### Canadian Institute Conducting Fair Investigations

## Privacy and Openness in Investigations

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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?

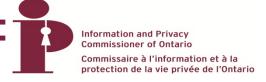
- privacy especially important in context of investigations
  - premature disclosure of personal information can undermine integrity of investigation
- note that FIPPA gives wide discretion to law enforcement investigators to decide what personal information may or may not be collected, used disclosed
  - 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:
  - o 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

- 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

- 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?

- 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

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



- 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?)

- 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")