

IPC Tribunal Post-Covid Updates & Enhancements

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**Office of the Information and Privacy
Commissioner of Ontario**



Information and Privacy
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IPC Tribunal Operations Post Pandemic Initiatives

Impact of COVID-19 on the IPC

- Prior to the pandemic, the IPC's processes were heavily paper-based.
- Moved to virtual model & electronic documents.
- Office closures and time to equip staff and convert to electronic processes resulted in a backlog of files.
- Backlog reduction projects have been in place to address this.
- Increase in privacy complaints, and institutions self-reporting data breaches involving sophisticated forms of ransomware and cyberattacks.
- Investigations have become more complex and take longer to resolve, given the complicated technological and legal issues involved.

Changes to Address Queues

- Queues have resulted in delays in file assignments
- Parties are increasingly more intense and more apt to complain
- Developed position of IPC Complaints Coordinator
- Streamlined tribunal processes with clear timeline expectations
- Developed IPC Service Charter & IPC Code of Conduct
 - Establishes an expectation that parties actively engage
 - Defines unacceptable behaviours and actions to address these behaviours

Move to Online Services

- IPC recognizes that not everyone lives close to Toronto – need to provide better service to residents and institutions in areas outside of the GTA.
- We have **implemented a ShareFile system** to allow institutions to submit records to us electronically, via a secure platform.
- In July 2022, the IPC launched **two new online services** that streamlined the appeal process and improved accessibility:
 - an **electronic appeal form** that can be submitted online (English and French); and
 - a **secure payment portal** that will enable the public to submit their appeal and required fee online.
- Paper appeal forms and cheques are still accepted; fees remain the same.

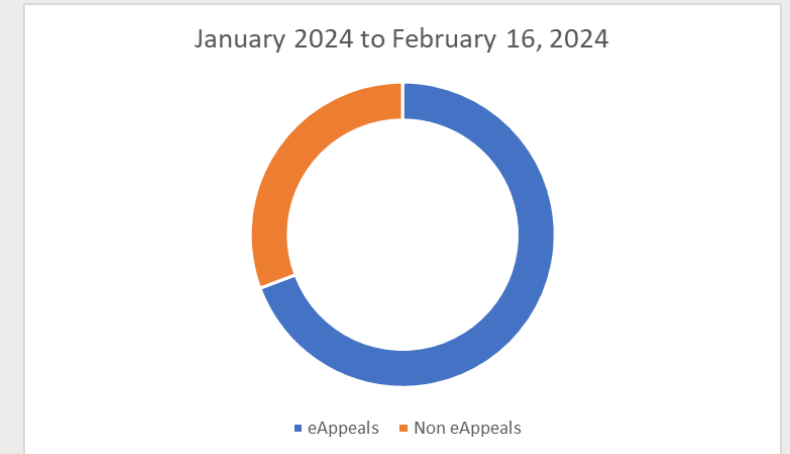
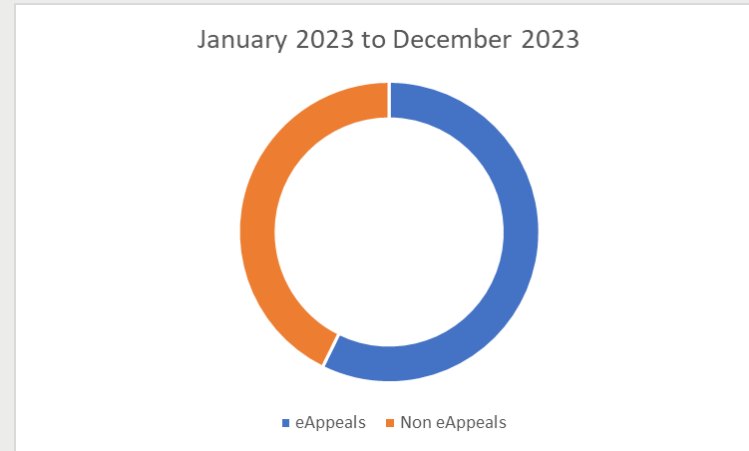
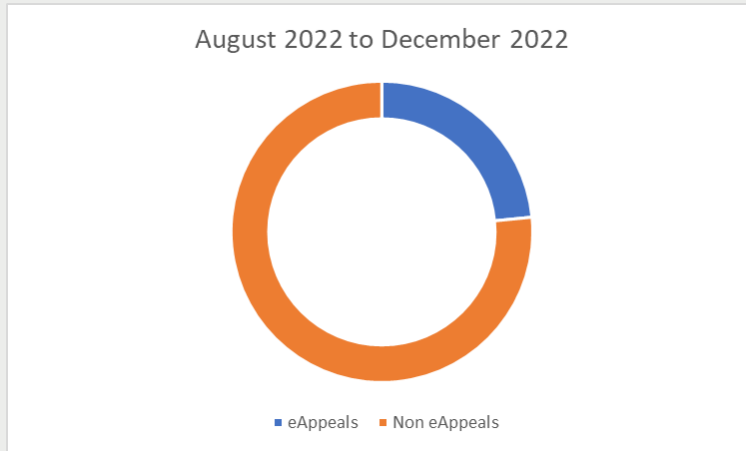
Creation of Electronic Appeal Form

- For appeals under FIPPA and MFIPPA.
- Together with the issuance of a decision, institutions may let requesters know that an option exists to file appeals through our new web portal that can be accessed on the IPC website.
- An appeal must be received by the Registrar within 30 days after the institution has given notice of its decision.

Changes to the Request for Documents

- The IPC's preferred format for the records is an **electronic copy**.
- Electronic **records** must be provided in a separate file, clearly marked as "Records". All other **documents** (such as requests, decision(s) and any other correspondence) must be in a separate file(s).
- The IPC can accommodate a secure file sharing program (ShareFile) which will allow staff to exchange files securely. Should you wish to use this ShareFile service, please contact the Program Assistant who will provide you with a hyperlink.
- The IPC recommends all electronic files are encrypted and the password sent in a separate email or provided by the phone.

Use of Electronic Appeal Form



- Initially, when first launched in August 2022, 23.5% of appeals were being filed electronically.
- In 2023, 57.3% of appeals were filed electronically.
- So far, in 2024, 69.3% of appeals have been filed electronically.

Updates to our Processes

Expedited Appeals Team Pilot Project

- Tribunal is establishing a two-year pilot project to develop processes and a cross-functional team to handle certain “straight forward” appeals from beginning to resolution in an expedited manner (single-person processing), where there is no potential for an order to disclose records.
- Using model currently used with Deemed Refusal cases and expediting the process currently used for other types of cases:
 - Dismissing cases where there is no reasonable basis for proceeding;
 - Assisting the parties with resolving the issue(s) in cases; or
 - Issuing an order/a decision to resolve the issue(s) in cases.
- Will evaluate the project on an ongoing basis to ensure that it has a net benefit on overall processing times and workload on the entire Tribunal.
- Objectives:
 - (1) To identify straight-forward cases that can be resolved more quickly with a single-person processing model; and
 - (2) To reduce the duration of straight-forward cases by maintaining duration for file types where the duration has traditionally been low (cases traditionally handled by ER and deemed refusals) and improving duration for file types where the duration has traditionally been high (cases traditionally going through mediation and adjudication).

Expedited Appeals Team Pilot Project

- Supports the Commissioner's vision of the IPC as a modern and effective regulator: addressing complaints and appeals in a fair, timely, and meaningful manner.
- Focused on a subset of appeals – straight forward issues, no exemption or third-party issues:
 - Reasonable search
 - Late appeals
 - Interim decisions (including fee estimates)
 - Time extension
 - Correction
 - Custody or control
 - Deemed refusal
 - Failure to disclose/provide access
 - Fees and/or fee waiver
 - Inadequate decision
 - Frivolous/vexatious
 - Act does not apply (exclusions)
 - Transfer/forward
 - Refuse to confirm or deny

Updating and Modernizing the Code of Procedure for M/FIPPA Appeals

Purpose of revisions to the Code of Procedure:

- Reflect the IPC's current and future operations for considering appeals under M/FIPPA
- Improve timeliness for the processing of appeals
- Maintain the fair and just consideration of appeals
- Provide greater transparency and understanding of the IPC's procedures when considering appeals

Updating and Modernizing the Code of Procedure for M/FIPPA Appeals

- Throughout 2022, the IPC undertook a thorough review of its FIPPA and MFIPPA Appeals Code of Procedure and associated Practice Directions
- The Tribunal has embraced the use of electronic methods of communication and records submission, including e-Appeals, which require a revised Code of Procedure.
- The Code also needs to better reflect the current state of the Tribunal's operations and procedures.
- A draft of the new Code was published on September 22, 2023:
https://www.ipc.on.ca/wp-content/uploads/2023/09/2023-09-22-code-of-procedure-fippa-mfippa_consultation-notice.pdf
- 3-month period to answer questions and receive feedback ended December 22, 2023.

Key Updates to the Code of Procedure

- Section 4: Submitting an appeal form and paying appeal fees through e-Appeals.
- Section 5: Registrar's intake function regarding the screening and streaming of appeals, and the authority to request copies of records from an institution, including a detailed index of records.
- Section 6: Powers of the IPC at the early resolution stage to informally resolve an appeal.
- Section 7: Allows mediation to move a non-settled appeal to adjudication **or** another part of the appeal process, as appropriate, to resolve any remaining issues.
- Section 8: Procedures when considering an appeal at adjudication. Sets out examples of circumstances where an adjudicator may decline to conduct an inquiry.
- Section 9: Sets up the possibility of expedited appeals process

Key Updates to Code of Procedure

- Section 9: Sets up the possibility of expedited appeals – an evolution of the “Straightforward Appeals” and “Reasonable Search Appeals and Fee Appeals” sections in the current Code that had fallen into disuse.
- Section 11: Expands on the power to request records and an index of records from institutions to assist with the processing of an appeal.
- Section 15: New process for the reconsideration of IPC decisions and orders. Currently the individual who made the decision in question will respond to the request, but revisions set out the process for an initial screening of a reconsideration request.
- Section 16: Expands on the current Code’s provisions to place an appeal **on hold** or deem it **abandoned**. Includes specific time frames for action by an appellant or third-party appellant, and a requirement that such parties respond to the IPC otherwise their appeal may be deemed abandoned and closed without further notice.

Code of Procedure for M/FIPPA Appeals

- Section 16: Expands on the current Code's provisions to place an appeal **on hold** or deem it **abandoned**. Includes specific time frames for action by an appellant or third-party appellant, and a requirement that such parties respond to the IPC otherwise their appeal may be deemed abandoned and closed without further notice.
- Section 19: IPC may make orders or give directions in an appeal to prevent an abuse of its processes, including the authority to deem an appellant to be a vexatious litigant and place restrictions on their ability to file appeals, or close their existing appeals.

Code of Procedure for M/FIPPA Appeals

- New Practice Directions under the Code – reduce the number of existing PDs, moving some into the revised Code and others onto the IPC website – examples:
 - PD #3 (guidelines for individuals whose personal information is at issue in an appeal) will likely be deleted and the information placed on the IPC's website
 - PD #10 (appeal fees) will be deleted and the information is in the updated Code
 - PD #11 (appeal form) will be deleted as the information is available on the IPC website and the link is referenced in the updated Code
- Practice Directions will not be renumbered to avoid confusion with existing guidance documents and orders

Abandoned Files Policy

- Enables Tribunal to allocate its limited resources
- Ability to address files where:
 - IPC is unable to contact or have lost contact with an appellant/requester
 - Appellant's/requesters are no longer responsive
 - Does not apply to unresponsive institutions
- Establishes procedures that simplify how to address files deemed abandoned and when/how they will be closed.
- Procedures include:
 - Several attempts to contact
 - First letter with **two weeks** to contact,
 - Second letter with **two weeks** to contact or close without further notice

Files Narrowed to Reasonable Search

- In the past, files that did not resolve in mediation would move to adjudication.
- Now, where the institution provides enough detailed information about their search efforts and/or conducts additional search(es) during mediation, the file could be moved to Early Resolution for possible screen out.
- A clear benefit to working to resolve files narrowed to sole search as a possible way to avoid making representations at adjudication.

Updated Guidance Documents

- IPC working on revamping the “Guidance and Resources” section of its website.
- In 2023-2024, the IPC will be releasing new and updated guidance in 10 key areas:

- Custody or control
- Frivolous or vexatious requests
- Reasonable search
- Fees and fee waiver
- Definition of personal information

- Advice and recommendations
- Third party information
- Economic interests of an institution
- Solicitor-client privilege
- Public interest override

- Public notice will be given once the guidance documents are available; new sets will be released periodically during the rest of the fiscal year and into 2024.



FOI Requests and Appeals – Tips

Tips at the Request Stage

- Even before a request is filed, ensure that your **records retention policies** are up-to-date, widely known, and are being followed in your organization.
- If the request is unfocused or overly broad, **contact the requester**
 - **Work with requester to reformulate request** to reduce scope/time needed/fees
 - **Explain** how the records are stored, the steps needed to locate, what may not exist, relevant retention schedules etc.
- Where appropriate, **notify** and seek consent.
- Provide a **detailed decision** explaining why the exemption(s) and/or exclusion(s) apply. The more detailed, the less likely an appeal.
- Prepare and provide a **detailed index of records** at the request stage – good record keeping helps you through this process. The more detailed, the less likely the appeal. If an appeal, a highly effective tool for the mediator to work to narrow/resolve.

Tips at the Request Stage

- Consider exercising your **discretion to disclose**, if not a mandatory exemption.
- If you are unable to issue a decision within the required **30 days**, to avoid a deemed refusal appeal, issue a fee estimate and/or time extension.
- Best practice is to issue a fee estimate and time extension at the same time.
- Fee estimates / Time extensions should be **detailed** to help requesters appreciate:
 - The costs / time involved
 - How the costs / time is calculated
- Requesters may then choose to narrow the scope.
- Fee estimates **protect you from doing all the work** if requester decides not to proceed.
- The Devil is in the **details!** The more detailed the decision, the less likely an appeal.

A green pushpin is pinned to a map, with its sharp point resting on a blue line representing a road or path. The map is slightly out of focus, showing various lines and colors. The background is a soft, light blue gradient.

IPC Appeal Streams

- Intake
- Early Resolution
- Investigations
- Mediation
- Adjudication
- Expedited Appeals (coming soon!)

Tips if an Appeal is Filed

- **Keep and secure the records at issue;** proper record keeping is very important!
- Provide IPC with records, documents an index as per *Request for Documents*.
- Always respond to IPC staff by the deadline specified in our communications.
- If the matter cannot quickly be resolved through our Early Resolution team, it will be assigned for mediation. The Mediator attempts to:
 - settle all issues in the appeal; or
 - if not settled, narrow and clarify the issues that proceed to adjudication.

Benefits of Mediation

- **Less Time** – Much more expedited than adjudication.
- **Less Formal** – Free flow conversation vs. writing representations.
- **Less Cost** – Costs of your staff time and added costs if not resolved.
- **Creativity** – Interest based vs. rights based. Expands the pie so that more options are available.
- **Control of Outcome** – Tailored to needs of parties.
- **Enhances Future Relationships** – Helps avoid appeals with repeat requesters!

Bottom line: Adjudication takes more time and effort and the onus is typically on you to defend your decision.

Tips to Resolve at Mediation

- **Work with the mediator** to try and resolve issues – an institution’s decision can be “right”, but the benefit of resolving in mediation is the file closes
- **Provide mediator with relevant** background information and documents
- **Recognize the benefits of informal resolution vs. time to write representations**
- Participate in the process with an **open mind**
- **Read relevant orders** provided by mediator and **hear mediator’s opinion**
- Follow up in a **timely fashion** as the process is appellant driven
- Participate in **Webex and/or teleconferences** as suggested, **bringing the right people to the table**
- **Most exemptions are discretionary**, very few are mandatory
- Appreciate the **give and take** of mediation and recognize the benefits of further disclosures, supplementary decisions, etc.
- Many files can resolve with **little or no access to actual records**

Tips for Voluminous Records

- Very important to prepare and share a **DETAILED INDEX**
 - Mediator asks appellant to review the index to try and narrow
 - Mediator reviews and attempts to **eliminate exemptions and issues** that appear not to be applicable or supportable
- Participate in an **early teleconference** with the appellant and a representative from the relevant program area
 - Listen to appellant to understand their bottom-line interests
 - Explain how records are stored
 - Explore ways to re-scope request and/or places to search
- Much success with a focus on **interests vs. records**
- Give & take significant here – **most exemptions are discretionary**

Why Adjudication?

- When appeals are not resolved at early resolution or mediation, they generally proceed to adjudication.
- Adjudicator:
 - Decides whether to conduct an inquiry
 - If more information is needed, conducts an inquiry
 - Issues an order that:
 - upholds the institution's decision and dismisses the appeal,
 - allows the appeal and orders disclosure, or
 - allows the appeal in part and orders partial disclosure
 - requires the institution to take a certain action such as; issue a new decision, complete a search, reduce a fee, grant a fee waiver etc.

Inquiry Process

- Generally, a written process involving the exchange of representations (submissions).
- If necessary, the Adjudicator can:
 - Receive oral evidence
 - Ask for affidavits
 - Inspect documents
 - Ask to review a workplace or electronic system
- Representations are shared with other parties to the appeal, unless there is a confidentiality concern.
- If Adjudicator disagrees with a party's sharing position, they can make a sharing order.
- Adjudicator can also ask a party for more evidence or to answer specific questions.

Tips for Representations in Adjudication

- Effective representations:
 - Are thorough
 - Explain any necessary background facts and context
 - Answer the Adjudicator's questions
 - Provide supporting affidavits where necessary
 - Identify whether any part of the representations should not be shared, and why
- Always respond to IPC staff by the **deadline specified in our communications.**

4. Decisions of Interest

Frivolous or Vexatious Requests

- MO-4300 (City of Brantford) – Dec. 19, 2022:
 - Dealt with three appeals from three requests made by a business owner in the city.
 - Each request was a variation on a theme but essentially each request asked for a variety of records (emails, text messages, letters, memos) regarding the appellant and individuals or departments at the city.
 - City denied access on the basis that the requests were frivolous or vexatious.
 - Adjudicator found that the appellant's access requests are part of a pattern of conduct that amounts to an abuse of the right of access. Also found that the appellant made recurring related requests and that the access requests in the appeal form part of that pattern of conduct.
 - The number of requests made by the appellant was excessive by reasonable standards, and the nature and scope of many of the requests are duplicative, excessively broad, and unusually detailed. There was sufficient evidence to conclude that the appellant's conduct was an attempt to burden the system with his access requests, including the requests that were at issue in the appeal.
 - Remedy: one access request before the city and one appeal before the IPC for the next year. The appellant was also limited to only 2 parts to any requests.

Need to Provide Representations

- MO-4397 (City of Hamilton) – Jun. 21, 2023:
 - City denied access to records relating to the cutting down of a tree at a particular address. The city denied access to the records on the basis the information was publicly available (s. 15(a) of MFIPPA) and provided the appellant with the manner to access the information.
 - The appellant was unable to access the records through the manner identified by the city and appealed the decision.
 - Adjudicator conducted an inquiry and received no representations from the city. As s. 15(a) is a discretionary exemption and no representations were received, disclosure of the records to the appellant was ordered.
 - City did not discharge its burden of proof under s. 42 that the records fall within s. 15(a).

Resources

- IPC Practices: *Drafting a Letter Refusing Access to a Record*

<https://www.ipc.on.ca/wp-content/uploads/Resources/num-1.pdf>

- Fact Sheet: *Frivolous and Vexatious Requests*

<https://www.ipc.on.ca/wp-content/uploads/2017/08/fs-access-friv-vex.pdf>

- Fact Sheet: *Labour Relations and Employment Exclusion*

<https://www.ipc.on.ca/wp-content/uploads/2020/06/labour-relations-employment-exclusion.pdf>

- Fact Sheet: *Public Interest Disclosure*

<https://www.ipc.on.ca/wp-content/uploads/2021/09/fs-access-public-interest-disclosure.pdf>

- Fact Sheet: *Reasonable search*

<https://www.ipc.on.ca/wp-content/uploads/2017/04/fs-access-reasonable-search.pdf>

- Fact Sheet: *Third Party Information Exemption*

<https://www.ipc.on.ca/wp-content/uploads/2018/09/fs-access-third-party-info-exemption.pdf>

- Protocol: *Solicitor-Client Privilege*

<https://www.ipc.on.ca/wp-content/uploads/2020/06/2020-06-19-ipc-protocol-cases-involving-privilege-claims.pdf>

- Search IPC Decisions:

<https://decisions.ipc.on.ca/ipc-cipvp/en/nav.do>

Take the Challenge!

- Does your organization have an innovative open government program?
- Submit it to the IPC's Transparency Challenge!
- Innovative programs will be featured in the IPC's **Transparency Showcase**.
- Visit transparencyshowcase.ipc.on.ca to see the great projects featured in the last challenge
- Organizations have until May 31, 2024 to submit their entries.
- Details about the Transparency Challenge, eligibility and entry requirements, frequently asked questions (FAQs) and an easy-to-use online submission form are available at www.ipc.on.ca/transparency-challenge.



Open government
in action

#IPCTransparencyChallenge



THANK YOU!

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