

Navigating the Appeal Process & Recent Significant Orders at the IPC

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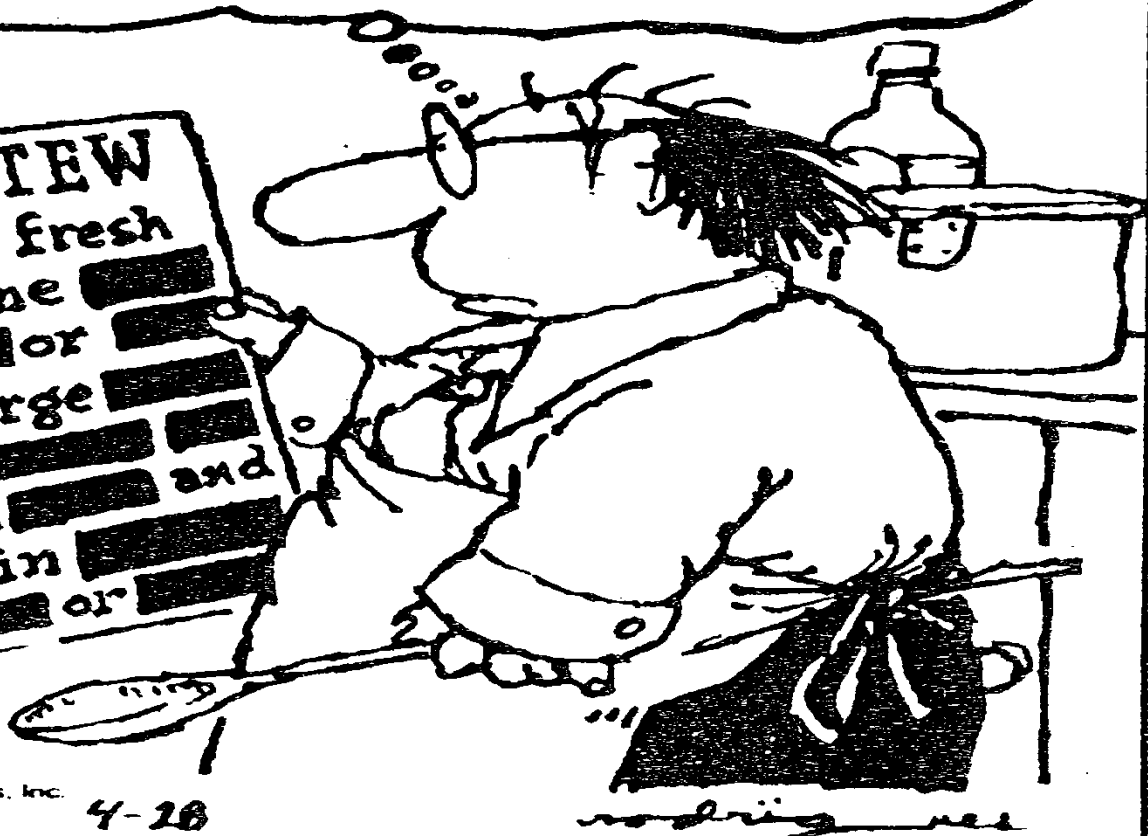
***University of Guelph
July 13, 2016***



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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FOR A RECIPE UNDER THE
FREEDOM OF INFORMATION ACT!

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Our Office

- Information and Privacy Commissioner (IPC) provides an **independent** review of government decisions and practices concerning access and privacy.
- Commissioner is appointed by and reports to the Legislative Assembly; remains independent of the government of the day to ensure **impartiality**.



The Three Acts

The IPC oversees compliance with:

- *Freedom of Information and Protection of Privacy Act (FIPPA)*
- *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*
- *Personal Health Information Protection Act (PHIPA)*



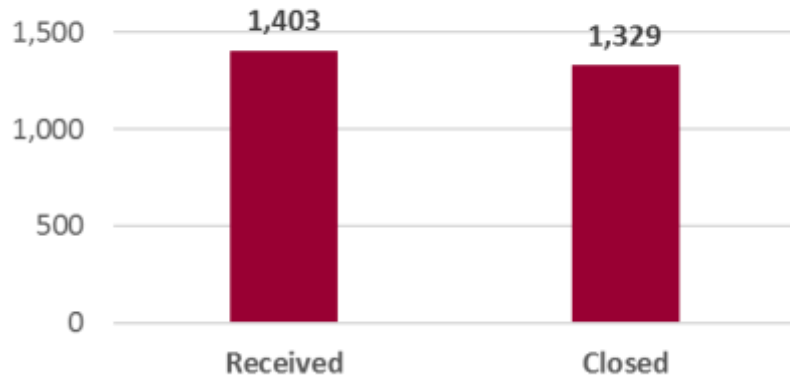
IPC Structure

- ***Tribunal***
 - Intake, mediation, investigation, adjudication
 - Led by **Assistant Commissioner Sherry Liang**
- ***Policy, Health Policy, Legal, Communications, Administration***
 - Research, advice, comment on proposed programs/legislation that impact privacy and access
 - Represent IPC in court
 - Led by **Assistant Commissioner David Goodis**

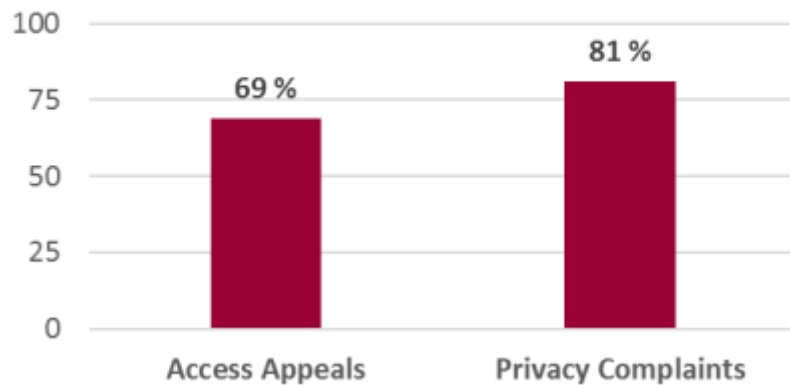


2015 Statistics

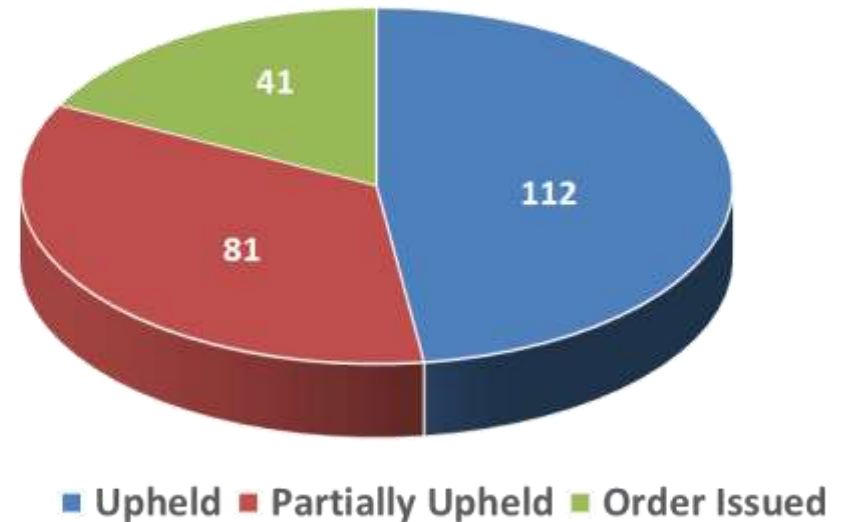
Access Appeals



Resolved Through Mediation



IPC Decisions



What We Do

- Key part of IPC's mandate is to resolve access to information appeals under *MFIPPA* and *FIPPA*.
- Three main stages to IPC's processes:
 - Intake
 - Mediation
 - Adjudication



Role of Intake Analyst

- Public Contacts – mail, phone and in-person;
- Screen out appeals from the process (eg. Non-jurisdiction);
- Issue Orders e.g. Deemed refusals;
- Other types of duties:
 - Clarify appeals;
 - Explain appeal process;
 - Redirect to other government organizations;
 - Call re: late appeals.



Intake - Screening

- Registrar and Analysts have delegated authority to screen out files where:
 - (a) The matter, on its face, is not within the IPC's jurisdiction (e.g. records from Royal Bank); or
 - (b) The matter falls within the IPC's jurisdiction, but the matter, on its face, is one that the IPC believes should not proceed through the appeal process e.g. employment-related, prosecution, decided before, out of time or crown brief.



Mediation

An appeal that moves to the Mediation stage is assigned to one of the following streams:

- Regular Appeal;
- Straightforward Appeal; or
- Reasonable Search Appeal.



Mediation – Straightforward

- Where the sole issue is a *time extension*;
- A short period is allocated for mediation;
- If unresolved, the Mediator also acts as an Adjudicator and has the authority to conduct an inquiry and issue an Order;
- The inquiry is conducted in writing.



Mediation – Reasonable Search

Where the sole issue is whether the institution has conducted a reasonable search for records responsive to the request:

- One Mediator attempts to settle the appeal;
- Another Mediator is designated as an Acting- Adjudicator, who will conduct an oral inquiry and issue an Order;
- The oral inquiry will be conducted in person or by teleconference.



Mediation - Regular

- The vast majority of appeals are processed in the Regular stream;
- The Mediator contacts the parties, explains the appeal process and the role of the Mediator, investigates the circumstance of the appeal and attempts to:
 - Settle all issues in the appeal; or
 - If not settled, narrow and clarify the issues that proceed to Adjudication.



Role of Mediator

The goal of the Mediator is to assist the parties:

- To clearly understand the appeal process and the issues in dispute;
- To reach a voluntary, mutually acceptable resolution of some or all issues in dispute;
- To clarify the issues and reduce the number of records and exemptions at issue;
- Where possible, provide advisory opinions based on past orders;
- To explore interest-based and rights-based approaches



Methods of Mediation

- Shuttle mediation by telephone;
- Conference calls;
- Face-to-Face mediation;
- We strongly encourage the last two methods due to the real benefits they present to the parties (enhanced mediation).



Revised Decisions

- Institutions can agree to disclose additional records and/or remove exemptions by issuing a revised decision at any stage of the appeal process.
- If a revised decision is issued during mediation, the appellant will review the revised decision along with the additional records and advise the Mediator whether or not he or she is satisfied.



The Mediator's Report

- MR is prepared at the end of the mediation.
- Sets out a description of the records, the issues and exemptions resolved and those remaining in dispute;
- Parties are given 10 days to review the Report for errors or omissions;
- The MR is provided to the parties and, if moving to adjudication, the Adjudicator.



Advantages of Mediation

- Parties can explain their respective positions;
- Retain control over the outcome;
- Issues are clarified, options generated, common ground discovered and agreements negotiated;
- Quicker and less costly;
- Win-win settlement that might not be possible through Adjudication;
- Builds trust, understanding and communication between parties and improves future interactions.



Key Elements of a Successful Mediation

- Prepare an Index of Records;
- Respond to the mediator in a timely fashion;
- Make an effort to understand the request, the appellant's real interests and the proposals;
- Provide background explanations – be prepared to discuss the general nature of the records and the reasons why they are being withheld;
- Ensure that decision makers are available to make decisions at the appropriate time;
- Give due consideration to the mediator's advisory opinion.



Adjudication

- Appeals may be streamed to the Adjudication stage either directly from Intake or from Mediation;
- At the Adjudication stage, an Adjudicator conducts an inquiry, either orally (by telephone or in person) or in writing, to dispose of the issues in the appeal.



Overview of Inquiry Process

- Generally, an inquiry involves an Adjudicator soliciting written representations from the parties on the issues in the appeal, one party at a time;
- Representations from one party are shared with other parties to the appeal unless there is an ***overriding confidentiality concern***; and
- Adjudicator issues a binding order disposing of the issues in the appeal.



Inquiry - Step 1

- 1st party Notice of Inquiry (NOI) sets out the facts and issues in the appeal and seeks representations from the party who bears the onus of proof, usually the institution;
- 1st party has 3 weeks to make submissions;
- Adjudicator decides whether to invite representations from the second party or issue an order if first party has not met its onus.



Inquiry - Step 2

- Second party (usually the appellant) is also invited to make representations in response to the same or a modified NOI, and is provided with a copy of first party's non-confidential representations;
- Second party has three weeks to submit representations, setting out their position on the issues identified in the NOI.



Inquiry - Step 3

- In some cases, the Adjudicator may send a further NOI to the first party, along with a copy of the second party's non-confidential representations, seeking their reply submissions;
- First party has 2 weeks to submit reply representations but may not raise any new issues in reply;
- Following this step, the Adjudicator issues an order addressing the issues in the appeal.



Reconsideration of a Decision

- Section 18 of the IPC Code of Procedure sets out the criteria for reconsideration of order or other IPC decision. The party seeking reconsideration must establish:
 - A fundamental defect in the adjudication process;
 - Some other jurisdictional defect in the decision; or
 - A clerical error, accidental error or omission or other similar error in the decision;
- The IPC will not reconsider simply on the basis of new evidence being provided.



Issues & Orders



Open Government

Open Government supports and enables the right of access to information under *FIPPA/MFIPPA* by encouraging proactive disclosure of information.

The three pillars:

1. **Open Data:** proactive publication of data in free, accessible and machine-readable forms for public use [e.g. water test results].
2. **Open Dialogue:** using new ways to provide the public with a meaningful voice in planning, decision making [e.g. police carding consultations].
3. **Open Information:** proactive release of information about the operation of government [e.g., contracts].



Municipalities are in the Lead!

- Institutions in the broader public sector, particularly **municipalities**, are leading the way in Open Data, Open Information and Open Dialogue.
- Many have Open Government **strategies and action plans** outlining their vision, principles, priorities and planned activities.
- Most larger municipalities have **Open Data catalogues** (for example: Toronto, Guelph, Waterloo, Windsor).



The City of Guelph

Guelph received **award** last year from Institute of Public Administration of Canada (IPAC) and Deloitte.

- One of **top three cities** for advancing local government, responding to citizens' needs.
- Included:
 - comprehensive Open Government Action Plan
 - open Government Community Leadership Team
 - turned Council orientation into an online resource everyone can access



Open Contracting: Proactive Disclosure of Procurement Records



- The proactive disclosure of procurement records will improve the **transparency of government spending** and reduce resources required to respond to access to information requests.
- This paper provides guidance on how to make procurement records publically available, while protecting sensitive **third party information** and **personal information**.

Open Contracting:
Proactive Disclosure Of
Procurement Records

September 2015

Public Sector and MPP Accountability and Transparency Act, 2014

- Came into effect on January 1, 2016.
- Amends FIPPA and MFIPPA to include requirements for institutions to ensure the preservation of records.
- Heads of institutions will be required to take “reasonable measures” to preserve records.
- Amendments make it an offence to alter, conceal or destroy a record with the intention of denying access.
- These amendments reflect some of the IPC’s recommendations from a 2013 special investigation report, *Deleting Accountability: Records Management Practices of Political Staff*.



FIPPA and MFIPPA: Bill 8 — The Recordkeeping Amendments



FIPPA and MFIPPA: Bill 8 – The Recordkeeping Amendments

December 2015



- The Amendments — What's New
- Is My Institution Required to Comply With These Provisions?
- What are Records?
- What are the Requirements?
- What are Reasonable Measures?
- Implementation Strategies
- Information Management Strategies
- Duty to Document
- The Offence for Intentional Destruction or Alteration of Records

Disclosure In the Public Interest – ORDER MO-3295

- [MO-3295](#) – Algoma Public Health (APH) received an access request to a forensic review examining whether a conflict of interest existed regarding the appointment of their former interim CFO and if any funds were subsequently misappropriated or lost. APH granted access pursuant to “public interest override.”
- An affected party appealed APH’s decision, claiming possible exposure to civil liability and that public interest override did not apply.
- The IPC decided that there was a compelling public interest in disclosure of the record and the decision to disclose the record was upheld.



Contracting

- [MO-3178](#) - The York Catholic District School Board was asked for all negotiated leases relating to the land that it leased to a third party, but it denied access.
- We found no exemptions could be applied and ordered the leases disclosed.



Closed Meetings

- [MO-3228](#) – The Toronto District School Board denied access to an audit report on the basis it would reveal the substance of deliberations of a closed meeting.
- We ordered the report to be released as we determined that the financial interest matters discussed did not qualify for the exemption.




Councillor Records

- [MO-3281](#) – The City of Oshawa received a request for access to communications between a councillor and an individual who was retained by the city to investigate alleged wrongdoings of city staff.
- City denied access to the email saying it was not within its custody because it was sent from a personal email account.
- Our office ruled that the email account used is irrelevant if it is for city business and ordered the information to be released.



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



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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



Frivolous Requests

- [MO-3292](#) –Six access requests were made to the City of Brampton which could not find all the records. The requester then submitted nine new requests to illustrate which records should have emerged out of the original requests. The city explained why certain records could not be found and asked that the new requests be withdrawn and that any outstanding fees be paid.
- The requester did not pay the fees nor did he appeal to our office to which the city decided to deny access to the new requests citing them as frivolous, unreasonable and interfering with the city's operations.
- The requester filed an appeal with our office to which we upheld the city's decision finding his requests demonstrated a pattern of conduct that amounts to an abuse of the right of access.



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.



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. 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.



Privacy



What is a privacy breach?

- The Acts establish rules for institutions to follow to ensure the protection of individual privacy.
- Sections 27 – 35 of *MFIPPA* govern the collection, retention, use, disclosure and security of personal information
- A privacy breach occurs when personal information is collected, retained, used or disclosed in ways that are not in accordance with the provisions of the Acts.
- Among the most common breaches of privacy is the unauthorized disclosure of PI, contrary to section 32 of *MFIPPA*.
- An individual can file a complaint with the IPC if they believe their privacy has been compromised.
- The IPC can also initiate a complaint in the absence of an individual complainant.



Responding to a privacy breach: Best Practices

- The first two priorities are:
 - 1. Containment:** Identify the scope of the potential breach and take steps to contain it; and
 - 2. Notification:** Identify individuals whose privacy was breached and notify accordingly.
- Notify appropriate staff within organization
- Inform IPC Registrar
- Conduct internal investigation into the matter to review circumstances and adequacy of existing policies and procedures
- Address systemic issues
- Educate and train staff

See: **Privacy Breach Protocol – Guidelines for Government Organizations**

Case Study – Privacy Complaint

- IPC received a privacy complaint arising from PRP’s disclosure of an individual’s criminal charges to the Peel CAS.
- IPC found the disclosure was permitted under section 32(e) of *MFIPPA* in conjunction with section 72 of *CFSA (duty to report)*. Dismissed at Intake.
- Complainant filed a JR – Divisional Court recently dismissed the matter and found:
 1. IPC’s privacy investigations are immune from JR on the basis of parliamentary privilege; and
 2. In any event, IPC’s decision on the merits was “based on an accurate interpretation of the law and was reasonable in all respects.”



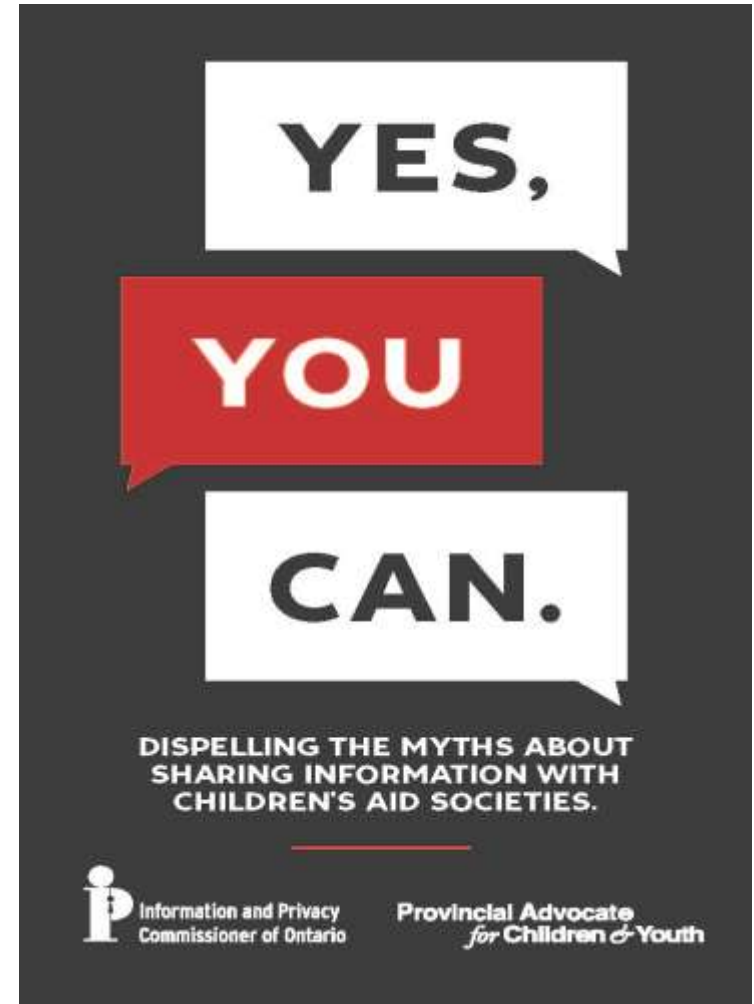
Disclosure to CAS Guidance

- Jeffrey Baldwin Coroner's inquest: 103 jury recommendations aimed at the Government of Ontario, the Ministry of Children and Youth Services, Children's Aid Societies, etc.
- At the inquest, CAS workers testified about the frustration they encountered when trying to obtain information from another party.
- IPC's position is that privacy should never be used as a barrier to ensuring the health and safety of individuals, especially children.
- The IPC worked with the Office of the Provincial Advocate for Children and Youth to develop guidance for institutions and health information custodians on permissible disclosures to CASs within the context of a child protection investigation.



Yes, You Can

- IPC collaborated with the Provincial Advocate for Children and Youth to develop this guide about privacy and Children's Aid Societies
- This guide dispels myths and explains that privacy legislation is not a barrier to sharing information about a child who may be at risk



Disclosure to Prevent Harm

- Ontario law (*FIPPA*, *MFIPPA*, *PHIPA* and *the Child and Family Services Act*) permits professionals working with children to share this information with a Children's Aid Society, including:
 - Teachers
 - Police officers
 - Health workers
 - Social service workers



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