

# Canadian Institute Conducting Fair Investigations

## Privacy and Openness in Investigations

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Information and Privacy  
Commissioner of Ontario

Commissaire à l'information et à la  
protection de la vie privée de l'Ontario



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# Our Office

- Ontario Information and Privacy Commissioner (IPC) provides **independent** review of government decisions and practices concerning access and privacy
- Commissioner is appointed by, reports to the Legislative Assembly





- Commissioner Brian Beamish
- 5 year appointment beginning 2015



# IPC Legislation

- *Freedom of Information and Protection of Privacy Acts* **FIPPA/MFIPPA**
  - Ontario **public sector**: ministries, agencies, hospitals, universities, municipalities, school boards
- *Personal Health Information Protection Act, 2004* **PHIPA**
  - **health** information custodians (hospitals, labs, clinics, health professionals)
- in Ontario, *PIPEDA* applies to private sector



# Why is **transparency** important?

- **access** to information supports transparency and accountability, essential to healthy democracy
  - *Charter* protects right of access where **necessary to permit meaningful discussion on a matter of public importance** [*Criminal Lawyers' Assn* SCC 2010]
  - media sought access to **report of investigation** into wrongdoing by police, Crown prosecutors, in murder investigation



# Why is **transparency** important?

- statutes ensure openness in government action, including **investigations**
  - freedom of information statutes (Ontario *FIPPA*, *MFIPPA*)
  - agency statutes
  - general procedural statutes (*SPPA*, open hearings s. 9)



# Why is **privacy** important?

- **privacy** integral to our social and political order; supports individuals' dignity, integrity [*Jones ONCA 2012; Lavigne SCC 2002*]
- constitutional dimension under *Charter* ss. 7 and 8
- statutes protect privacy in government action
  - privacy acts (ON *FIPPA*, federal *Privacy Act*)
  - agency statute
  - general procedural statutes (ON *SPPA*, s. 9 exceptions to open hearing)



# Why is **privacy** important?

- **privacy** especially important in context of investigations
  - premature **disclosure** of personal information can undermine integrity of investigation
- note that *FIPPA* gives wide **discretion** to law enforcement investigators to decide what personal information may or may not be collected, used disclosed
  - Legislature (in turn Commissioner) recognize need to allow investigator to make these decisions based on **specialized expertise**





# Privacy under pressure

- Three ways in which privacy under pressure:
  - hacking/malware/ransomeware
  - leaks (by insiders?)
  - increasing public demands for officials to be more transparent! [eg SIU, medical colleges]



# How to we **balance** privacy and access?

- what is the privacy interest, and how strong is it?
  - sensitive medical info vs innocuous info
- how important is public scrutiny?
  - medical malpractice matter vs. landlord/tenant matter
  - highly relevant vs. marginally relevant
  - **investigation as preliminary vs. final stage**
  - **timing – during or after investigation?**
- can we address the critical aspects of both privacy and openness?



# New and current approaches to disclosure: investigation reports

- under *FIPPA/MFIPPA*, an institution has **discretion** to disclose records in response to specific **access request**, on its **own initiative**, or under a legal requirement
- government's decision to disclose redacted copy of the SIU report on Andrew Loku's death was first disclosure of its kind in Ontario
- some police services have begun to disclose police chiefs' SIU-related investigation reports routinely



# Reforming the *Police Services Act*

- submissions to the *Strategy for a Safer Ontario* consultation and Justice Tulloch's *Review of Police Oversight Agencies*, IPC recommends:
  - government should amend the *Police Services Act* to **require** that, subject to limited statutory exceptions, all *Police Services Act* hearing decisions, police chiefs' SIU-related investigation reports, and SIU Director reports be made available to the public



# Tips for balancing access and privacy in investigations

- work with individuals/organizations you are seeking information from to ensure they withhold **unnecessary** personal information
  - for example, list of names, addresses, phone numbers -- maybe only one element is relevant -- delete irrelevant elements
  - investigator and third parties should consider and apply the “need to know” rule



# Tips for balancing access and privacy in investigations

- explain to involved parties the manner and extent to which investigator **may or will disclose personal information**
  - does investigator disclose personal information to other involved parties?
  - does the investigator make personal information accessible to the public?
  - does the agency have a public database of investigation reports?



# Tips for balancing access and privacy in investigations

- explain to involved parties that agency's information-handling rules and policies may be subject to **overriding access/privacy legislation**
  - be explicit about which statutes, what provisions



# Tips for balancing access and privacy in investigations

- where applicable, consider using **confidentiality orders** that place limits on further disclosures of personal information already disclosed to involved parties





# Tips for balancing access and privacy in investigations

- consider removing personal identifiers and information from investigation reports
  - weigh public scrutiny vs. privacy considerations - may or may not be justified, depending on circumstances (e.g. How sensitive is the personal information? How important is public scrutiny of individuals? Is the information relevant and necessary to understanding the report?)



# Tips for balancing access and privacy in investigations

- employ and physical and electronic **safeguards** to protect personal information
  - locked filing cabinets, passwords, encryption, internal audit trails for databases
  - strict laptop/mobile device policies
  - electronic measures e.g., encoding web pages to make names inaccessible to search engines (“web robot exclusion protocol”)

