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# IPC PERSPECTIVES

INFORMATION AND PRIVACY COMMISSIONER / ONTARIO

ANN CAVOUKIAN, Ph.D., COMMISSIONER



Commissioner Ann Cavoukian; Ken Anderson, the IPC's Director of Legal and Corporate Services (right), and John Swaigen, of the IPC's legal department, discuss the IPC's outreach program to Ontario legal clinics. See story on page 3.

## Draft privacy legislation welcomed; Commissioner proposes improvements

Ontario Information and Privacy Commissioner Ann Cavoukian is pleased with the extensive scope of the province's recently released draft privacy legislation — the *Privacy of Personal Information Act, 2002* — but has made a number of specific recommendations for improvements.

The Commissioner has sent a letter and a detailed submission to Norman Sterling, Minister of Consumer and Business Services. The Commissioner commended the Minister for releasing a consultation

draft for public comment prior to its introduction in the Legislature.

The Commissioner said that she was “particularly pleased with the broad scope of the proposed legislation.... The combining of general rules with health-specific rules for privacy protection does indeed make for a complex piece of legislation. Nonetheless, I strongly support the government in its desire to create a single comprehensive piece of privacy legislation. It is essential that both the health

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## Recent IPC publications

The IPC has issued (in order of publication) the following publications and submissions since the last edition of *Perspectives*:

1. ***Working with the Municipal Freedom of Information and Protection of Privacy Act: A Councillor's Guide*** provides a brief description of the City of Ottawa's corporate program for access to information and protection of privacy, and focuses particularly on how the Act applies to both records requested by, and in the possession of, elected members of Council. November 2001.
2. ***Backgrounder for Senior Managers and Privacy Co-ordinators: Raising the profile of Access and Privacy in your institution.*** Each provincial and municipal government organization has a Co-ordinator. This Backgrounder, produced by the IPC and the Ministry of Natural Resources, looks at ways Co-ordinators can help staff integrate an awareness and understanding of access and privacy into their daily work. December 2001.
3. ***Exercising Discretion under section 38(b) of the Municipal Freedom of Information and Protection of Privacy Act*** provides institutions with an outline of what constitutes a valid exercise of discretion in the application of section 38(b), and some practical tips on how to properly exercise discretion when dealing with a specific category of records. Produced by the Toronto Police Service and the Information and Privacy Commissioner/Ontario. January 2002.
4. ***If you wanted to know... What are the 15 most frequently asked questions the Information and Privacy Commissioner receives?*** This is the latest release in the IPC's *If you wanted to know...* series. February 2002.
5. ***Submission to the Ministry of Consumer and Business Services: Consultation Draft of the Privacy of Personal Information Act, 2002.*** February 2002.

All of these publications and more are available on the IPC's Web site at [www.ipc.on.ca](http://www.ipc.on.ca).

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## Windsor and Area Educational Initiative

The next IPC outreach project under our *Reaching out to Ontario* program is the *Windsor and Area Educational Initiative*, May 16 and 17.

A number of presentations were still being finalized when this edition of *IPC Perspectives* went to press, but this initiative will include:

- a seminar for Freedom of Information Co-ordinators from the western portion of southwestern Ontario, at 2 p.m., May 16;
- meetings with education consultants from area school boards re: the IPC's teachers' guides for elementary and secondary school teachers;
- a public information meeting at the Windsor Public Library, 7 p.m., May 16;
- a presentation by Assistant Commissioner Tom Mitchinson to the Windsor Chamber of Commerce at a breakfast meeting May 17;
- presentations to several Grade 5 classes;
- and a number of other meetings for which arrangements are still being made.

The first *Reaching out to Ontario* initiative of 2002 was the *Central Ontario Educational Initiative* in the Barrie area March 26.

Two more initiatives are tentatively planned for this fall (Sault Ste. Marie and Mississauga).



# Legal clinics helping IPC tell the public about its rights

The Information and Privacy Commission has a multi-faceted outreach program aimed at helping to educate Ontarians about their access and privacy rights. As well as a variety of broadly based programs, the IPC reaches out to specific organizations that frequently deal with the public. Groups as diverse as librarians, the media and legal clinics are offered speakers and educational material.

Among the local organizations contacted when the IPC is planning an educational initiative under its *Reaching out to Ontario* program are legal clinics. Since this aspect of program was launched two years ago, legal counsel from the IPC have made presentations to community legal clinics in Barrie, Belleville, Halton Region, Hamilton, Kingston, Kitchener, Sudbury and Thunder Bay. Presentations are planned at clinics in three more cities this year.

Community legal clinics were first established in Ontario in the early 1970s to help low-income and disadvantaged people to assert their legal rights to obtain the fundamental entitlements of life — food and shelter. Clinic lawyers and community legal workers represent and provide advice to people with problems related to landlord-tenant disputes, workers' compensation, employment insurance, social assistance, refugee and immigration law, and human rights.

John Swaigen, a member of the IPC's legal department — and a former clinic lawyer and former director of quality assurance for the clinic system — makes most of the IPC presentations at clinics.



John Swaigen of the IPC's legal department.

“These presentations and question and answer sessions serve two purposes,” said Swaigen. “They inform the clinics about specific access and privacy issues, such as mandatory drug testing and treatment for social assistance applicants, and they raise public awareness of the IPC and its objectives.”

The presentations include a review of key provisions of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*, privacy principles, how the access process works, and citizens' rights of appeal.

The IPC speakers often get a wide range of questions, as many of the issues that a legal clinic is involved in deal with the collection by a government organization of personal information, or efforts to access information held by a government organization.

Often, individuals are not sure what their rights are. Legal clinics instruct their clients about what types of information gathering go beyond fair information practices. On behalf of a client, clinic staff may seek a copy of the information a government agency is relying on to deny benefits and may challenge its accuracy.

Requests from legal clinics for IPC publications have increased since this outreach program was launched.

“The IPC has had an excellent response to sessions at legal clinics,” said Swaigen. “The clinics are helping to raise the public's awareness of privacy and access rights.”



## Mediation teams restructured

Although it's business as usual for appellants, complainants and institutions, there has been a seamless behind-the-scenes change to the structure of the IPC's Tribunal Services Department's mediation teams.

Formerly, there were two managers of mediation, one for the provincial mediation team, the other for the municipal team. Now we

have one mediation manager in charge of the full mediation program, supported by two team leaders.

Irena Pascoe is the provincial mediation team leader, while the municipal team is led by Mona Wong. Each team leader oversees a team of six mediators, including part-time staff, and both team leaders report to Diane Frank, the manager of mediation.

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## Upcoming presentations

*The Commissioner and IPC staff members make presentations to more than 100 groups each year. Among the major presentations coming up in the near future are:*

**April 17.** Commissioner **Ann Cavoukian** is speaking on a panel of distinguished experts discussing the privacy implications of anti-terrorism legislation at the 12<sup>th</sup> annual *Conference on Computers, Freedom and Privacy* in San Francisco.

**May 10.** Commissioner **Ann Cavoukian** joins Assistant Commissioner **Tom Mitchinson**, General Counsel **William Challis** and Manager of Adjudication **David Goodis** at *Open Government: Freedom of Information Law In Ontario* — an Ontario Bar Association continuing legal education conference, organized by the IPC and the Ministry of the Attorney General.

**May 16.** A team from the IPC is holding a public information meeting at the Windsor Public Library at 7 p.m., one of a series of presentations being conducted as part of the two-day *Windsor and Area Educational Initiative*, part of the IPC's *Reaching out to Ontario* program.

**May 17.** Assistant Commissioner **Tom Mitchinson** is making a special presentation to the Windsor Chamber of Commerce at a breakfast meeting, another of the key sessions during the *Windsor and Area Educational Initiative*.

The presentation will focus on how businesses can respond to the critical issue of privacy.

**May 29.** **Ken Anderson**, the IPC's Director of Legal and Corporate Services, will address a legal and IT audience on the topic of Internet privacy at the Internet Law Conference in Toronto. He will review Ontario's proposed *Privacy of Personal Information Act, 2002*, and discuss privacy in the post 9-11 era.

**June 5.** Commissioner **Ann Cavoukian** is a special guest speaker at a conference — organized by the Centre for Innovation — at the Faculty of Law at the University of Toronto. She will discuss the proposed privacy legislation and how she sees it moving forward.

**June 17.** Commissioner **Ann Cavoukian** is a keynote speaker at the Canadian Institute Forum on Health Care Privacy in Toronto. Her presentation will focus on the personal and public interest imperatives in Ontario's proposed privacy legislation. **Brian Beamish**, the IPC's Director of Policy and Compliance, is participating on a panel addressing personal health information.

**July 11.** **Ken Anderson**, Director of Legal and Corporate Services, will speak at a Canadian Institute session in Toronto on the fundamentals of pension governance. His presentation is entitled, *Complying with New Privacy Laws*.





**Draft privacy legislation**

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sector and the broader private sector are covered by privacy legislation.”

The foundation of the draft privacy legislation is the 10 principles of the Canadian Standards Association’s *Model Code for the Protection of Personal Information* — which is also the basis of the federal private sector legislation.

While noting in her letter to Minister Sterling that she was “supportive of the overall objective,” the Commissioner stressed that the draft legislation needed “to be improved and strengthened in a number of critical areas in order to strike the right balance between protecting individual privacy rights and the reasonable needs of organizations in Ontario.”

The majority of the Commissioner’s concerns fall under four overall themes. These are:

- **Drafting Issues:** The legislation is overly complex because of problems with the drafting — difficult and ambiguous language, inconsistencies, redundancies and duplication. The most critical issue to be clarified is the application of express and implied consent.
- **Enhancing Consent:** The privacy protections afforded by the legislation are based upon individuals being able to knowledgeably give or withhold their consent regarding matters associated with their personal information. “While recognizing that certain situations may necessitate the collection, use or disclosure of personal information without the individual’s consent, I’m concerned that the exemptions to consent in the draft legislation are too broad,” the Commissioner said in her letter to the Minister. “In our submission, we have highlighted those exemptions which we think are unreasonable and, therefore, should be

removed or narrowed. We have also indicated where notice should be required, for those circumstances when consent is not appropriate or possible. This enables the individual to make informed decisions and to take action, if necessary.”

- **Strengthening Oversight:** While generally supportive of the scope of the powers provided for in the draft legislation, the Commissioner

is concerned by the fact that her office would be unable to require an individual to give testimony. When an oversight body does not have clear authority to compel testimony as part of the evidence-gathering process, it cannot adequately assess the extent to which organizations are complying with

their responsibilities. In turn, the public cannot be confident that organizations are being held accountable for their information-management practices.

- **Reducing the Scope of the Regulations:** The Commissioner’s submission stresses that the regulation provisions in the draft legislation are too broad. A number of these provisions could result in an erosion of the fundamental rights and responsibilities set out in the draft legislation, and she has recommended they be eliminated. As well, she suggests provisions be added to ensure the regulation-making process is more transparent and accountable.

“The consultation draft of the *Privacy of Personal Information Act, 2002* is an important step forward toward enacting privacy legislation for the broader private and health sectors,” said the Commissioner. “I look forward to continued discussions between the IPC and Minister Sterling’s offices as the legislation proceeds.”



Commissioner Ann Cavoukian, Brian Beamish, the IPC’s Director of Policy and Compliance (centre), and Greg Keeling, Director of Strategic Planning and the Commissioner’s acting Executive Assistant, discuss the IPC’s submission re: the proposed *Privacy of Personal Information Act, 2002*.



# Mediation success stories

*“Mediation success stories” is a regular column highlighting several of the recent appeals that have been resolved through mediation.*

## Seeking consent

The Ministry of the Solicitor General received a request from a member of the media for answers to five questions regarding a competition for appointment to a particular police services board. The Ministry provided answers to four of the questions but denied access to records responsive to where the unsuccessful applicants resided, on the basis that this would be an unjustified invasion of their privacy.

The Ministry’s decision was appealed. During mediation, the mediator explored the interests and issues of both parties. The appellant advised that a broad range of communities were not represented on the board and his interest was to see if applicants had in fact applied from a variety of communities. The Ministry’s concern was that several applicants lived in communities so small that releasing names of their communities could serve to identify them, even in the absence of their names.

With the agreement of the parties, the mediator contacted the unsuccessful applicants and sought their consent to release the names of the communities they resided in. While recognizing that it was still possible to be identified by the release of the name of their community, two of the three applicants consented to the release. The appellant was satisfied to receive the two community names and decided not to pursue the appeal further.

## Providing a detailed explanation

The Toronto Police Service received a request for a copy of a 911-call report about the requester. The call had been made from a doughnut store where the requester had been a customer.

The police located five reports and provided the requester with partial access. Certain information was severed under section 14 (personal information). The decision letter also noted that the police were unable to confirm that the requester is the subject of the reports.

The requester (now the appellant) appealed on the basis that records relating to him should exist. He stated that store staff had told him they had called 911, and later a police officer instructed him to leave the store.

The mediator contacted staff in the Police Services’ Freedom of Information and Privacy office and was provided with the following explanation. After an initial search using the appellant’s name did not produce any records, staff then searched all records relating to 911 calls for a four-month period. They removed from this subgroup all records in which the subject of the call was named, or identified as a woman, or identified as a group. Five 911 reports remained in which the subject of the call from the store in question was an unnamed male. Those records were disclosed (with minor severances) to the appellant in the event that he might be able to identify himself in one of those records.

Once the mediator provided this explanation to the appellant, he was satisfied and considered his appeal resolved.

## Interest-based mediation

An appellant filed six appeals resulting from related requests he had made to the Ministry of Natural Resources. Although each request was distinct in nature, all related to the same issue — the sale of cottage lots.

The Ministry’s decisions varied from case to case: it either granted partial access, denied access in full on the basis that the information was publicly available, or claimed that no records exist. From reviewing the parties’ correspondence, it was evident that there was an ongoing relationship between them over this issue. Not only had the requester (now the appellant) filed access requests, but he had also been corresponding directly with the Ministry’s program area staff.

During mediation, the mediator discussed all of the files collectively with the parties, in hopes

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# Summaries

*“Summaries” is a regular column highlighting significant orders and privacy investigations.*

## **Order PO-1886 Appeals PA-000183-1 and PA-000181-1 Ministry of Consumer and Business Services**

The Ministry of Consumer and Business Services received a request for access to the names and country of birth of the parents of two individuals who themselves had been dead for more than 30 years. The requester represents a company that traces heirs and provides genealogical research services for individuals and families.

The Ministry denied the request on the basis that disclosure would constitute an unjustified invasion of the privacy of the individuals who are identified in the records. In doing so, it relied on section 2(2), which states that “personal information does not include information about an individual who has been dead for more than

30 years.” The Ministry calculated that the individuals could have lived to approximately 95 years of age, and then added the 30 years referred to in section 2(2) to come up with the appropriate date to be applied in the circumstances.

The requester (now the appellant) appealed the decision. He argued that, assuming that life expectancy at the turn of the century was approximately 71 years, the “parents of the deceased have in all probability been deceased for more than 30 years.”

Assistant Commissioner Tom Mitchinson reviewed the issue of the estimated life expectancy. He accepted that life expectancy has increased over time, and found that applying current life expectancy assumptions to those

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## **Mediation success stories**

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of getting to their underlying interests. The appellant explained what he was trying to determine by the filing of requests and the Ministry explained why it believed it had already addressed his concerns.

Through this interest-based mediation approach, the appellant received the additional explanations he felt met his real needs. The appellant was satisfied with the Ministry’s explanations and all six appeals were resolved on that basis.

Mediation was successful in large part due to the co-operation and willingness of the Ministry to agree to take the time and effort necessary to provide the appellant with explanations, rather than focusing on the Ministry’s exemption claims.

## **Alternate access**

The Ottawa Police Service received a request for the names of two individuals who were involved in an altercation outside of a bar that resulted in damage to the requester’s car. The requester wanted this information in order to take the matter to Small Claims Court to recover the costs of car repairs.

The police identified the general occurrence report as the record responsive to the request. The police granted partial access to the record and denied access to the remainder, including the identities of the individuals who damaged the requester’s car.

The decision was appealed. The appellant explained that at the time of the incident, the police told her that the individuals had been charged. She was advised to wait to see whether or not the court would award her damages. The appellant advised the IPC that one of the individuals was convicted, but the appellant was not awarded damages.

The mediator discussed the purposes of the Act and the possibility of seeking the individuals’ consent to disclose their information. The appellant acknowledged that it was doubtful that they would consent. The mediator advised the appellant that court records are available to the public. The appellant checked the court files for the relevant time period and satisfied herself that she had obtained the information she needed from this alternate method of access. She decided not to pursue her appeal.



Summaries CONTINUED FROM PAGE 7

born in the 1800s was not reasonable. He concluded that the appropriate approach was to determine the estimated life expectancy of individuals born at approximately the same time as the parents.

Using Statistics Canada data, he applied a conservative assumption to the particular situation. Under this projected life expectancy, the parents of one individual would have died around 1957 and the parents of the other individual around 1961. The Assistant Commissioner concluded that it was reasonable that the parents identified by the appellant have been dead for at least 30 years. The information was ordered released.

As a postscript to this order, the Assistant Commissioner stated that knowledge of the actual date of death is the best method of determining the application of section 2(2), and that, in future similar situations, any steps taken by the Ministry to determine the actual date would be welcome.

ORDER MO-1494 Appeal MA-000374-1 Regional Municipality of Peel

The Regional Municipality of Peel received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all records relating to a joint project that also involved the Town of Caledon. This involved a resource study concerning an amendment to the town's official plan, which was scheduled to be the subject of an Ontario Municipal Board hearing. The requester represented a party involved in that hearing.

The region initially responded by allowing the requester to review the records at the region's

offices to determine which ones he wanted photocopied. Following this review by the requester, the region claimed that certain records qualified for exemption under the Act, and that others had subsequently been transferred to the town for a decision on access.

That decision was appealed to the IPC.

The adjudicator had to decide whether the Act permitted the region to provide a "quick peek" to the requester, and then refuse disclosure on the basis of discretionary exemptions. The region argued that, although it had allowed the requester to review the records, it had never intended to waive any possible exemption, including solicitor-client privilege.

The adjudicator reviewed relevant case law on waiver of solicitor-client privilege. She found that, even if the privilege did apply, when the region allowed the appellant to review the documents, it waived the privilege. Further, it was barred from claiming any discretionary exemptions after allowing the requester to view the records. The waiver did not apply, however, to the records which the region transferred to the town, and in which the town had a greater interest. She upheld the region's transfer decision for most of the records, citing a number of reasons, including the significant prejudice to the town if the transfer was not permitted, and the existence of a parallel outstanding request to the town.

The adjudicator referred to the worthy intentions of the region in following the "reasonable and administratively feasible" process that it used in dealing with a broad request. However, she also noted that there is point where informality ends and the provisions of the law must govern. In this case, that line was crossed.

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