

MANITOBA OMBUDSMAN PRACTICE NOTE

Practice Notes are prepared by Manitoba Ombudsman to assist persons using the legislation. They are intended as advice only and are not a substitute for the legislation.

Manitoba Ombudsman
750 – 500 Portage Avenue
Winnipeg, Manitoba R3C 3X1
Phone: (204) 982-9130 Toll free 1-800-665-0531
Fax: (204) 942-7803
Web site: www.ombudsman.mb.ca

RESPONDING TO A COMPLAINT ABOUT A REFUSAL OF ACCESS UNDER *THE PERSONAL HEALTH INFORMATION ACT (PHIA)*

Under PHIA (subsection 39(1)), an individual has a right to make an access complaint to the Ombudsman about any decision, act or failure to act by a trustee that relates to the request. This includes a complaint about a decision to refuse access to all or part of the requested records. This Practice Note has been prepared to assist trustees in responding to this type of complaint.

When Manitoba Ombudsman investigates a complaint concerning a refusal of access, a trustee would be asked to provide our office with a copy of the records containing withheld information and representations to explain the decision to rely on the exceptions cited to refuse access. There could be other information relevant to a particular complaint that may also be requested from a trustee.

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 trustee's office (section 29). The Act provides the Ombudsman with authority to obtain and examine any records despite any other act or legal privilege (subsection 29(5)). The Ombudsman does not release information from withheld records to the individual and such disclosure is prohibited under subsection 34(2).

The investigation process is more efficient if the records are readily available to review at our office. There may be special circumstances, such as in the case of voluminous or fragile records, where an on-site review may be requested by the trustee. This can be discussed when the Investigator contacts the trustee at the outset of an investigation.

PREPARING THE RECORDS

A well-organized records package is essential to ensure that our review can fully consider the trustee's decision to refuse access and to facilitate any discussions that may take place between our offices concerning particular records. It is not necessary to send records that have been released in full, unless there is a particular reason for doing this.

In a case where no records were released with severing and records were fully withheld, our office would need only one photocopy of the records, with the exceptions indicated in the margin beside the information to which they apply.

If records have been released with severing, our office would require two sets of photocopies of the records that are at issue: one set being the unsevered records and the second set being records with the severed parts blacked or whited out.

- All pages should be numbered consecutively and the page numbers on the first set should match those on the second set.
- Each exception on the severed set of records should be noted with a complete citation, for example “11(1)(d)(i)”. The citation should be placed adjacent to the severed information either in the whited-out space or in the margin nearby. If more than one exception applies to the same piece of information, all of the exceptions should be clearly noted near the withheld information.
- If a page is withheld in full, this should be represented in the severed set by inserting a copy of the unsevered page, indicating on the page that it was withheld in full. The exception(s) being relied upon should be noted using the process described in the point above.
- Photocopies should be legible and complete, on a standard paper size.

EXAMPLE OF A PREPARED RECORD

| |
|-------------------------------------------------------------------------------------------------------------------------------------|
| 11(1)(b) |
| I met with the individual on January 6, 2006, and also with another patient, [REDACTED] to discuss the incident of January 6, 2006. |

PREPARING AN INDEX

In some circumstances, such as with voluminous records or where multiple exceptions have been applied to records with significant severing, an index would be helpful in providing an overview of the records at issue. If an index of the records has been prepared in the course of processing the access request, it could be provided to our office to assist in our review of the records.

In situations where it may be helpful to prepare an index to accompany a records package, please consider including the following headings: Page Number, Description and Exception (including the section/subsection/clause/paragraph). Depending on the complexity of the severing, this may involve numbering the lines on the page and indicating the exceptions by line number on the page.

The following is a sample index that could be used to prepare an index for a records package.

| Page # | Description | Exception |
|--------|----------------------------------------------|-----------|
| 1-2 | Memo to file about incident with third party | 11(1)(b) |
| 3-5 | Notes | 11(1)(a) |

| | | |
|------|-------------------------------------------------------|----------|
| 6 | Telephone message from third party (withheld in full) | 11(1)(c) |
| 7-10 | Case conference notes | 11(1)(b) |

PROVIDING REPRESENTATIONS TO EXPLAIN THE REFUSAL OF ACCESS

Each exception under the Act has certain requirements that must be satisfied. It is important that a trustee addresses each component of these requirements.

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

Generally, providing written representations is a more efficient process for explaining the trustee's decision to our office. Providing written representations enables a trustee to describe in its own words, the basis for its decision.

Regardless of how representations are provided, the following should be considered by a trustee in providing full representations:

- A full explanation should be provided to clearly demonstrate how all of the required elements of each exception apply to the withheld information.
- Where an exception states that a particular consequence would result from disclosure of the information, describe the consequence in detail and provide an explanation to establish a reasonable expectation of the harm described in the exception (clause 11(1)(a)).
- Where an exception states that the information was provided in confidence, supply details of the circumstances in which the information was provided and explain the basis for the expectation of confidentiality (clause 11(1)(c)).
- Where an exception states that a record was compiled for a particular purpose, provide facts to support this claim (clauses 11(1)(d) and 11(1)(e)).
- As the exceptions in subsection 11(1) are discretionary, a trustee has the discretion to give access rather than refuse access to the information. Therefore, a trustee should provide an explanation of the reasons for refusing access in order to demonstrate that its exercise of discretion was reasonable.