIU to conduct an investigation;*
- (3) *report to Legal Counsel prepared by SIU;*
- (4) *records of internal deliberations involving the lawyer, the Case Manager and SIU, created during the course of seeking, and providing legal advice with respect to the further handling of the claim, the legal advice given having specifically taken into account the results of the surveillance;*

The Supreme Court of Canada in *Blank v. Canada (Minister of Justice)* determined that provisions such as FIPPA 27(1)(a) encompass both "legal advice privilege" and "litigation privilege". These are two different privileges having different rationales, purposes and characteristics.

MPI has not explained its reliance on 27(1)(a) for these records, including why it claims that they are subject to solicitor-client privilege.

However, based on the circumstances and the description of the information in the Referral for Legal Services, we accept that it is a record subject to solicitor-client privilege, specifically legal advice privilege. We accept that this is a communication between a lawyer and the lawyer's client, that the communication entailed the seeking of legal advice and the communication is intended to be confidential. MPI has decided not to waive privilege.

Had we been provided with more information, we might have been able to conclude that the lawyer's direction to SIU for an investigation, the investigation report prepared for the lawyer, and information in the communications involving the lawyer, case manager and SIU are information subject to solicitor-client privilege, more particularly legal advice privilege. Specifically, it might be that information in the report was a necessary step in the process of providing legal advice to which legal advice privilege attaches. Also, it might be that legal advice privilege attaches to information that passed between the lawyer and the client as part of a continuum aimed at keeping both informed in the provision of legal advice. The records of internal deliberations were not itemized. We do not know what kind of records these were, between whom communications took place and whether, for each record, communications were

of a nature about seeking and providing legal advice or if they were about the handling of the claim from a business perspective.

There is insufficient evidence to conclude that clause 27(1)(a) of FIPPA applies to information in these records, except for the Referral for Legal Services.

MPI has also claimed clause 27(1)(b) for these records. Clause 27(1)(b) is an "extended exception" that, beyond solicitor-client privilege, describes specific circumstances in which a public body may refuse to disclose to an applicant information because of privilege. Clause 27(1)(b) covers information that has been prepared by or for an agent or lawyer of a public body in relation to a matter involving the provision of legal advice, services or the prosecution or investigation of an offence.

It may be that the lawyer's direction to SIU to conduct an investigation and the report prepared for him by SIU meet the elements of clause 27(1)(b), however MPI has not provided information in support of this being prepared for the provision of legal advice or services, or the prosecution or investigation of an offence. Further, there was no information in support of the reasonableness of MPI's exercise of discretion not to release this information. Again, with respect to the records concerning internal deliberations, these records were not itemized, we do not know the kinds of records they were, who were the senders and recipients and whether any particular record was about the handling of the claim from a business perspective rather than relating to the provision of legal advice or services or the prosecution or investigation of an offence. On that basis, there is insufficient information to conclude that clause 27(1)(b) has been properly applied by MPI.

In summary, there is insufficient evidence to conclude that clause 27(1)(a) or (b) of FIPPA applies to information in these records with the exception of the Referral for Legal Services.

2. Do clauses 27(1)(a) and (c) apply to the information described under heading 5?

MPI has claimed clauses 27(1)(a) and (c) for what it has described to be the following records:

- (5) *communications between SIU and the private investigation firm retained to assist with the evidence-gathering process*

MPI has not explained why it claims that communications between SIU and the private investigation firm retained to assist in the evidence-gathering process, is subject to solicitor-client privilege. MPI's reliance on this exception for other information that passed between SIU and the private investigation firm is discussed under question 3, below. The same rationale for why we are unable to accept clause 27(1)(a) under question 3 also applies to these records.

MPI has also claimed clause 27(1)(c) for these records. Clause 27(1)(c) is an "extended exception" that, beyond solicitor-client privilege, describes specific circumstances in which a public body may refuse to disclose to an applicant information because of privilege. Clause 27(1)(c) covers information in correspondence between an agent or lawyer for a public body and any other person in relation to a matter involving the provision of legal advice, services or the investigation or prosecution of an offence.

MPI states that "[s]ubsection 27(1)(c) applies to the communications between SIU and the private investigation firm retained to assist with the evidence-gathering process." MPI does not actually say that the communications are "correspondence" (again, the records are not itemized), that the correspondence was between an agent or lawyer and another person or that it was in relation to the provision of legal advice, legal services or the investigation or prosecution of an offence. Clause 27(1)(c) is specific and we cannot impute that all of the elements necessary for the clause exist. MPI has not established this. Further, even if there were sufficient information, MPI has provided no information on its exercise of discretion not to release the information in the records.

In summary, there is insufficient evidence to conclude that clause 27(1)(a) or clause 27(1)(c) of FIPPA applies to information in these records.

3. Does clause 27(1)(a) apply to the information described under heading 6?

MPI has claimed clause 27(1)(a) for what it has described to be the following records:

- (6) *video and written materials/notes produced by the private investigation firm, obtained under the supervision of, and pursuant to directives provided by, the Director of Legal Services, bringing those materials, in their entirety, under the umbrella of solicitor-client privilege; [also referred to as] all investigative material generated at the behest of, and under the supervision of the lawyer*

MPI has not explained why it claims that information contained in investigative records, generated by the private investigation firm upon the request of SIU, including notes and a video, is subject to solicitor-client privilege. Again, the various records are not itemized.

If MPI is relying on legal advice privilege for some or all of the records under this heading, it has not provided evidence of the connection between the information in the video and investigator's notes and other written materials, and the legal advice that was being sought or provided.

If MPI is relying on litigation privilege for some or all of the records under this heading, it has not demonstrated how litigation privilege would apply. Being a "no-fault" insurance scheme, there is no longer the ability for individuals to seek redress from the courts from decisions made by MPI.

MPI provided little clarification and certainly insufficient evidence for our office to consider the application of solicitor-client privilege to the information in the investigation materials requested of the private investigation firm by SIU and generated by the private investigation firm.

MPI's claim that these investigative materials are subject to solicitor-client privilege without any explanation as to how or why the privileges under solicitor-client privilege apply has not met the requirements of FIPPA.

There is insufficient evidence to conclude that clause 27(1)(a) applies to information in these records.

4. Could the records be released with severing?

Subsection 7(1) of FIPPA sets out an applicant's right of access to any record in the custody or under the control of a public body, subject to the Act including applicable exceptions. By providing for severing, subsection 7(2) of FIPPA preserves the applicant's right of access to information in a record where other information in that record is subject to an exception:

Severing information

7(2) The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can be reasonably be severed from the record, an applicant has a right of access to the remainder of the record.

Because we have not been provided with the records for review, we are unable to determine whether, if a provision of subsection 27(1) does apply to a record, there is other information in the record to which the privilege does not apply.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

The Ombudsman found that:

1. a) Respecting the record described under heading 1 on page 3 of this Report, the Ombudsman found that clause 27(1)(a) applies.
1. b) Respecting the records described under headings 2, 3 and 4 on page 3 of this Report, there is insufficient evidence to conclude that clause 27(1)(a) or 27(1)(b) of FIPPA applies to the information.

Based on the findings, the Ombudsman is recommending that MPI release the records coming under headings 2, 3 and 4.

2. Respecting the records described under heading 5 on page 3 of this Report, there was inadequate evidence to conclude that clause 27(1)(a) or 27(1)(c) of FIPPA applies to the information.

Based on the findings, the Ombudsman is recommending that MPI release the records coming under heading 5.

3. Respecting the records described under heading 6 on page 3 of this Report, there was inadequate evidence to conclude that clause 27(1)(a) of FIPPA applies to the information.

Based on the finding, the Ombudsman is recommending that MPI release the records coming under heading 6.

4. Respecting the issue of severing, because the records have not been provided

to the Ombudsman, it could not be determined if severing could reasonably have been applied to the records so that some information could be released.

HEAD'S RESPONSE TO THE RECOMMENDATIONS

Under subsection 66(4), MPI must respond to the Ombudsman's report in writing within 15 days of receiving this report. As this report is being sent by courier to the head on this date, the head shall respond by June 21, 2011. The head's response must contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*
(a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or
(b) the reasons why the head refuses to take action to implement the recommendations.

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD'S RESPONSE

When the Ombudsman has received MPI's response to her recommendation, she will notify the complainant about the head's response as required under subsection 66(5).

HEAD'S COMPLIANCE WITH RECOMMENDATIONS

If the head accepts the recommendations, subsection 66(6) requires the head to comply with the recommendations within 15 days of acceptance of the recommendations or within an additional period if the Ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the Ombudsman and information to demonstrate that the public body has complied with the recommendations and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendations, the head's response to the Ombudsman under subsection 66(4) must include a request that the Ombudsman consider an additional period of time for compliance with the recommendations. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

Subsection 66(7) of FIPPA provides that the Ombudsman must make recommendations made under this section available to the public, and may do so by publishing them on a website on the Internet. Publication will occur after the 15-day timeframe set out in subsection 66(4) of FIPPA.

June 6, 2011

Irene A. Hamilton
 Manitoba Ombudsman

Manitoba Ombudsman

RESPONSE TO THE RECOMMENDATIONS UNDER *THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

CASE 2010-0332

MANITOBA PUBLIC INSURANCE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 27(1)(a), (b) and (c)

RESPONSE ISSUED ON SEPTEMBER 19, 2011

SUMMARY: On June 20, 2011 the public body provided its initial response to the Ombudsman, accepting that *Blood Tribe* does not apply to the Ombudsman under FIPPA and responding to each recommendation by indicating it would be making the records available to the Ombudsman for review. On June 27, 2011 the public body advised that it would be granting the complainant full access to seven pages of records. On August 25, 2011, following our review of the withheld records, the public body advised that it had decided to accept all four recommendations made by the Ombudsman and that it would release all of the withheld records to the complainant. On August 30, 2011 the public body demonstrated that it had complied with all four recommendations by forwarding copies of the records to the complainant on August 26, 2011.

RESPONSE TO THE RECOMMENDATIONS

Under subsection 66(4), Manitoba Public Insurance (the public body) was required to respond to the Ombudsman's report in writing within 15 days of receiving the report. As the report was sent by courier on June 6, 2011 the head had until June 21, 2011 to respond. The head's response was to contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*

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

The public body provided its response to the Ombudsman on June 20, 2011, accepting that *Blood Tribe* does not apply to the Ombudsman under FIPPA and responding to each recommendation by advising that it would make the records available to the Ombudsman for review.

On June 27, 2011 the public body advised our office that it would be granting the complainant full access to seven pages of records located upon further review of the file. The public body also provided our office with an index of the remaining withheld records and additional representations regarding its reliance on section 27.

On June 30, 2011, the public body provided our office with a copy of the letter sent to the complainant granting full access to the seven pages of records. Our office also notified the complainant about the head's response to the recommendations as required under subsection 66(5) on June 30, 2011.

On August 25, 2011, following our review of the withheld records, the public body advised that it had decided to accept all four recommendations made by the Ombudsman and that it would release the records to the complainant.

Subsection 66(6) required the head to comply with the recommendations within 15 days of acceptance. On August 30, 2011 the public body advised our office that it had complied with the recommendations within the 15 day timeline and provided us with a copy of the letter sent to the complainant on August 26, 2011, granting the complainant full access to the records.

September 19, 2011

Irene A. Hamilton
Manitoba Ombudsman