

# Bill 8 Access and Privacy Issues: FOI and e-Records

David Goodis

Assistant Commissioner  
Information and Privacy Commissioner  
of Ontario



Information and Privacy  
Commissioner of Ontario

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

Infonex Public  
Records  
Management

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2018

# Who is the Information and Privacy Commissioner?

- **Brian Beamish** appointed by Ontario Legislature (March 2015)
- 5 year term
- reports to the **Legislature**, not government or minister
- ensures independence as government “watchdog”



# Ontario's Legislative Framework

Public Sector	Health Sector	Private Sector
<p>Government organizations e.g. ministries, agencies, hospitals, universities, cities, police, schools, hydro</p> <p><i>Freedom of Information and Protection of Privacy Act (FIPPA)</i></p> <p><i>Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)</i></p>	<p>Individuals, organizations delivering health care e.g. hospitals, pharmacies, labs, doctors, dentists, nurses</p> <p><i>Personal Health Information Protection Act (PHIPA)</i></p>	<p>Private sector businesses engaged in commercial activities</p> <p><i>Personal Information Protection and Electronic Documents Act (PIPEDA)</i></p>
<p>IPC/O oversight</p>	<p>IPC/O oversight</p>	<p>Privacy Commissioner of Canada oversight</p>

# Mission and Mandate

**MISSION:** We champion and uphold the public's right to know and **right to privacy**

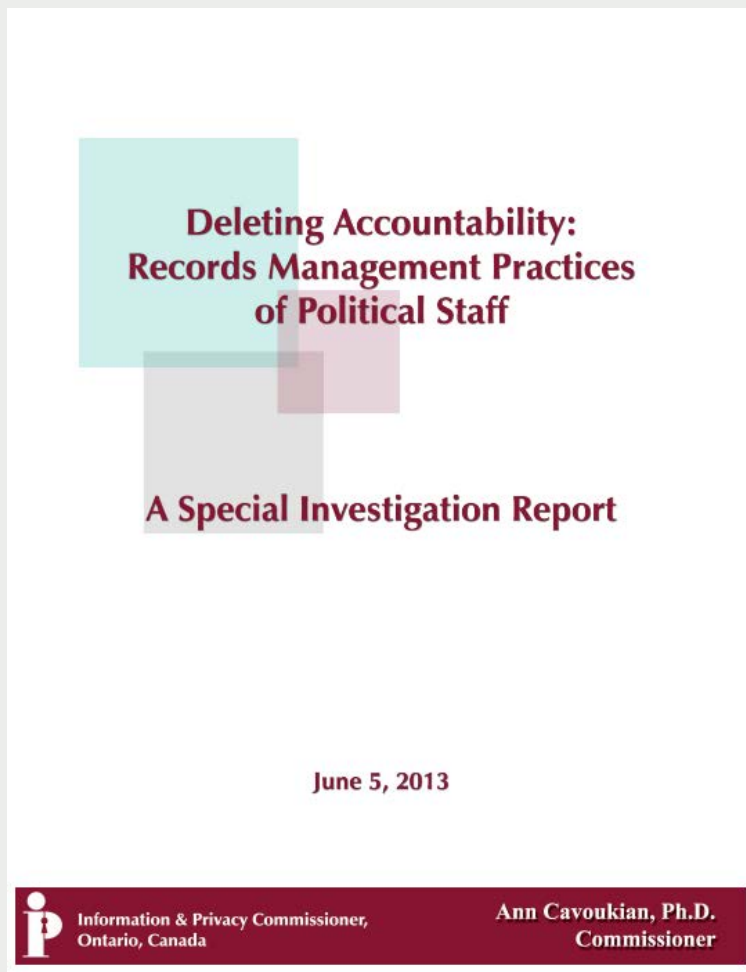
**MANDATE:**

- resolve access to information appeals and **privacy complaints**
- review and approve information practices
- conduct research, deliver education and guidance on access and privacy issues
- comment on proposed legislation, programs and practices



# Bill 8: Recordkeeping Amendments

# The Context



IPC investigates **deleted emails** about gas plant cancellations; 1000s of documents destroyed without authorization

Commissioner makes **recommendations** on records management

# Bill 8, *Public Sector and MPP Accountability and Transparency Act*

- institutions must take **reasonable measures** to protect records in accordance with recordkeeping requirements
- new **offence** to alter, conceal, destroy with intention of denying access, fine up to \$5,000
- IPC/MGCS guidance on new rules, impact on **record retention**, how to ensure records **preserved**



## **FIPPA and MFIPPA: Bill 8 – The Recordkeeping Amendments**

December 2015



# What Are Reasonable Measures?

Not defined in the acts; IPC guidelines highlight these considerations:

## ❖ **size of institution and its record holdings**

- how large is the institution?
- how many records are accumulated annually?
- what is the nature of the records?
- what human, financial and technical resources are available to the institution?

## ❖ **format of records**

- what format?
- measures must appropriately match format
- if records cannot be retained because of their format, then avoid using those formats



# Charges

2017, IPC refers matter to Ministry of Attorney General to consider laying **intentional destruction** charges under *MIFPPA*





Good Records Management  
Supports Compliance

# Records Management and Access & Privacy

Strong records management is essential to the FOI process

- Improves the ability to respond to **FOI requests** in a timely manner
- Facilitates responses to requests for **correction** of personal information
- **Reduces the risk of a privacy breach** and improves privacy breach response
- **Reduces reputational risks** by improving statistical reports and relationships with requesters

# Records Management and Open Government

Strong records management helps fuel **Open Government**

- File planning and effective storage ensures information more easily found and understood, facilitating **proactive disclosure**
- Creation and use of **metadata** makes open data and information useable and understandable
- Early **classification of sensitive records** and records containing personal information will help prevent the publication of confidential information
- **Retention schedules** ensure that records are not inadvertently destroyed

# RIM Guidance



## Improving Access and Privacy with Records and Information Management

November 2016



IPC guidance to help institutions understand relationship between strong RIM practices and compliance with the acts – both **access and privacy!**

Brief introduction to basic RIM concepts and best practices, to encourage further conversation with RIM professionals

# RIM Best Practices

- Develop and use **file naming conventions** to improve searchability
- Develop plans for ensuring that records are retained and protected **when staff leave**
- **Train** and support staff
- Make compliance a **performance measure**
- Regularly review and **audit** for compliance



# RIM Best Practices

- Create a requirement to **document business actions and decisions** and the reasons for them (“duty to document”)
- Define **appropriate media** for communication of business information
- Develop and implement record **retention schedules** and policies
- Organize records into a **functional file classification** and plans, rather than by structure of the organization or media used to record information
- Understand the **sensitivity** of your records and plan for access, privacy and security throughout the information life cycle



# Personal E-mail Records



# Access to Information Rights

Under *MFIPPA* institutions must provide a **right of access** to information in the custody or control of an institution in accordance with the principles that:

- information should be available to the public
- access exemptions should be limited and specific
- access decisions should be reviewed independently of government

A record is **any information however recorded**, whether in printed form, on film, by electronic means or otherwise

# Personal Emails

CITATION: City of Ottawa v. Ontario, 2010 ONSC 6835  
DIVISIONAL COURT FILE NO.: 2011/10  
DATE: 20101213

ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

JENNINGS, MOLLOY and DALEY JJ.

B E T W E E N:

CITY OF OTTAWA

Applicant

)  
) Priscilla Platt and Brad Elberg, for the

) Applicant

- and -

ONTARIO (INFORMATION AND  
PRIVACY COMMISSIONER) and  
JOHN DUNN

Respondents

) David Goodis and Allison Knight, for the

) Respondent Ontario (Information and  
) Privacy Commissioner

) John Dunn, in person

) HEARD: December 7, 2010 in Toronto

MOLLOY J.:

REASONS FOR DECISION

A. INTRODUCTION

[1] When a government employee uses his workplace email address to send and receive personal emails completely unrelated to his work, are those emails subject to disclosure to members of the public who request them under freedom of information legislation? That is the central issue raised by this judicial review application.

[2] The City of Ottawa was of the view that the personal emails of one of its employees were not within its "custody or control" within the meaning of the applicable legislation and refused a request to disclose them. On appeal, the Information and Privacy Commissioner took the opposite view, ruled that the emails were subject to the legislation, and ordered the City to process the application for disclosure. The City of Ottawa seeks judicial review of that decision (Order MO-2408, which is dated April 9, 2009).

*City of Ottawa v. Ontario (IPC), 2010 ONSC 6835 (Div. Ct.)*

- Divisional Court says **personal emails** sent from an employee's work email address not in city's custody or control, no right of access under *MFIPPA*
- Court: "it is not reasonable for emails belonging to a private individual to be subject to access by members of the public merely because they are sent or received on a government owned email server"

# Personal Email Accounts

## IPC Order MO-3281 (2016)

- City of Oshawa received request for all communications between named councillor and named individual
- city identified one responsive record, e-mail from councillor to the individual, but denied access since not in its **custody or control**, as email sent from a personal e-mail account
- IPC applied finds city had **control** over the record because it **relates to city business – content drives the result!**
- IPC orders city to disclose record

# Instant Messaging and Personal E-mail Accounts

Emails sent or received from personal email accounts and instant messages are **subject to access requests** (if about government business)

Challenges in managing records produced using person email or IM include:

- **search and production** when responding to access to information requests
- **retention and preservation** in compliance with the acts
- ensuring **privacy and security** of personal information

Institutions should **prohibit use** or enact measures to ensure business records are preserved



## Instant Messaging and Personal Email Accounts: Meeting Your Access and Privacy Obligations


June 2016





# Balancing Transparency and Privacy

# “Personal Information” and Privacy



Information and Privacy  
Commissioner of Ontario  
Commissaire à l'information et à la  
protection de la vie privée de l'Ontario

Fact Sheet

## What is Personal Information?

October 2016

### INTRODUCTION

The *Freedom of Information and Protection of Privacy Act (FIPPA)* and the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* (the acts) protect the privacy of personal information while providing individuals with a right of access to their own information.

In this fact sheet, we provide guidance about how the Information and Privacy Commissioner (IPC) interprets the term “personal information.”

### HOW IS PERSONAL INFORMATION DEFINED IN THE ACTS?

The acts define personal information as “recorded information about an identifiable individual,” and include a list of examples of personal information (see Appendix A for the full definition).

**Recorded information**

Information can be recorded in any format, such as paper records, electronic records, digital photographs, videos or maps.

**About an identifiable individual**

Information is about an identifiable individual if:

- it is about the individual in a personal capacity; that is, it reveals something of a personal nature about the individual, and
- it is reasonable to expect that an individual can be identified from the information (either alone or by combining it with other information)

The listed examples include a person's name when combined with other information about them, such as their address, sex, age, education, or medical history. These examples are not exhaustive and many other kinds of information may still qualify as personal information.

Privacy in the context of the acts, refers to the protection of personal information from **inappropriate collection, use or disclosure**

**Personal information** is defined as any recorded information about an **identifiable** individual

Not always easy: is it **identifiable**? Is it about the person in a **personal or professional** context?

# Jurisdictional Attitudes Towards Public's Right to Know

American vs. Canadian expectations about public disclosure of politicians' health status



# Balancing Transparency and Privacy

Privacy is never **absolute**

Needs of the public must be considered to ensure that the protection of privacy does not come at the cost of the **greater good**

*FIPPA/MFIPPA* seek to **balance access and privacy** in their limits on privacy protection in:

- 1) *Public-interest override situations*
- 2) *Emergency and compassionate situations*



# Public Interest Override

Provision enables release of information that otherwise may be withheld under an exemption, such as personal privacy, if it is in the public's interest to do so

It applies where there is a **compelling public interest** in disclosure that clearly outweighs the purpose of the exemption



# Doctor's billings - Public Interest Override



Significant public attention about the amount doctors bill to the OHIP

Previous IPC decisions kept this information private

Order **PO-3617**, requires disclosure – personal privacy exemption does not apply

Even if exemption applies, **public interest in disclosure** given the importance of transparency in the use of substantial amounts of public money

Application for judicial review was dismissed June 2017 (ONCA granted doctors leave to appeal)

# Emergency and Compassionate Situations

Personal information can be released where **necessary to protect health or safety of an individual**, or where disclosure to close relative desirable for **compassionate reasons**



# Jeffrey Baldwin Inquest

5 year old boy died of starvation while in care of maternal grandparents



Coroner's Inquest revealed that critical information about grandparents, which could have flagged potential dangers, not shared with the children's aid society that placed him into grandparents' care

Fundamental lack of understanding of privacy laws by key parties highlighted as one of the reasons

Professionals misunderstood and misapplied privacy legislation, resulting in the belief that they were legally prevented from sharing personal information

# Yes, You Can.

IPC and the Provincial Advocate for Children & Youth released a guide on information sharing with children's aid societies

Clarifies that Ontario privacy legislation does not prevent teachers, health care providers, social workers or police from sharing information with children's aid workers when children may be at risk

In fact, *Child and Family Services Act* requires disclosure



# Transparency, Privacy and the Internet



## Transparency, Privacy and the Internet: Municipal Balancing Acts



Public expects to be able to access publicly available information online

Information can be made publicly available in this manner while protecting privacy

# Publishing on the Internet

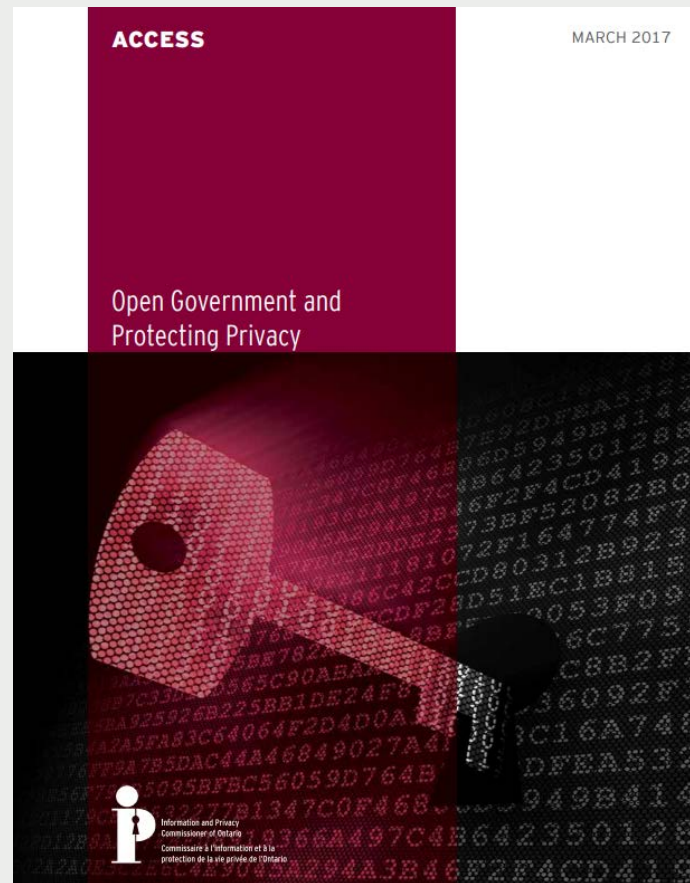
Privacy protection may be improved through a number of risk mitigation strategies:

- **Redaction**
  - removing any unnecessary PI before publishing
- **Data minimization**
  - requesting and storing only as much PI as is necessary
- **Technological measures to limit searchability**
  - e.g, robot exclusion protocols, images instead of text
- **Transparent administration**
  - when information is received, be clear about how it will be published; manage expectations

# Open Government and Protecting Privacy

Guidance issued to assist institutions with enhancing proactive disclosure while ensuring protection of privacy

Helps institutions understand that privacy is not a barrier to Open Government and that proactively addressing privacy risks is critical to the success of any open government initiative







Questions?

# HOW TO CONTACT US

## Information and Privacy Commissioner of Ontario

2 Bloor Street East, Suite 1400

Toronto, Ontario, Canada M4W 1A8

Phone: (416) 326-3333 / 1-800-387-0073

TDD/TTY: 416-325-7539

Web: [www.ipc.on.ca](http://www.ipc.on.ca)

E-mail: [info@ipc.on.ca](mailto:info@ipc.on.ca)

Media: [media@ipc.on.ca](mailto:media@ipc.on.ca) / 416-326-3965