

Recent Significant Orders and Practical Tips on Working with the IPC

**Sherry Liang,
Assistant Commissioner, Tribunal Services,
Office of the Information and Privacy Commissioner of Ontario**

**Don Fawcett,
Senior Counsel, Access and Privacy Law Group,
Ministry of Government and Consumer Services**

Ontario Connections

June 6, 2017

Sherry's Topics

- What is personal information?
- When can privacy rights take a backseat to access?
- Innocence Project case
- Solicitor-client privilege and settlements
- Practical tips for working with the IPC

Don's Topics

- Custody and Control of records held by an institution that may be personal or unrelated to the mandate of the institution.
- Managing frivolous and vexatious requests
- Application of the Charter to the exclusions of FIPPA and MFIPPA

What is Personal Information?



Professional information

- **PO-3617** – Request for names, specialties, and payments of OHIP’s top 100 billers
- Ministry of Health and Long-Term Care disclosed payment amounts and the specialties of some physicians, but withheld names and some identified specialties, claiming privacy invasion
- Noting that the principal of *stare decisis* does not apply to administrative tribunals and relying on the reasoning in PO-2225, IPC found that submitting OHIP billings and receiving payment is in a business/professional context and the records relating to that do not reveal anything about the physicians that is “inherently personal in nature.”

The records do not contain PI as they relate to a business or profession and their disclosure would not reveal PI, therefore the Ministry was ordered to disclose them.

Candidates for Political Office

- **MO-3420** – Request for information regarding election sign removal fees incurred by election candidates
- Town of Newmarket refused access to the names of election candidates on the basis that, until the candidates are elected, information about them as a candidate is their personal information
- Our office ordered the information to be released

The information, as it relates to candidates in their official capacity, is not personal information

Applicants for Citizen Advisory Committee

- **MO-3355** – Request for names of unsuccessful applicants to the Town's Waterfront Advisory Committee
- Town of Cobourg refused access based on the personal privacy exemption and the closed meeting exemption as the applications were considered at a closed meeting
- Our office upheld the town's decision, finding that the names of the unsuccessful candidates are PI as disclosure would reveal that they applied to be appointed and were unsuccessful, which is information about them in their personal capacities

The information is personal information and the public interest override did not apply

Requesters Under FIPPA/MFIPPA

- **PO-3695** – Request by affected party for name of appellant who had filed access request about the requester. (Requester had asked for detailed information about feed-in tariff contracts.)
- Independent Electricity System Operator decided to disclose the appellant's name because, in the context of the request, it was professional information, not personal information
- Appellant appealed saying his name, in the context of the access request, was personal as he was acting as a social justice advocate and watchdog
- IPC upheld the decision of the Independent Electricity System Operator

The appellant carries on business in the solar energy industry; his argument that his request was “unrelated to business purposes” was not convincing. His name, in the context of the access request, was not PI

Drug Advisory Committee Members

- **PO-3693- I** – Request for the names of Drug Advisory Committee members, who advise about which drugs are funded by the Workplace Safety and Insurance Board (WSIB)
- The WSIB refused access on the basis that the names were personal information
- Our office ordered disclosure of the names

As they are acting in a professional capacity when making recommendations regarding the composition and management of the WSIB's drug formularies, disclosure of their names does not reveal personal information about them.

Custody and Control

Custody and Control

- **PO-3612-I** Request for personal emails of employees *and* electronic record of staff entering workplace (card access)
- IPC held that personal emails of staff members on the institution's servers did not fall within the custody and control of institution. Followed **City of Ottawa v. Ontario**, 2010 ONSC 6835 (Div. Ct.)
- While an “Acceptable Use policy” governs employee personal use of email system, the policy is not sufficient to bring personal emails into control .
- However, IPC held that records of staff access to the workplace were within the control of the institution – although the record was not created as part of the delivery of government services, administrative records relating to day to day operations do fall within the control of the institution.

Custody and Control

Employee Emails

- **PO -3666** Request for email records of University Professor in relation to her work as an “expert witness”.
- **PO- 3715** Should email accounts of University medical residents be searched in response to an access request?
- Both decisions of the IPC review the application of FIPPA to emails of individuals who are employees of an institution, and where emails are maintained on the institution’s servers, but the emails may not relate to the institution's mandate and functions.
- Careful review and application of the IPC’s historical custody and control tests, the principles established in *City of Ottawa* case ,and the two-part control test of *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25.

Custody and Control

- **MO -3424-I** Access request for records created by municipal staff in relation to the management of a housing co-op
- **Issue:** when municipal staff are acting as agents for the Board of a Housing Co-op, are records created in that capacity within the custody and control of the municipality?
- IPC held that the records were created and used solely for the management of the co-op and relate to the co-op's mandate and functions and not the municipality's business.
- The IPC applied the two-part control test in **National Defence**

When can privacy rights take a backseat to access?

Government Expenditures

- **PO-3617** – Request for OHIP billing information
- The adjudicator ordered disclosure based on the finding that the information was not PI and was also not exempt under s.17
- In the alternative, he held that, if these exemptions had been found to apply, the public interest override in s.23 would also apply, such that he would order disclosure of the records

OHIP payments represent a significant part of health care spending, which consumes much of the provincial budget. Large expenditures of public funds relate to the public interest and therefore the Act's central purpose of shedding light on the operations of government. The public interest in transparency in regard to the allocation of taxpayer dollars is compelling, outweighing the purposes of the exemptions.

Mixed Personal Information

- **MO-3370** – Request for identity and address of dog owner whose animal bit the appellant
- City of Hamilton refused access until finding out that the affected person did not provide representations in the appeal. It then indicated that it agreed to disclose the name of the dog owner.
- Our office ordered disclosure of the name and address

The name and address was relevant to a fair determination of rights; requester needed the information to make a civil claim and disclosure would promote public health and safety as civil suits under the Dog Owners' Liability Act hold owners accountable.

Compassionate Disclosure

- **MO-3343** – Request for contents of requester’s father’s suicide note (note was addressed to his spouse, the affected party) and other records where the contents of the note is reproduced
- Greater/Grand Sudbury Police Services Board denied access based on s.14 (personal privacy)
- IPC found the records were the PI of the deceased and affected party. The part containing the PI of both is exempt as a presumed invasion of privacy under 14(3)(b), but that containing only the PI of the deceased is not exempt. Although the affected party objected to disclosure, IPC ordered part of the note and other records, containing only the PI of the deceased, disclosed under 14(4)(c) for compassionate reasons

Other Topics



Information and Privacy
Commissioner of Ontario

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

Frivolous and Vexatious

- **PO- 3691** -- Issue: Does a large number of requests at the same time from one requester constitute frivolous and vexatious conduct?
- OPGT advised a requester that it would limit the number of access requests it processed from a requester at any given time.
- IPC held that the number of requests submitted by a requester amounted to a pattern of conduct that interfered with the operations of the institution and were frivolous and vexatious.
- IPC restricted requester to five requests at one time.
- Contrast to same issue in **MO 3406** -- Town of Iroquois Falls (six requests at once)

Innocence Project Case

- **PO-3673-I** – Requester convicted of manslaughter in 1986 and released from prison in 1992, requested access to records relating to his homicide investigation, prosecution and conviction. He had commenced a court application to reopen his case based on wrongful conviction.
- Ministry of the Attorney General denied request on basis that the application for ministerial review of his conviction are proceedings in respect of a prosecution that had not been completed, so they are excluded from the application of FIPPA.
- Our office disagreed and continued to process the file

The current wrongful conviction proceedings are not in respect of the original prosecution of the requester. The appellant does not have a current and active right to appeal his conviction. The purposes for the prosecution exclusion are not engaged here.

Employment and Labour Relations

Exclusion and the *Charter*

- **PO -3686** Issue --Does denial of access to a record under the employment and labour relations exclusion violate section 2 (b) of the *Charter*?
- The appellant sought records subject to the employment records exclusion relating to his dismissal, and argued that the application of the employment-records exclusion violated his *Charter* right to freedom of expression within the meaning of section 2(b) of the *Charter*.
- IPC considered the Supreme Court of Canada's test in *Criminal Lawyer's Association* case and held that section 2(b) was not breached in the circumstances of this case as the appellant had an opportunity to engage in meaningful and detailed public expression about his dismissal from the University without access to the particular employment record he sought.
- *ONTARIO (PUBLIC SAFETY AND SECURITY) V. CRIMINAL LAWYERS' ASSOCIATION*, 2010 SCC 23

Solicitor-Client Privilege and Settlements

- **PO-3651** – Request for job titles and dollar amount of severance paid to managers at Niagara Health System (NHS)
- NHS refused access, claiming s.19(c) (litigation privilege). It claimed that the agreements containing the information were prepared in contemplation of or for use in the settlement of litigation.
- Our office upheld NHS's decision finding, in accordance with *LCBO v. Magnotta Winery Corp.* 2010 ONCA 681, that records prepared for use in the settlement of litigation are exempt under the statutory litigation privilege found in branch 2 of s.19. Further, the privilege had not been waived and NHS had exercised its discretion under that section in a proper manner.

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

- 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 – *Make Your Representations Detailed*

- 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



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

www.ipc.on.ca

info@ipc.on.ca

Media: media@ipc.on.ca / 416-326-3965



Information and Privacy
Commissioner of Ontario

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