

Access and Privacy in Ontario: Latest Developments

Brian Beamish

**Information and Privacy Commissioner
of Ontario**

**University of Alberta
Access and Privacy Conference
June 16, 2017**



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Ontario's Access & Privacy Laws

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)*



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What the IPC Looks Like

- 105 full-time employees
 - Approximately half in Tribunal Services Division
 - intake, mediation, adjudication
 - access appeals and privacy investigations
 - Legal, Communications, Policy
 - Minimal turnover
- Soon to expand by 20



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The Challenge

- Change in Commissioner after 16+ years
- Opportunity to re-examine focus of office
- Priority setting for five-year term



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Tasks

- Break entrenched habits
- Encourage new ways of thinking
 - Policy, Communications, Tribunal
- Review staff allocation
- Address perception of “two solitudes”



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Strengths

- Dedicated and skilled staff
- Known entity
- Familiarity with both policy and tribunal functions
- Ease of decision-making



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Initial Steps

- Strategic planning
- Re-org Assistant Commissioners
- Regular management meetings
- Strengthen connections with the Ontario Public Service



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Mission, Mandate & Values

- *MISSION*: We champion and uphold the public's right to know and right to privacy
- *MANDATE*: We resolve access to information appeals and privacy complaints, review and approve information practices, conduct research and deliver education and guidance on access and privacy issues, and comment on proposed legislation, programs and practices
- *VALUES*: **Respect, Integrity, Fairness, Collaboration and Excellence**



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Re-Focusing Office

- Concentrate on Ontario
 - government consultations
 - legislative reviews
 - guidance documents
 - public education
 - reaching Out to Ontario
- Increase focus on access to information
- Tribunal efficiency



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Other Steps

- Increased internal communications
- Dedicated budget for staff training
- Website renewal
- Review of tribunal processes



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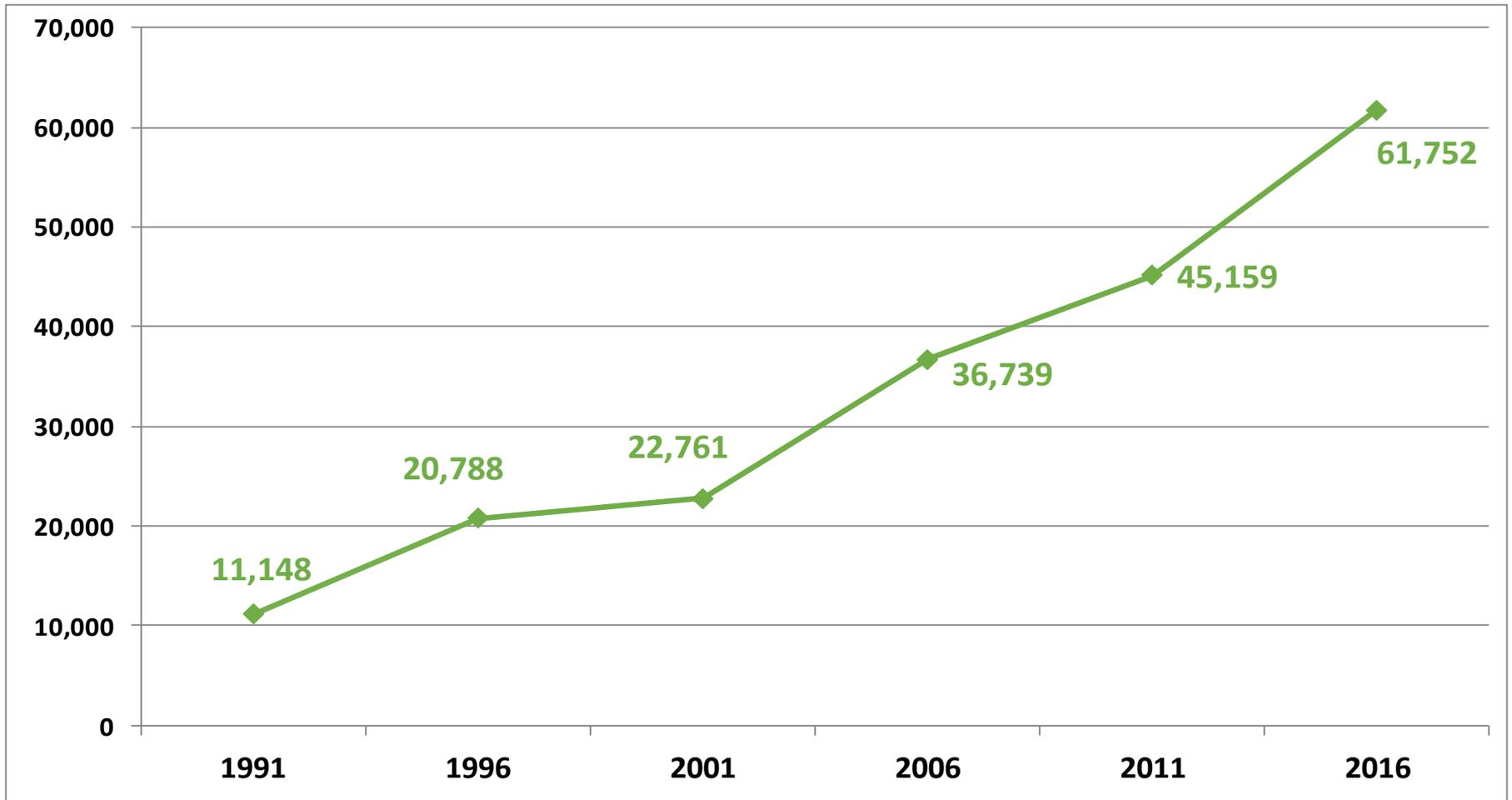
ACCESS



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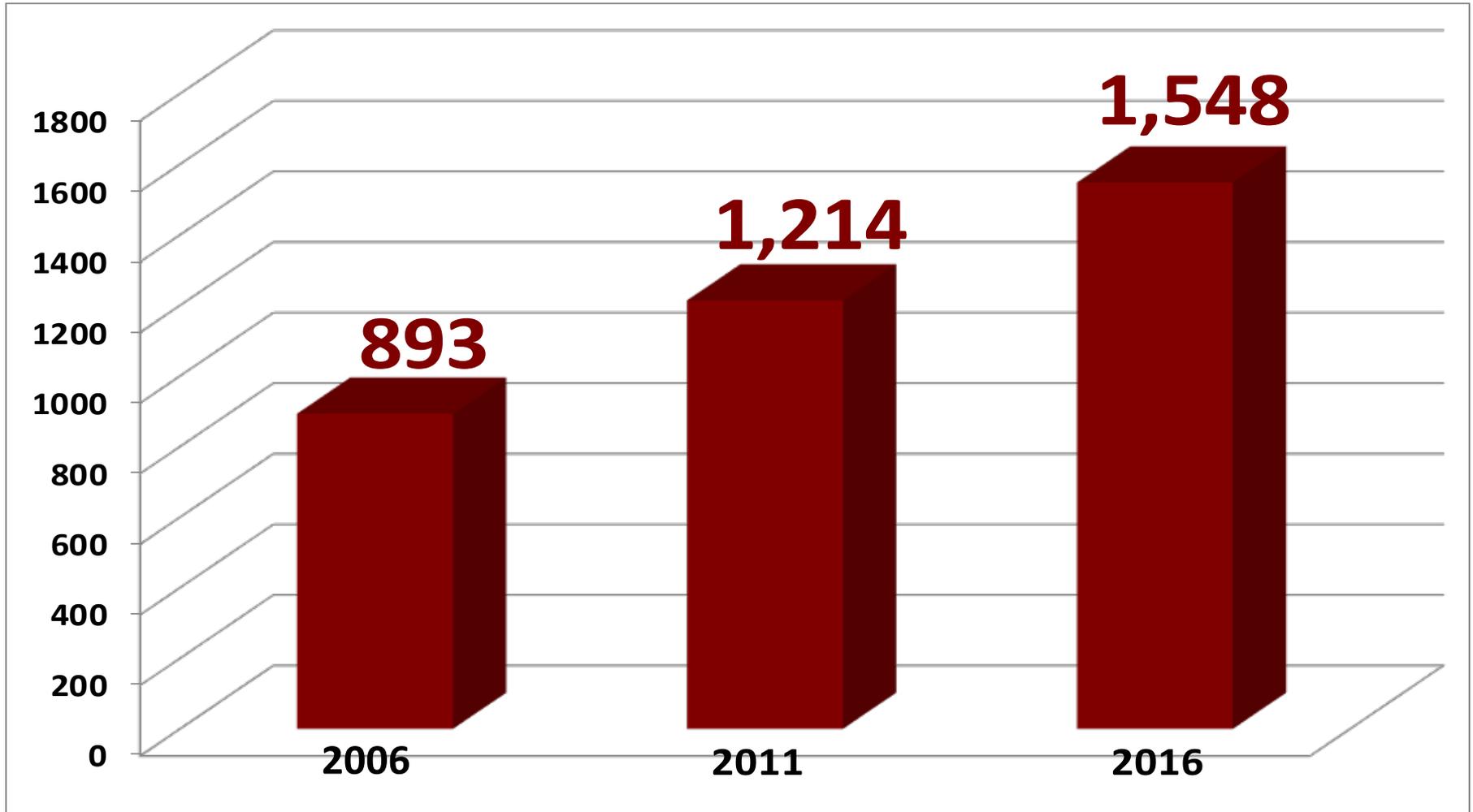
Total Access Requests Per Year



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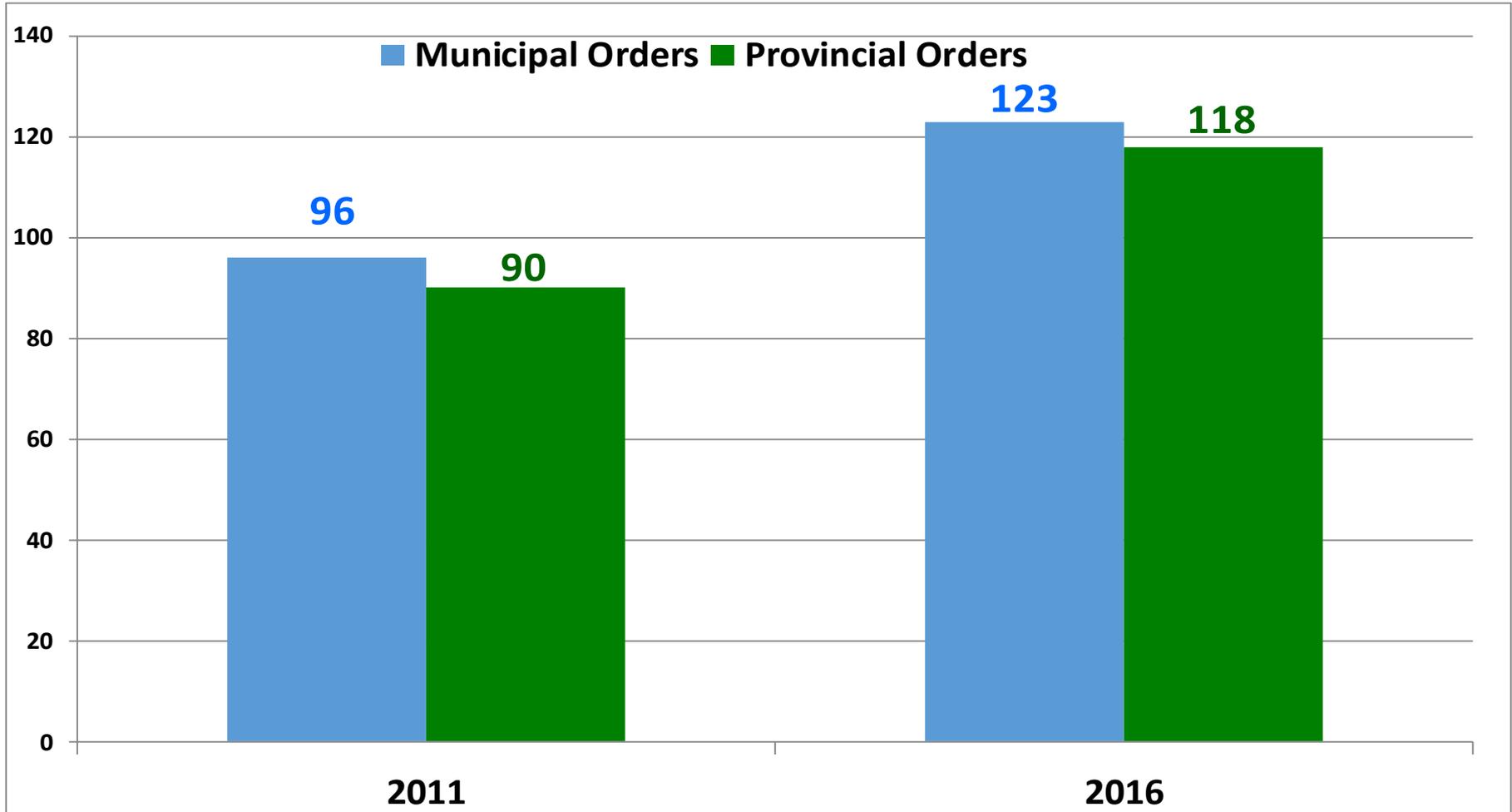
Total Appeals Received Per Year



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Total Access to Information Orders



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Mediation: Critical to Our Success

- Most appeals and privacy complaints are resolved by intake analysts and mediators
- Goal is to find a resolution which satisfies the needs of all involved
- Saves significant time and resources for all parties
- Usually, 75 per cent of appeals and almost all privacy complaints are closed before adjudication/investigation

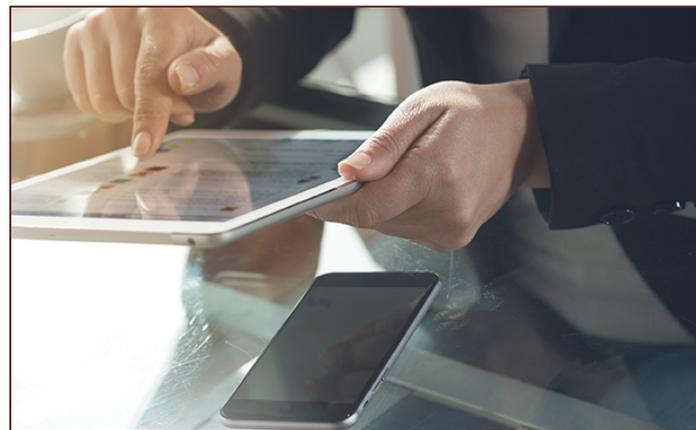


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Instant Messaging & Personal Email Accounts

- Personal email accounts and instant messages are subject to access requests
- Challenges include:
 - search and production
 - retention and preservation
 - privacy and security
- We advise institutions to prohibit use or preserve business records



Instant Messaging and
Personal Email Accounts:
Meeting Your Access and Privacy
Obligations

June 2016



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Solicitor-Client Privilege

- Increasingly, institutions have been unwilling to provide documents to the IPC where S/C privilege exemption claimed
- 2016 – Supreme Court of Canada found Alberta’s access law was not clear enough for Alberta IPC to compel production of records where S/C privilege claimed
- Recent Sask. Court considered different statutory language and conclude that Sask. access law permitted the review of S/C privileged records
- Ontario Legislature should amend access laws to reconfirm:
 - that the IPC can compel production of records claimed to be privileged, including S/C privilege
 - that providing records to the IPC does not constitute a waiver of S/C privilege



Frivolous and Vexatious Requests

- Section 4(1)(b) creates an exception to the right of access where the institution is of the opinion on reasonable grounds that the request for access is **frivolous** or **vexatious**
- Section 5.1 of Regulation 823 explains that a request is frivolous or vexatious if the request is:
 - part of a pattern of conduct that amounts to an **abuse of the right of access**
 - part of a pattern of conduct that would **interfere with the operations of the institution**
 - made in **bad faith** or
 - made for a **purpose other than to obtain access**



What makes a request frivolous or vexatious?

- Number of requests
- Nature and scope of requests – excessively broad/identical to previous requests
- Timing of requests – connected to some other event
- Purpose of requests – “nuisance” value/harass government/burden system
- Nature and quality of interaction/contact between requester and FOI staff



Example:

Frivolous and Vexatious Requests

IPC Order MO-2488

- High number of requests: **54 requests** with **372 parts** in total (an average of 6.5 parts per request)
- Requests excessively broad and unusually detailed: Open ended wording (“**any and all**”, “**including but not limited to**”)
- Purpose of the request for an objective other than access: The appellant **already possessed** many of the emails requested
- Timing of the requests: The close timing of **appellant’s lawsuit** and requests was a relevant factor in favour of finding an abuse of the right of access



MO-2488 *(Cont'd)*

The adjudicator imposed conditions on the processing of the appellant's requests:

- for one year, only **one transaction** by the appellant
- city may decide the **order** of processing remaining requests
- after the one-year period, the appellant or the city may apply for variance
- only one subject matter per request
- no other contact with city after request filed



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Public Interest Override

- Sections 23 and 16 of Ontario's *FIPPA and MFIPPA*, respectively:

An exemption from disclosure of a record...does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption

- Recent IPC decisions have applied the override to promote:
 - transparency in spending
 - accountability for actions



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Algoma Public Health

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



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Doctor's Billings

- Ministry of Health and Long-Term Care denied reporter's request to access the names and specialties of the top billers, claiming invasion of personal privacy
- IPC Order PO-3617 found this information to be in the public interest, *"...the concept of transparency, and in particular, the closely related goal of accountability, requires the identification of parties who receive substantial payments from the public purse."*
- Divisional Court of Ontario hearing this month about this order compelling the release of names of top 100 OHIP billers



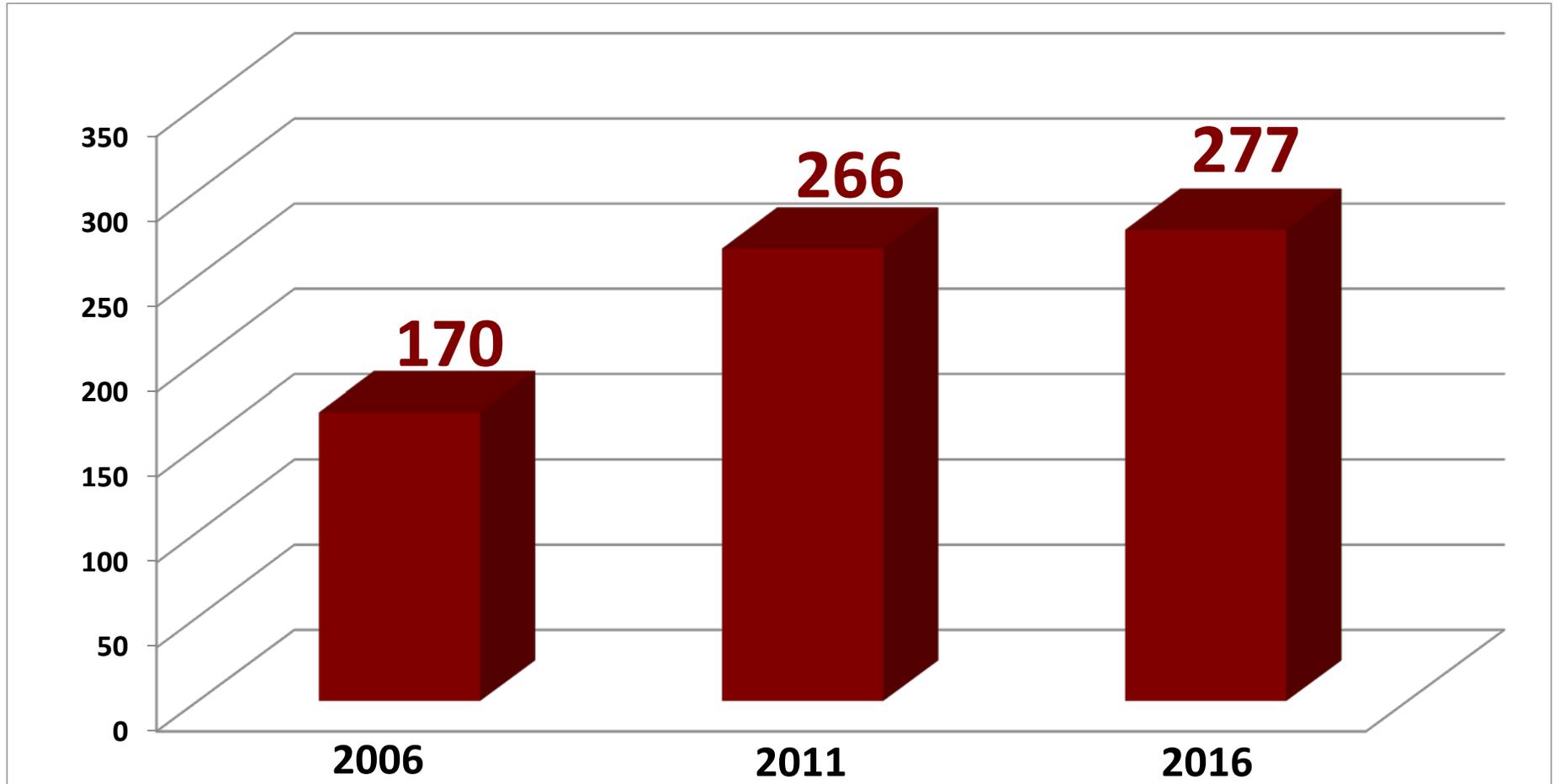
PRIVACY



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Total Privacy Complaints Opened Per Year

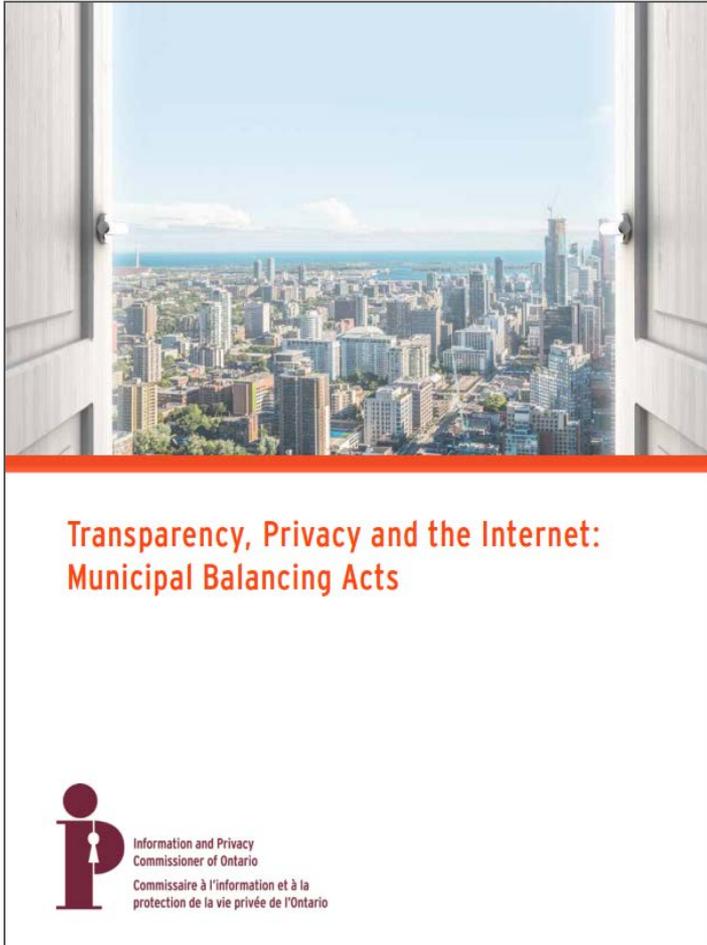


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Publishing on the Internet

- Guidance for privacy protective policy, procedural and technical options when publishing personal information online



Publishing on the Internet *(Cont'd)*

Privacy protection may be improved through a number of risk mitigation strategies:

- **Transparent administration**
 - when information received or video is recorded (e.g., council meetings), provide clear notice about how it will be published; manage expectations
- **Redaction**
 - develop a process where individuals can have their information redacted in certain circumstances; remove unnecessary information
- **Data minimization**
 - request and store only as much personal information as is necessary
- **Technological measures to limit searchability**
 - e.g., robot exclusion protocols, images instead of text



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Publishing on the Internet

Privacy Complaint Report MC13-67

- A complaint was received about a municipality's online publication of **personal information** collected as part of a minor variance application
- IPC found that the publication of this information was **not in contravention** of *MFIPPA* because the published information was required to be made publicly available under the *Planning Act*
- IPC, however, recommended that the City consider implementing privacy protective measures that obscure this type of information from search engines and automated agents



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Publishing Tribunal Decision

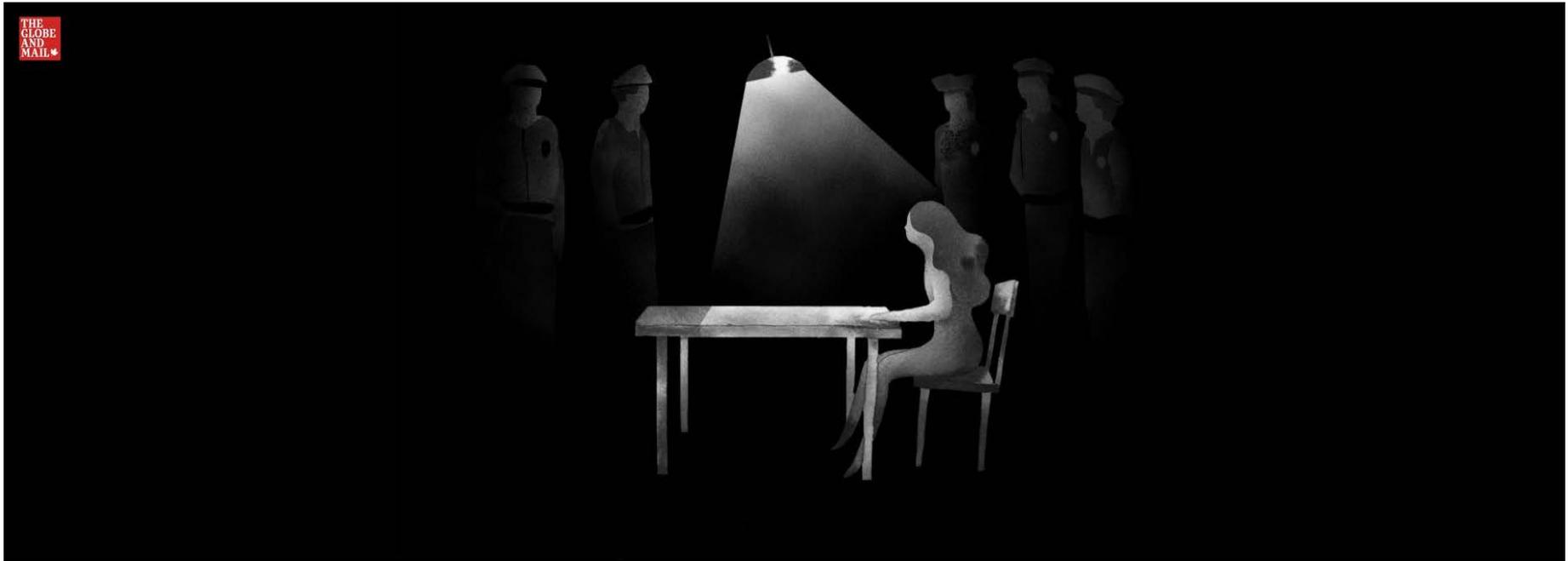
- Complainant was a member of a profession regulated by an administrative tribunal
- As a result of a complaint about this member, tribunal initiated a proceeding, concluding that the complainant had breached his professional duties, and imposed a lifetime ban on practicing within his profession
- Complainant alleged that **internet publication** of the tribunal's decision was violation of his privacy
- IPC **dismissed** the complaint at the intake stage:
 - tribunal had the authority to investigate and impose sanctions
 - continuing publication of the information about the complainant was consistent with the purpose for which it was collected, and **not a breach of FIPPA**



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Globe and Mail Series: 'Unfounded'



UNFOUNDED

WHY POLICE DISMISS 1 IN 5 SEXUAL ASSAULT CLAIMS AS BASELESS



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The Philadelphia Model

- Annual meeting of advocates, representatives from the Women's Law Project and high-ranking officers
- Search of police sexual assault files to look for deficiencies and biases
- Now in its 17th year
- Since implemented, 'unfounded rape' rate has dropped to four per cent, compared to the national average of seven per cent



Working with Police on an Ontario-based Philadelphia Model

- Describe the purposes of the program
- Identify external partners with experience to assist with the review of sexual assault files and appoint them agents of the service
- Ensure external reviewers are subject to a background check and sign an oath of confidentiality
- Provide external reviewers with privacy and confidentiality training
- Determine which classes of case files will be reviewed



Working with Police on an Ontario-based Philadelphia Model *(Cont'd)*

- Require external reviewers to see names of principals so they can recuse themselves if they are known to them outside of a professional context
- Permit external reviewers to review complete closed files, including the personal information they contain, subject only to redactions or restrictions required by law
- Ensure reviews take place at police facilities and no identifying information is copied, retained or removed by agents



Interview with Globe and Mail

May 31, 2017

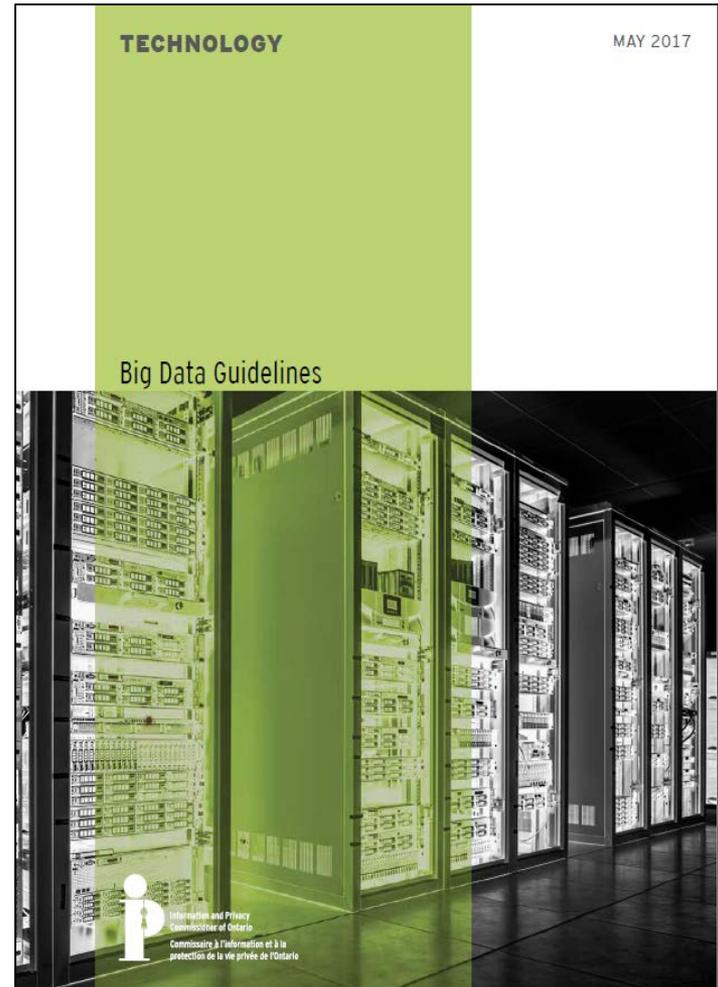
“It is my view that external review of sexual-assault case files can make an important contribution to improving the investigation of sexual assault complaints while complying with privacy requirements, including through the use of agreements, oaths of confidentiality and privacy and confidentiality training.”

~ Brian Beamish, Commissioner



Big Data Guidelines

- Guidelines discuss key issues to consider when conducting big data projects
- Outlines the considerations at each stage of a big data project, including:
 - collection
 - integration
 - analysis
 - profiling



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Data Integration: Recommended *FIPPA* and *MFIPPA* Reforms

- IPC recommends a strong legislative framework to manage privacy risks of data integration projects
- Legislation should include effective governance, oversight and measures to prevent privacy risks, including:
 - additional investigation, order making and audit powers for the IPC
 - mandatory breach notification and reporting
 - requirements for privacy impact assessments
 - requirements for de-identification



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HEALTH

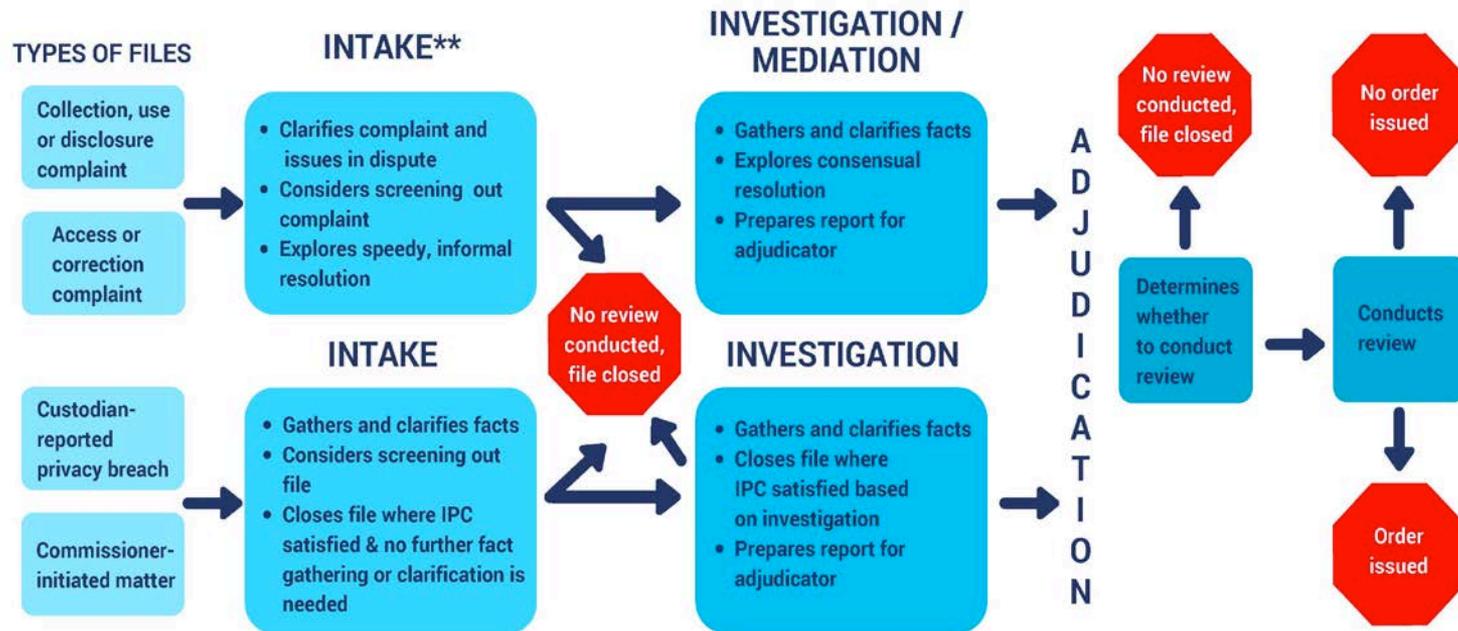


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Simplifying the *PHIPA* Process

PHIPA Processes Flowchart



* The above process may be varied at the discretion of the IPC to achieve the fair, just and timely resolution of proceedings before the Commissioner or his delegates. Note specifically that urgent matters may be expedited to the adjudication stage.

** In addition to the general procedures outlined in the above flowchart, Intake also adjudicates time-sensitive complaints related to deemed refusals, failures to provide access and expedited access requests.



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PHIPA Decisions

- Interaction between *FIPPA* and *PHIPA* access provisions:
PHIPA Decision 17
- What is a reasonable search in response to an access request?
PHIPA Decision 18
- Can a complaint be made about a refusal to disclose?
PHIPA Decisions 19, 20, 21, 22
- Approach to issuing an interim order: *PHIPA* Decision 23
- Decision not to conduct a review: *PHIPA* Decision 32
- Duty to correct health records: *PHIPA* Decisions 36, 37, 39, 41
- Alleged breach of collection, use and disclosure provisions of *PHIPA* by hospital: *PHIPA* Decision 38



Unauthorized Access

- The IPC receives 300-350 complaints per year about privacy breaches in the health sector
- Most are caused by carelessness, e.g. loss or theft of portable devices or misdirected emails or faxes
- Two or three cases per month of intentional “snooping,” unauthorized access to records of PHI
- Very few snooping cases have resulted in orders
 - custodians (mainly hospitals) take these cases seriously and take steps to address the IPC’s concerns about systemic issues that contribute to snooping



New Challenges

Education and Quality Improvement

There have been a number of instances of unauthorized access where individuals have used the rationale that it was for:

- educational purposes
- improving the quality of the health care they provide



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Most Recent *PHIPA* Prosecution

- March 2015, the IPC was notified that a Masters of Social Work student on educational placement illegally accessed health records of family, friends and other individuals
- IPC investigated and referred matter to the Attorney General (AG)
- In her plea, student admitted to unlawfully accessing health records of 139 individuals between September 9, 2014 and March 5, 2015



Most Recent *PHIPA* Prosecution *(Cont'd)*

- *“The various victims have provided victim impact statements which are quite telling in terms of the sense of violation, the loss of trust, the loss of faith in their own health care community, and the utter disrespect [the accused] displayed towards these individuals.”*
- *“I have to take [the effect of deterrence on the accused] into consideration, but realistically, it’s general deterrence, and that has to deal with every other health care professional or someone who is governed by this piece of legislation. This is an important piece of legislation ...”*

– Justice of the Peace, Anna Hampson



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PHIPA Amendments

- *PHIPA* amendments that have been proclaimed in force:
 - privacy breaches meeting a threshold must be reported to IPC and health regulatory colleges (in certain circumstances)
 - Threshold to be prescribed in regulation
 - six-month time limit on laying charges under *PHIPA* removed
 - fines for offences under *PHIPA* doubled to \$100,000 for individuals and \$500,000 for organizations
 - persons other than AG may commence prosecution, with AG's consent



Communicating PHI by Email

- Fact sheet describes the risks of using email and custodians' obligations under *PHIPA*
- Outlines technical, physical and administrative safeguards to protect personal health information (PHI)
- IPC expects encryption for email between custodians, barring exceptional circumstances



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Fact Sheet

Communicating Personal Health Information by Email

September 2016

Email is one of the dominant forms of communication today. Individuals and organizations have come to rely on its convenience, speed and economy for both personal and professional purposes. Health information custodians (custodians) are no exception. While email offers many benefits, it also poses risks to the privacy of individuals and to the security of personal health information. It is important for custodians to understand these risks and take steps to mitigate them before using email in their professional communications.

OBLIGATIONS UNDER THE PERSONAL HEALTH INFORMATION PROTECTION ACT

The *Personal Health Information Protection Act* establishes rules for protecting the privacy of individuals and the confidentiality of their personal health information, while at the same time facilitating effective and timely health care. Custodians have a duty to ensure that health records in their custody or control are retained, transferred and disposed of in a secure manner. They are also required to take reasonable steps to protect personal health information against theft, loss and unauthorized use or disclosure.

UNDERSTANDING THE RISKS

Like most forms of communication, email entails an element of risk. An email can be inadvertently sent to the wrong recipient, for example, by mistyping an email address or using the autocomplete feature. Email is often accessed on portable devices, such as smart phones, tablets and laptops, which are vulnerable to theft and loss. An email can also be forwarded or changed without the knowledge or permission of the original sender. Email may also be vulnerable to interception and hacking by unauthorized third parties.

Personal health information is sensitive in nature. Its unauthorized collection, use or disclosure may have far-reaching consequences for individuals, including stigmatization, discrimination and psychological harm. For custodians and their agents, privacy breaches may result in disciplinary proceedings, prosecutions and lawsuits. In addition, such privacy breaches may result in a loss of trust and confidence in the entire health sector that was entrusted to protect this sensitive information.



Communicating PHI by Email *(Cont'd)*

- For emailing PHI between custodians and patients:
 - use encryption where feasible
 - where encryption is not feasible, only communicate PHI through unencrypted email where reasonable using risk-based approach
 - approach to emailing patients should be captured in a written policy
 - notify patients of email policy and obtain consent prior to use of unencrypted email
- Even with patient consent: custodian has a duty to limit the amount and type of PHI included in an email
- Custodians have obligation to retain and dispose of emails containing PHI in a secure manner



RESOURCES



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Find out about privacy rights

LEARN MORE



Go to forms



Request records



File an appeal



Make a complaint



Search IPC Decisions



Contact the IPC

What's New

New Big Data Guidelines

Media Centre

Health Record Snooping Case
Prosecuted in Goderich

IPC webinar series

Watch our webinar on Understanding
Exemptions in FIPPA and MFIPPA

@ipcinforprivacy

Our #BigData Guidelines are available! 27m
Please share and RT.
<https://t.co/zyQ3aTOQ05>
<https://t.co/L4f27PRTwm>

Learn what #FOI requesters can do to 5h
support the search for records
<https://t.co/kr0x3xnbnP>
<https://t.co/5cxaBwRg15>

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Recent Decisions

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MO-3426 2017-04-11	Information and Privacy Commissioner of Ontario The appellant submitted a request to the City of Toronto under the Municipal Freedom of Information and Protection of Privacy Act for records relating to any complaints received regarding his property. The city located responsive records and granted the appellant partial access to the records claiming that disclosure of most of the informa ... Read More
PO-3719 2017-04-07	
PO-3720 2017-04-07	
PO-3719-1 2017-04-06	

Guidance Documents

- Yes, You Can
- Thinking about Clouds
- Instant Messaging and Personal Email Accounts
- De-identification Guidelines for Structured Data
- Open Government (3)
- Guidance on the Use of Automated Licence Plate Recognition Technology by Police Services
- Improving Access and Privacy with Records and Information Management
- Online Educational Services



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IPC Fact Sheets

- Published to provide information in response to frequently asked questions about access, privacy and technology
- Series includes:
 - Reasonable Search
 - Councillors' Records
 - What is Personal Information?
 - Video Surveillance
 - Ransomware

APRIL 2017

ACCESS FACT SHEET

Reasonable Search

Ontario's access and privacy laws require public institutions to conduct a reasonable search for responsive records when they receive a request for access to information.

Requesters who are not satisfied with the search or believe that additional records may exist have the right to file an appeal with the Office of the Information and Privacy Commissioner (IPC). The IPC may review the search conducted by the institution to determine if it was reasonable. If the IPC decides that the search is not reasonable, it can order the institution to conduct a further search.

This fact sheet explains what a reasonable search is, how institutions can comply with their search obligations, how requesters can support institutions' efforts to find responsive records, and the role of the IPC in an appeal.

Requesters who are not satisfied with the search or believe that additional records may exist have the right to file an appeal with the Information and Privacy Commissioner.

WHAT IS A REASONABLE SEARCH?

A reasonable search occurs when an experienced employee who is knowledgeable in the subject matter of the request makes a reasonable effort to locate records related to the request.¹

A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

¹ Orders M-909, PO-2469 and PO-2592.

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Reaching Out to Ontario (ROTO)

- Outreach program to engage with stakeholders across Ontario
- IPC hosts events on latest access and privacy developments
 - St. Catharines
 - Ottawa
 - Sault Ste. Marie
 - Kingston
 - London
 - Thunder Bay



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IPC Webinars

- New series on timely, in-demand topics about access to information and privacy issues
- First two presentations are available on our website
 - [Situation Tables](#)
 - [Understanding Exemptions in *FIPPA* and *MFIPPA*](#)



New Publications Coming Soon

- This summer and fall the IPC will issue new publications focusing on:
 - breach notification guidelines on compliance with recent *PHIPA* amendments
 - frivolous and vexatious access requests
 - access fees



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