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# IPC PERSPECTIVES

INFORMATION AND PRIVACY COMMISSIONER / ONTARIO

ANN CAVOUKIAN, Ph.D., COMMISSIONER



Commissioner Ann Cavoukian, Senior Adjudicator and Manager of Adjudication David Goodis (right), and Legal Counsel John Higgins — architects of the IPC's new Code of Procedure — examine the completed document.

## Code of Procedure created as a guide

IN LINE WITH THE IPC'S OBJECTIVE OF transparency in the appeals process, Commissioner Ann Cavoukian has released a *Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act*. The *Code* outlines the basic procedural steps in the various types of appeals under the *Acts*.

"The *Code* will benefit appellants, affected parties and institutions alike," says Assistant Commissioner Tom Mitchinson. "They will be in a better position to know how their appeal is processed. If anything

is unclear, the *Code* will be a guide and should answer most questions." Mitchinson describes the *Code* as being a single, comprehensive document that covers the procedures in appeals from start to finish — a "one-stop" source. He emphasized that a special effort was made to use plain language throughout the document.

The *Code*, which applies to appeals made under both the provincial and municipal statutes, is in effect for all appeals that were received by the IPC's Tribunal Services Department on or after September 1, 2000. It is comprised of two parts: the main *Code*, which sets out basic procedural

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# Public commitment to FOI needed MBS conference delegates told

ALTHOUGH THE VALUES UNDERLYING FREEDOM OF information laws — open, transparent, accountable and citizen-driven government — are embraced proudly and enthusiastically by the governments that introduce them, commitment to these values is hard to sustain over time, Tom Mitchinson, Assistant Commissioner, Ontario Information and Privacy Commission, told Management Board’s annual access and privacy conference. “Secrecy is inherently attractive to governments, and demands for accountability through use of the law butt up against the instincts of self-protection on a daily basis. FOI laws need two things in place for any hope of success: **rules** and **commitment**.”

“Over the course of the past year or so, we’ve made progress as a province in both of these areas. Today, I’d like to acknowledge these successes, and then go on to identify some of the challenges for the upcoming year.”

He identified our laws as the most important set of “rules,” maintaining: “We have strong and robust FOI laws in Ontario.... I’m sure we can all think of changes that would improve our statutory framework, but I would argue that our laws are fundamentally sound.”

He reviewed a number of other rules, including the binding directives and guidelines issued by Management Board of Cabinet. “The Secretary of Management Board of Cabinet took a significant step in this area during this past year by agreeing to amend the Management Board Guideline on Freedom of Information.” Mitchinson pointed out that the new guideline will more clearly reflect expectations for the effective administration of FOI programs throughout the government. “We had hoped for stronger requirements in certain areas,” he said, “and we’ll be pushing for improvements, but I don’t want to underestimate the importance of the new guideline in more clearly defining expectations.”

“So, I think we’re making some progress in the area of rules,” he told the conference.

“However, no matter how good and comprehensive your set of rules is, rules alone will never make for a truly successful and effective FOI scheme. It also needs something else — commitment — and that’s the real challenge.”

Mitchinson pointed to the significant changes in attitude in the U.S. after President Clinton made a strong public commitment to freedom of information. “Although we’re still a long way in Ontario from a Clinton-like commitment,” he told the conference, “we have made some important and significant progress over the course of the past year.”

“Commitments to performance standards, including response times in dealing with requests, have this year, for the first time, been included in Deputy Ministers’ performance contracts. This is an extremely important step, which we have been advocating for several years, and former Secretary of Cabinet Rita Burak should be commended strongly for setting this process in motion before leaving office this past spring. Deputy Ministers must now account for ministry performance on FOI programs as part of the annual appraisal process with the Secretary of Cabinet.”

Mitchinson then addressed “some challenges for the future.”

“What we don’t have in Ontario, and this is a common problem in many other jurisdictions as well, are enough internal champions for freedom of information. People in positions of influence and power who are prepared to commit themselves to the values inherent in the law and to do so publicly and proudly.”

“Have any of you ever heard a senior government official in Ontario make a public commitment to the importance of our FOI law and to its effective administration? Has your CAO, Police

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# Think RC/AC when in doubt about releasing personal information

WHEN IN DOUBT ABOUT DISCLOSING PERSONAL INFORMATION, it is better to err on the side of caution, Ontario Information and Privacy Commissioner Ann Cavoukian told the more than 300 delegates at *Workshop 2000: Access and Privacy in the Digital World*, Management Board Secretariat's annual fall access and privacy conference.

She also advised the delegates, most of whom were Freedom of Information and Privacy Co-ordinators from provincial or municipal organizations, that if their organization is undertaking a new initiative, a Privacy Impact Assessment should be conducted to identify, up front, any potential privacy issues that may have to be addressed.

The Commissioner launched her presentation by focusing on how privacy is becoming a major issue in many parts of the world. She observed that one cannot turn around today without bumping into a news story about another privacy violation or lawsuit. "What's even more interesting," she said, "is the volume of privacy legislation being debated and the number of major businesses which have, or are at least starting to, embrace privacy."

Citing an example, she said there are currently 39 privacy bills being debated in the New York state legislature. In Canada, the Commissioner noted, we now have Bill C-6, the federal *Personal Information Protection and Electronic Documents Act*. She also cited the IPC's consultation with the Ministry of Consumer and Commercial Relations, which just wrapped-up, regarding a made-in-Ontario private sector privacy law, and the health information privacy consultation currently under way. Ontarians also have the benefit of public sector freedom of information and privacy legislation, she added. "However," said the Commissioner, "I want everyone to know

that while legislation — be it public or private sector focused — is an important component of any privacy scheme, education, training and above all, sound judgment is also just as necessary to ensure that a system which purports to protect people's privacy actually does the job."

With the expanding spotlight on privacy protection within the business community, survey after survey shows why e-commerce is not taking off as projected. Cavoukian cited some examples:

- 90% of people surveyed said privacy was the single most important issue for e-commerce to address,
- 79% don't use Web sites which require personal information.

Relating this corporate/business model to government, the Commissioner said that as the public becomes more privacy conscious and starts to take its business only to companies with sound privacy policies and practices, it will begin to have different expectations of government regarding the personal information that the government holds. She listed five key questions that need to be answered *before*, not after, collection, use, or disclosure of personal information:

- Why are you asking?
- How will my information be used?
- Who will be able to see my information?
- Will there be any secondary uses?
- How can I control my data?

The Commissioner emphasized that privacy is not just about anonymity, but about choice — the choice that an informed person makes regarding the use of his or her own personal information.

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## 20 *IPC Practices* still available

WITH THE CREATION OF THE IPC'S *CODE OF PROCEDURE* and the *Practice Directions*, 10 of the 30 *IPC Practices* – those that dealt with appeals – have been superseded.

Here is an updated list of *IPC Practices* that shows which have been superseded, and by what, and the 20 *Practices* that are still available. The remaining *Practices* deal with issues related to requests or privacy.

### *IPC Practices*

- |   |  |
|---|--|
| No. 1: <i>Drafting a Letter Refusing Access to a Record</i>   | No. 16: <i>Maintaining the Confidentiality of Requesters and Privacy Complainants</i>  |
| No. 2: <i>Copying Information to Individuals Inside and Outside an Institution</i>                                | No. 17: <i>Processing Privacy Complaints</i>   |
| No. 3: <i>Providing Records to the IPC (superseded by Code Practice Direction 1)</i>                              | No. 18: <i>How to Protect Personal Information in the Custody of a Third Party</i>   |
| No. 4: <i>Mediation: What an Institution Can Expect (superseded by Code section 6)</i>                            | No. 19: <i>Tips on Protecting Privacy</i>  |
| No. 5: <i>Third Party Information at the Request Stage</i>  | No. 20: <i>Privacy and Confidentiality When Working Outside the Office</i>   |
| No. 6: <i>Raising Discretionary Exemptions During an Appeal (superseded by Code section 11)</i>                   | No. 21: <i>Privacy of Personnel Files</i>  |
| No. 7: <i>The Collection and Use of the Social Insurance Number</i>   | No. 22: <i>Routine Disclosure/Active Dissemination (RD/AD) of Government Information</i>   |
| No. 8: <i>Providing Notice of Collection</i>  | No. 23: <i>Preparing the Records Package for an Appeal (superseded by Code Practice Direction 1)</i>                                 |
| No. 9: <i>Responding to Requests for Personal Information</i>   | No. 24: <i>Q's and A's for Managing Electronic Mail Systems</i>  |
| No. 10: <i>Video Surveillance: The Privacy Implications</i>   | No. 25: <i>You and Your Personal Information at the Ministry of Transportation</i>   |
| No. 11: <i>Audits and the Collection of Personal Information</i>  | No. 26: <i>Safe and Secure Disposal Procedures for Municipal Institutions</i>  |
| No. 12: <i>Increasing the Effectiveness of Representations (superseded by Code Practice Direction 2, 3, 4, 5)</i> | No. 27: <i>Appeals Involving Third Party Commercial, Financial and Related Information (superseded by Code Practice Direction 4)</i> |
| No. 13: <i>Affidavit Evidence (superseded by Code Practice Direction 6)</i>                                       | No. 28: <i>Reconsideration of Appeal Decisions (superseded by Code section 18)</i>   |
| No. 14: <i>The Indirect Collection of Personal Information</i>  | No. 29: <i>Appeals Involving Personal (Third Party) Information (superseded by Code Practice Direction 4)</i>                        |
| No. 15: <i>Clarifying Access Requests</i>   | No. 30: <i>Submitting and sharing of representations in an inquiry (superseded by Code Practice Direction 7)</i>                     |

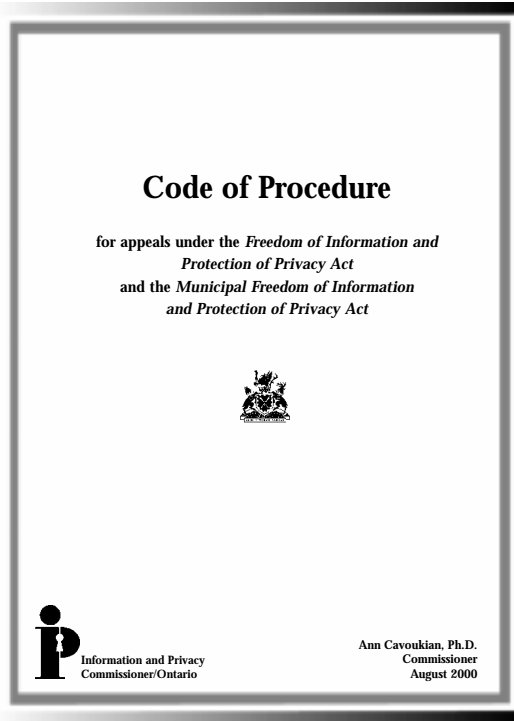


**Code of  
Procedure**

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guidelines for parties involved in an appeal, and 10 *Practice Directions*, which deal with procedural issues in a more detailed and specific way. The *Code* and *Practice Directions* supersede a number of the *IPC Practices* (see separate story). All institutions that had at least one appeal in the past year have been sent a copy of the *Code*. It is also available on the IPC's Web site, at < [www.ipc.on.ca](http://www.ipc.on.ca) > .

Rather than introducing changes, or setting out a new approach or process, the *Code* was created to codify the IPC's existing practices. Almost all of the content reflects what the IPC already does. The *Code* outlines the process for initiating an appeal and what may transpire at the Intake, Mediation and Adjudication stages. It explains how special types of appeals, such as Straightforward Appeals and Reasonable Search Appeals, are conducted. It also covers subjects ranging from discretionary exemption claims to constitutional questions. The *Code* also sets out the conditions under which a reconsideration is undertaken.



The *Practice Directions* deal with such topics as providing records to the IPC during an appeal, and guidelines for individuals whose personal information is at issue in an appeal. There are also guidelines for parties whose commercial or business information is at issue in an appeal. Institutions are given guidelines for making representations. Affidavits are discussed in detail, with a sample affidavit provided.

"Publication of the *Code* demonstrates the IPC's ongoing commitment to the principles of accessibility, active dissemination and free-flowing information," said Commissioner Cavoukian. "All who consult it, whether appellants, affected parties or institutions, will have a much better understanding of why and how process decisions regarding an appeal are made."

The IPC welcomes feedback on the *Code*. Contacts are John Higgins, Legal Counsel, at (416) 326-3941 (e-mail: [jhiggins@ipc.on.ca](mailto:jhiggins@ipc.on.ca)), or David Goodis, Manager of Adjudication, at (416) 326-0006 (e-mail: [dgoodis@ipc.on.ca](mailto:dgoodis@ipc.on.ca)).

## *Practice Directions* released by IPC

HERE ARE THE 10 *PRACTICE DIRECTIONS* THAT ARE part of the IPC's new *Code of Procedures*.

- No. 1: *Providing records to the IPC during an appeal*
- No. 2: *Representations: general guidelines*
- No. 3: *Guidelines for individuals whose personal information is at issue in an appeal*
- No. 4: *Guidelines for parties whose commercial or business information is at issue in an appeal*

- No. 5: *Guidelines for institutions in making representations*
- No. 6: *Affidavit and other evidence*
- No. 7: *Sharing of representations*
- No. 8: *Reasonable search appeals*
- No. 9: *Constitutional questions*
- No. 10: *Appeal fees*

Each of the *Practice Directions*, and the *Code*, can be found on the IPC's Web site: [www.ipc.on.ca](http://www.ipc.on.ca).



# Summaries

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

## Order PO-1804-F (Appeal PA-990362-1)

This is the final order for an appeal involving a request under the *Act* by a journalist to the Ontario Realty Corporation (ORC) for information pertaining to all properties sold by the ORC since 1995.

The records at issue were five lists, which included the name of the purchaser (individual or business), the legal description of the property, the closing date, a project number assigned by the ORC, and the purchase price. The ORC granted partial access to the information regarding the business purchasers and denied access to the remaining records in this category on the basis of section 17(1) (third party information) of the *Act*. The ORC denied access to all of the information regarding individual purchasers citing the exemption at section 21(1) (invasion of privacy).

In Interim Order PO-1786-I, the IPC ordered disclosure of all information relating to the business purchasers on the basis that it did not qualify for exemption under section 17. The IPC also found that information relating to the individual purchasers fit within the scope of the section 21(3)(f) presumption (financial information).

The IPC requested submissions on whether section 23 of the *Act* applied — where a compelling public interest in the disclosure of the records relating to the individual purchasers outweighed the section 21 exemption.

The appellant provided evidence that the sale of property by the ORC had been the subject of current and ongoing media debate. In addition, the IPC found the fact that the land dealings of the ORC had been given priority attention by the ORC, the provincial government and law enforcement authorities indicated there was a strong interest or attention involving this particular public agency. The IPC held that the names, locations, and purchase prices paid by

various purchasers were directly related to the strong interest in the ORC dealings, and their disclosure would serve to inform the public. For these reasons, the IPC found there was a compelling public interest in the disclosure of the individual purchasers’ personal information.

In addition, the IPC was persuaded by the appellant’s arguments that the information contained in the records was the same information that was already accessible through the land registry system. The fact that this information was publicly available lessened the individual purchasers’ expectation of confidentiality, and therefore rendered it less sensitive.

When the IPC balanced the demonstrated, current and compelling public interest in disclosure against a privacy interest that was at the lower end of relative seriousness and sensitivity, the balance was found to favour disclosure. As a result, the IPC found that the requirements of section 23 of the *Act* were present and ordered the ORC to disclose the personal information of the individual purchasers contained in the records.

## Order MO-1323 Appeal MA-990304-1 Sault Ste. Marie Police Services Board

In this appeal, a mother sought access to the cassette tape from her deceased son’s answering machine. The son had lived in an apartment in the mother’s home and the mother had in the past listened to messages for her son, and had received messages on his machine for herself. The son apparently committed suicide. The mother discovered his body and was present when the police came. A friend of the mother later went into the son’s apartment and found the tape, listened to it in the son’s apartment, and then brought it to the mother who gave it to the police. The mother’s subsequent request for access under the *Act* was denied under section 14(1) (invasion of privacy).

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## Public Commitment

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Chief or Deputy Minister ever written to staff of your organization making it clear that effective FOI administration is a key component of excellence in public service?”

Mitchinson focused on several specific ways of building commitment, including the government’s Business Planning process.

“FOI is a corporate program, with a designated responsible minister, the Chair of Management Board.... Yet, surprisingly, at least to us, FOI and privacy programs are not identified as a core business of Management Board Secretariat, either on their own, or as part of a broader information management program area. This deficiency needs to be addressed, and the IPC will be calling on the Chair of Management Board to identify FOI and privacy as a core business of the ministry during the upcoming Business Planning cycle.”

Mitchinson closed his address by emphasizing that this past year has been a *different* one for FOI administration in Ontario.

“The government has acknowledged the need for change and has demonstrated a willingness to work together with our Commission in improving the system.” He cited the new Freedom of Information Guideline and the changes to the Deputy Minister performance contracts as “evidence of a changing attitude to our important FOI programs.”

“These are important first steps. Our challenge in the upcoming year will be to ensure that these new approaches produce fundamental and meaningful results on the ground. That will require strong leadership and a willingness to continually challenge the status quo, which I recognize is often difficult. However, if we can all keep ourselves focused on the underlying value of the law, and ensure that it serves as our guidepost for decision making, we can and will have an FOI program in Ontario that lives up to the public accountability expectations of our law.”

(The speech is available on the IPC’s Web site: [www.ipc.on.ca](http://www.ipc.on.ca).)

## Summaries

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The cassette tape at issue contained only messages for the son. The IPC found that section 14(3)(b) applied because the tape contained the personal information of the son and other individuals and was compiled by the Police in the course of an investigation.

The IPC then addressed the “absurd result” principle — where denying access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an “absurd” result. The IPC identified that previous orders have considered its application only where the record contains the appellant’s personal information. In this case, the appellant was indirectly aware of the information on the tape, but it was not her personal information.

The IPC examined the rationale for the application of the “absurd result” principle in light of the purposes of the *Act*. An underlying reason for its application is a “higher” right of individuals to their own information in the custody of an

institution. This right has to be balanced with the competing purpose of protection of privacy, and the IPC concluded that expanding the application of the absurd result in personal information appeals beyond the “clearest of cases” risks compromising a fundamental principle of the *Act*, which is the protection of privacy.

In this case, because the appellant did not actually hear the tape herself, and because hearing the tape might disclose additional personal information to her, the IPC found that this was not one of those “clear cases” where the absurd result principle should apply.

The IPC found that the fact that a record does not contain the personal information of the requester weighs very significantly against the application of the “absurd result” principle. Although the IPC found that the principle did not apply, it appears it might apply in other circumstances where the request is not for the requester’s own personal information. In such situations, the evidence supporting its application would need to be very clear and unambiguous.



# Recent publications and submissions

AMONG THE IPC PUBLICATIONS AND SUBMISSIONS released since the last edition of *Perspectives* was published, are:

- *Submission to the Ministry of Consumer and Commercial Relations in Response to A Consultation Paper: Proposed Ontario Privacy Act.*
- 1999 Annual Report.
- *A Special Report to the Legislative Assembly of Ontario on the Disclosure of Personal Information by the Province of Ontario Savings Office, Ministry of Finance.*
- The IPC's *Code of Procedure*, and *Practice Directions 1 to 10*, for appeals under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.
- *What Students Need to Know About Freedom of Information and Protection of Privacy.* A guide for Grade 10 Civics teachers, created by the IPC in consultation with curriculum specialists and classroom teachers.
- *Privacy Design Principles for an Integrated Justice System*, a working paper jointly

produced by the IPC and the U. S. Department of Justice, Office of Justice Programs.

- *P3P and Privacy: An update for the Privacy Community.* This is a joint paper produced by the IPC and the Centre for Democracy and Technology.
- *Making an access request to a Police Service Board.* This brochure, a joint project of the St. Thomas Police Services Board and the IPC, was created to assist members of the public who are considering making a Freedom of Information request to a police department.
- *WebSeals: A Review of Online Privacy Programs.* A joint paper by the IPC and the Federal Privacy Commissioner of Australia, for presentation to the 22nd International Conference on Privacy and Personal Data Protection, Venice, Italy.
- *Should the OECD Guidelines Apply to Personal Data Online?* A report to the 22nd International Conference of Data Protection Commissioners, in Venice, Italy.

All IPC publications are available on the IPC's Web site, [www.ipc.on.ca](http://www.ipc.on.ca).

RC/AC  
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She reminded the delegates that her Office has promoted the concept of *Routine Disclosure/Active Dissemination (RD/AD)* in freedom of information matters. She has created a parallel theme for the privacy world — *Routine Care/Active Containment*, or *RC/AC*.

All organizations, whether public or private, have a duty of care to protect the personal information they have in their custody or control, she said. "They are entrusted with this

information by the public, who is often obligated to provide it. The custodian in turn, is obligated to safeguard that information. ...So think RC/AC, and if in doubt about disclosing any personal information — don't do it! Active containment should be the default — keep it within your safekeeping until you are confident that it may be properly disclosed under the Act."

*The Commissioner's speech can be found on the IPC's Web site, [www.ipc.on.ca](http://www.ipc.on.ca).*

## IPC PERSPECTIVES

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