

Recent Significant Orders and Practical Tips on Working with the IPC

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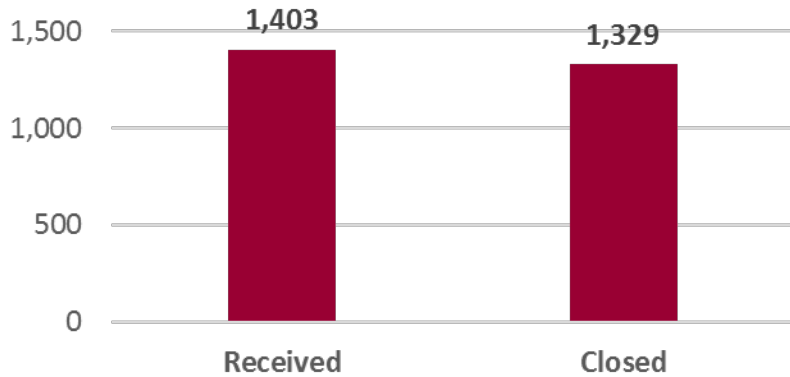
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***Ontario Connections
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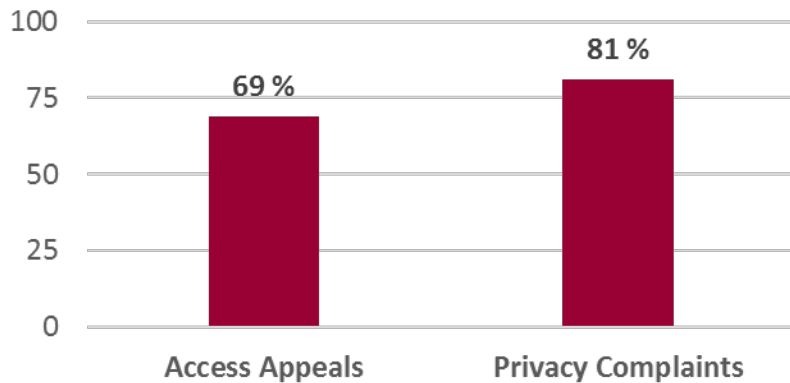


2015 Statistics

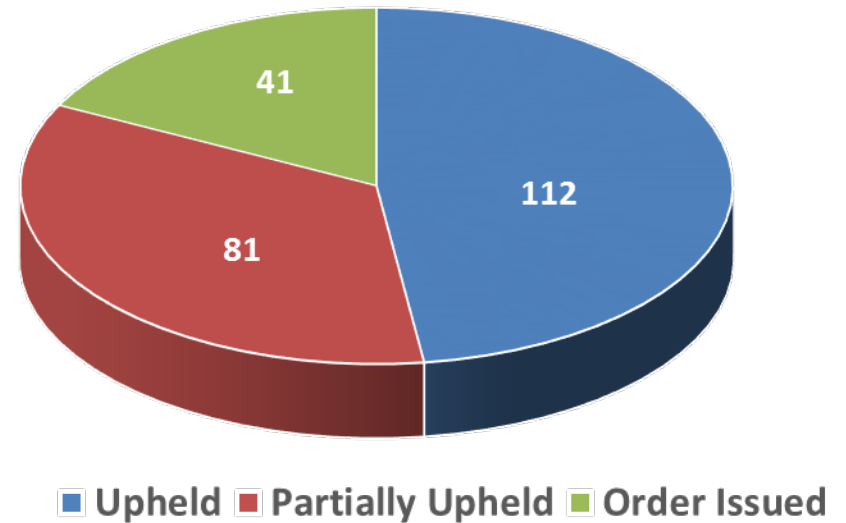
Access Appeals



Resolved Through Mediation



IPC Decisions



Councillor Records

- [MO-3281](#) – Request for emails between a councillor and an individual who was hired by the city to investigate alleged wrongdoings of City of Oshawa staff
- The city denied access, claiming it did not have custody of the records because they came from a personal email account
- Our office ordered the city to issue an access decision

Records related to government business that are sent from a personal email account are subject to access laws



FOI Fact Sheet No.1 – *MFIPPA and Councillors' Records*



FOI Fact Sheet 1

The *Municipal Freedom of Information and Protection of Privacy Act* and Councillors' records

April 2016

INTRODUCTION

The Information and Privacy Commissioner of Ontario (IPC) sometimes decides appeals relating to requests for access to records created or held by municipal councillors. The *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* does not expressly refer to records of municipal councillors and, therefore, before a determination can be made on access to those records, the IPC must decide whether *MFIPPA* applies. In making this decision, the IPC examines the specific facts of each case in light of a number of principles.

The IPC has been calling for amendments to *MFIPPA* to clarify when it applies to these records, including in August 2015, when the IPC wrote to the Minister of Municipal Affairs and Housing setting out proposed amendments (this letter is available on the IPC's [website](#)).

In the absence of amendments, however, the IPC is issuing this fact sheet, which explains when and how councillors' records are subject to *MFIPPA*.

WHEN ARE COUNCILLORS' RECORDS SUBJECT TO *MFIPPA*?

Councillors' records are subject to *MFIPPA* where:

1. a councillor is acting as an officer or employee of the municipality, or performs a duty assigned by council, such that they might be considered part of the institution, or
2. the records are in the custody or control of the municipality.

WHEN IS A COUNCILLOR AN OFFICER OR EMPLOYEE OF A MUNICIPALITY?

A councillor is likely to have several roles, such as an individual constituent representative, a politician, or a head or member of a municipal committee or board, such as a transit corporation. Some of these roles may entail the councillor acting as an officer or employee, while others do not.

- Whether councillors' records are subject to *MFIPPA* depends largely on context
- Outlines relevant factors and findings in a number of cases
- Helps councillors know their responsibilities and how to develop appropriate policies and procedures



Custody and Control

Section 4(1) MFIPPA

Orders MO-3141 to MO-3146:

- Access request to school boards for records held by consortiums established to procure school transportation services. The Boards denied access, stating that the consortiums, not the Boards, have custody and control of the responsive records.
- IPC held that notwithstanding separate infrastructure (office, website, etc.), a consortium established for the purposes of fulfilling the school boards' statutory **mandate** to provide transportation is **part of a school board for the purposes of the Act**.
- Alternatively, the **board has control of the consortium's records** using the control test described in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.



Custody and Control

Section 10(1) *FIPPA*

Order PO-3520:

- Access request to the Office of the Children's Lawyer (OCL), a division of the Ministry of the Attorney General , for records relating to custody and access proceedings involving the OCL.
- Access denied on grounds that the Act does not apply to litigation files where the OCL provides legal services to children.
 - OCL drew a functional distinction between its administrative records (subject to FIPPA) and records relating to the provision of legal services to children (argued not subject to FIPPA).
- IPC held that the Act applies to MAG as an institution, of which the OCL is a part, and noted that there is no statutory basis for a functional exclusion of classes of records held by the OCL.
 - **N.B. Currently under Judicial Review.**



Custody and Control

Section 10(1) *FIPPA*

Order PO-3267:

- Access request made for records of an investigation made in St. John's, Newfoundland by Ontario Provincial Police (OPP) and the Royal Newfoundland Constabulary (RNC). Are the records subject to FIPPA?
- IPC held that records are **not in the custody or under the control** of the Ministry within the meaning of section 10(1).
- Found that the **agreement** between the OPP and the RNC does not establish a duty on the OPP for the creation or retention of the records. There was **no statutory or other authority** granting the OPP/Ministry a right to possess or control the records.



General Information v. Personal Information – Order PO-3467

- [PO-3467](#) – Request for the names of driving instructors who had their instructor licenses revoked, without the reasons for the revocation
- The Ministry of Transportation denied the request, citing a personal privacy exemption under *FIPPA*
- The IPC considered this information to be in a business capacity (rather than personal) and ordered the ministry to release the names

***Names of individuals are not considered personal information
if they are part of business records***



General Information v. Personal Information – Order MO-3298

- [MO-3298](#) – request for names and addresses of all registered kennel owners in the Township of Perth East investigated for by-law infractions, reported to the Ontario Society for the Prevention of Cruelty to Animals or had licenses revoked
- 11 parties objected to the disclosure and the requester appealed to our office
- Names and addresses of kennel owners is not “personal information” and IPC ordered the Township to disclose

Information may be not be considered personal information if it is about individuals in a business rather than a personal capacity



General Information v. Personal Information – Order MO-3261

- [MO-3261](#) – request to Sudbury District Health Unit (SDHU) for the addresses of all locations where there were investigations into mould complaints or concerns
- SDHU denied access to the list of addresses, citing the mandatory personal privacy exemption under *MFIPPA*
- The IPC determined that the record did not contain any personal information of identifiable individuals and ordered the record to be disclosed

If the record does not reveal something of a personal nature “about individuals” but information “about the properties” it may not be considered personal information



Solicitor – Client Privilege

Sections 12 MFIPPA Section 19 FIPPA

Common Interest Privilege

Order MO-3253-I

- Access request to School Board for a legal opinion prepared for Ontario Public School Boards' Association (the Association. Denied on the basis of solicitor-client privilege, section 12 of MFIPPA
- The IPC accepted that the Association is a body that advocated on behalf of school boards, and that it **shared a common interest** with its member school boards, including the LDSB. Therefore privilege was **not** waived when the opinion was shared amongst Boards.
- N.B. The legal opinion expressly contemplated that it might be shared amongst school boards, and although it was prepared for a single client, it was for the benefit of multiple parties.



Solicitor – Client Privilege

Sections 19(a) & (b) *FIPPA*

Common Interest Privilege

Order PO-3514:

- Access request for draft guidelines for Crown counsel relating to prosecution of HIV exposure and transmission cases. Access denied under section 19
- One set of draft guidelines was shared with the Sexual Health and Harm Reduction Program Manager of the City of Hamilton for comment.
- IPC held that the drafts were privileged at first instance, but sharing one of the drafts with the external third party was not a solicitor-client communication, and **no common interest** existed that was sufficient to withstand waiver of privilege when the draft was shared.
- N.B. Decision is currently under Judicial Review.



Solicitor – Client Privilege

Sections 19(a)(b) *FIPPA*

Prosecutorial Discretion

Order PO-3597 :

- Access request to the Ministry of Government and Consumer Services for information relating to the ministry's decision to discontinue a prosecution of a named company and individual.
- Ministry withheld some information under section 19 (solicitor-client privilege) and section 13 (advice or recommendations) of *FIPPA*.
- The IPC found that records relating to the **exercise of prosecutorial discretion** to withdraw charges falls within the class of information exempt under section 19.



Applying the Public Interest Override

- [MO-3295](#) – request for KPMG forensic audit report
- Algoma Public Health decided that the public interest override justified disclosure of the report, even though it contained personal information
- KPMG investigated allegations about conflict of interest in the hiring of interim CFO and financial consultant and about misappropriation of funds
- the IPC agreed with the decision of APH to apply the public interest override



Access Requests Under *FIPPA* and *PHIPA*

- [PHIPA Decision 17](#) – Complaint and appeal of a decision made by a hospital in response to a request for records relating to the birth and death of an infant and the care given to the mother and child at the hospital
- Hospital is subject to both *PHIPA* and *FIPPA*, so need to consider:
 - status of hospitals under the acts
 - Application of *PHIPA/FIPPA* to records
 - Meaning of “primarily dedicated” to health care
 - Ability of complainant to make request on behalf of wife/daughter

Requests for personal information from hospitals can be complex and may require examination of both PHIPA and FIPPA



Who Can Access Personal Health Information

- **PHIPA Decision 27** – request to the City of Toronto for audio recording made to 911 seeking medical assistance for her uncle (who passed away)
- Request denied based on her failure to establish authority to make a request for the record under Ontario’s health privacy laws
- IPC upheld the city’s denial of access because the complainant did not have a right of access to the personal health information of her deceased uncle

The right of access to personal health information (PHI) belongs only to the individual or an authorized “substitute decision-maker”



Practical Tips for Working with the IPC – *Benefits of Mediation over Adjudication*

- The benefits of mediation
 - Requires significantly less time and resources
 - Parties can learn about their respective positions
 - Allows for control over the outcome
 - Issues are clarified, common ground discovered and agreements can be negotiated
 - A win-win settlement that might not be possible through adjudication
 - Allows for understanding between parties that can improve future interactions



Practical Tips for Working with the IPC – *Have an Index of Records*

- Importance of indexes of records
 - Success in mediation depends on ability of appellants to understand the nature of the records and information being withheld – having a detailed index helps the mediator discuss the issues with both sides
 - Appeals have gone from 5,000 pages of records at beginning of mediation, to just a few pages in adjudication – would not have been possible without an index



Practical Tips for Working with the IPC – *Understand the Notice of Inquiry*

- What you need to know about the notice of inquiry
 - Frames the issues: what is and is not in dispute
 - Describes the background facts
 - Sets out the standard legal tests that the adjudicator will apply
 - Tells you that your representations may be shared and invites you to let adjudicator know if there are any portions that you want kept confidential
 - Read it thoroughly



Practical Tips for Working with the IPC – *Ensure a Detailed Representation*

- Tips for putting your best case forward
 - The adjudicator knows the law – doesn't know as much about your facts
 - Educate the adjudicator about your facts
 - Tailor the representations to the specific case



Practical Tips for Working with the IPC – *Understand Sharing of Representations*

- What you should know about sharing of representations
 - Sharing is about procedural fairness – knowing the case you have to meet
 - May be valid reasons for keeping part of your representations confidential but you have to spell those out



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