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IPC

PERSPECTIVES

INFORMATION AND PRIVACY COMMISSIONER / ONTARIO

ANN CAVOUKIAN, Ph.D., COMMISSIONER

Proposed regulation to regulate fees for access under *PHIPA*

Since the introduction of the *Personal Health Information Protection Act* (*PHIPA*) in November, 2004, the IPC has responded to numerous inquiries and complaints from members of the public about the fees that some health information custodians have been charging individuals for providing access to records of personal health information. *PHIPA* currently allows custodians to charge a reasonable cost recovery fee, but provides no guidance on what may be considered reasonable in this context. Consequently, the fees that are being charged can vary widely from one health information custodian to the next. Information and Privacy Commissioner Ann Cavoukian asked the government to address the issue of fees through regulation.

The Ministry of Health and Long-Term Care published a proposed regulation in the Ontario Gazette March 11, 2006, that sets out the fees that health information custodians would be able to charge individuals for providing access to records of personal health information under *PHIPA*.

If the proposed regulation is passed, health information custodians would be entitled to charge an individual up to $30 (total) for any or all of the following:

- Receipt and clarification of a request for a record;
- Providing a fee estimate;
- Locating and retrieving the record;
- Reviewing the contents of the record for up to 15 minutes to determine if the record contains personal health information to which access may be refused;
- Preparing a letter of response;
- Preparing the record for photocopying, printing or electronic transmission;
- Photocopying or printing a record up to a maximum of 20 pages (excluding the printing of photographs);
- Packaging of the record for shipping or faxing;
- Electronically transmitting a copy of the record, instead of printing, shipping or faxing;
- Faxing or mailing a copy of the record;
- Supervising the individual's examination of the record for not more than 15 minutes.

Additional fees could be charged for additional services, such as photocopying where a record exceeds 20 pages, or making a copy of the record on a storage medium such as a video cassette.

Members of the public can provide comments to the Ministry of Health and Long-Term Care on the proposed regulation up until May 10, 2006.

Commissioner Ann Cavoukian

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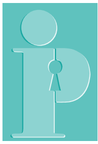


Recent IPC Publications

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

Submission to the Standing Committee on Regulations and Private Bills - Bill 123: Transparency in Public Matters Act, 2004. September 2005.

Long-term Care Homes: Consent and Access under the Personal Health Information Protection Act, 2004, a ***PHIPA*** fact sheet. October 2005.

Privacy Impact Assessment Guidelines for the Ontario Personal Health Information Protection Act. November 2005.

PHIPA Practice Direction 1: Clarifying Access Requests. December 2005.

PHIPA Practice Direction 2: Drafting a Letter Responding to a Request for Access to Personal Health Information. December 2005.

Secure Destruction of Personal Information, a ***PHIPA*** fact sheet. December 2005.

Health Information Custodians Working for Non-Health Information Custodians, a *PHIPA* fact sheet. February 2006.

The Personal Health Information Protection Act, 2004 - A Video Guide for Training and Education (video). March 2006.

A Word About RFIDs and Your Privacy in the Retail Sector (video). March 2006.

All of these publications and more are available on the IPC's website at **www.ipc.on.ca**.

Presentations

Among recent presentations, Commissioner Ann Cavoukian was a special guest speaker at an HSBC Women's Forum in late April, addressing a number of HSBC managers from across Ontario. And in early May, the Commissioner was a keynote speaker at a privacy and security seminar organized by Gowling Lafleur Henderson and ITAC. The seminar was entitled, *Privacy and Security Update: Outsourcing, Security and Compliance – Practical Tips for Business*.

May 8. Assistant Commissioner (Privacy) Ken Anderson is speaking at the Canadian Institute's *Implementing the Personal Health Information Protection Act* conference at the Four Seasons Hotel, Toronto. His topic is *Evaluating PHIPA: Is it a good thing?*

May 25. Commissioner Cavoukian is making a presentation to business executives – on the direct relation between privacy and the bottom line – at a Toronto seminar sponsored by Fogler Rubinoff.

May 29. Commissioner Cavoukian is a special guest speaker at the Canadian Region conference of ARMA International (formerly the Association of Records Managers and Administrators) at the Delta Chelsea Hotel, Toronto. Her topic is *Do You Think Secure Records Destruction is Boring? Think Again and Avoid Becoming the Next Hit*.

June 7. Commissioner Cavoukian is presenting at the International Association of Business Communicators (IABC) International Conference at the Hyatt Regency and Fairmont Hotel, Vancouver. Her presentation is entitled: *Make privacy work for you: Turn promises into commitments and strategies.*

September 27. Commissioner Cavoukian is the speaker at the Powerpoint Group's *Women of Influence* luncheon at the Metro Toronto Convention Centre. She will be sharing her personal life experiences in having overcome obstacles in attaining her goals.

A practical tool for health information custodians

The IPC has developed a special tool – the *Privacy Impact Assessment Guidelines for the Ontario Personal Health Information Protection Act* – to help health information custodians.

The PIA guidelines and questionnaire were developed to assist health information custodians in conducting privacy impact assessments to review the impact of a proposed or existing information system, technology or program on the privacy of individuals.

A privacy impact assessment is a risk management tool that:

- identifies the actual or potential risks to privacy posed by an information system, technology or program;
- identifies and addresses the manner in which these actual or potential privacy risks can be mitigated; and
- addresses whether or not the retention, collection, use, disclosure or disposal of information is compliant with privacy legislation.

A privacy impact assessment can help ensure compliance with sections 12(1) and 13(1) of *PHIPA*. These provisions require health information custodians to take reasonable steps to ensure personal health information is protected against theft, loss and unauthorized use, disclosure, copying and disposal, and to ensure personal health information is retained, transferred and disposed of in a secure manner.

"A PIA is an indispensable tool when it comes to performing due diligence," said Manuela DiRe, health law counsel at the IPC, who delivered a presentation on privacy impact assessments at the IPC-sponsored *PHIPA Summit* in November.

The *Privacy Impact Assessment Guidelines for the Ontario Personal Health Information Protection Act* are divided into two parts. Part one deals with the organizational privacy management practices of a health information custodian as a whole. Part two relates to the privacy management practices of the health information custodian in relation to the specific information system, technology or program. The privacy impact assessment questionnaire may be filled-out directly in the workbook or by using the newly produced interactive CD.

The *Privacy Impact Assessment Guidelines for the Ontario Personal Health Information Protection Act* can be downloaded from the IPC's website: www.ipc.on.ca/docs/phipa_pia-e.pdf. Or, to request a copy, contact the IPC at 1-800-387-0073, or 416-326-3333, or by e-mail at publication@ipc.on.ca.

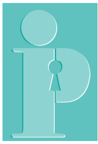
A privacy impact assessment tool for the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* is also available. It was developed by the forerunner of the Ministry of Government Services, with input from the IPC. That PIA is accessible on the website of the Ministry of Government Services: www.accessandprivacy.

Two educational videos available from IPC

One of the core roles of the IPC is to help educate the public about access and privacy issues. The IPC uses a variety of methods and programs – from its outreach program, to its publication program, to its speakers program, to its extensive website – to help accomplish this.

Adding to these resources, the IPC has produced two free videos, one of which is a training tool for health information custodians and their staff. The other is an educational tool that addresses privacy issues related to radio frequency identification tags (RFIDs).

- ***The Personal Health Information Protection Act, 2004 - A Video Guide for Training and Education.*** This training video for health care professionals and health information custodians, with four true-to-life scenarios, was developed by the IPC to address many of the questions posed by health professionals regarding the best way to ensure compliance with the *Personal Health Information Protection Act*. It is available on the IPC website, www.ipc.on.ca. Or, you can order a copy by sending an e-mail to the IPC at publication@ipc.on.ca.
- ***A Word About RFIDs and Your Privacy in the Retail Sector.*** This short video is aimed at both the public and businesses. It dispels some of the myths about RFIDs and explains what the key privacy issues really are. The video is available on the IPC website in two formats: Windows Media Format and Real Media Format. If you would like to order a DVD copy of this nine-minute video, send an e-mail to: publication@ipc.on.ca.



Facing hard decisions doesn't faze Hale

Some decisions have more impact than others. Just ask Donald Hale, the IPC's newly appointed adjudication team leader, who has issued more than 800 orders over the past 14 years as an IPC adjudicator. The first person to hold the new position of adjudication team leader, he recalls one order in particular.

"In Reconsideration Order R-980015, I evaluated and commented on the distinction between personal information – as defined in section 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act* – and information that relates to an individual in their professional or employment capacity or as a spokesperson for an organization. This was an important decision that continues to inform the discussion of this very difficult issue to this day."

Donald Hale, Adjudication Team Leader

Hale, in his new role, describes himself as a resource person for IPC adjudicators. He assists them in conducting their research, drafting their orders, and advising on procedural matters that arise in the course of an inquiry. Because each adjudicator is an independent decision-maker, their decisions are entirely their own and cannot be directed by the team leader.

Adjudicators can tap into his knowledge of the exemptions and procedural provisions in the *Acts* and in the IPC's approach to decision-making.

If a provincial or municipal government organization denies a freedom of information request for access to information on the basis that it falls within one of the listed exemptions in the *Acts*, that decision (and a number of other issues, including fees, lack of adequate search, etc.) can be appealed to the IPC.

Appeals that cannot be resolved through mediation end up with an IPC adjudicator, who will ultimately either uphold the government organization's decision or order some or all of the information disclosed, or require other action (such as an additional search for records).

When an appeal reaches an adjudicator, he or she launches an inquiry. "This involves," said Hale, "seeking the representations, usually in writing, of the parties to the appeal through the issuance of a Notice of Inquiry that sets out the facts and issues in the appeal. The representations received from the parties are then usually shared with the opposite parties in order to allow them the opportunity to test or dispute the evidence and arguments made by the other side or other sides."

Following the submission of the parties' representations, said Hale, the adjudicator addresses the issues in the appeal in a written decision that applies the principles in the *Acts* to the appeal and determines whether the government organization's decision ought to be upheld. "If the adjudicator finds that the exemptions claimed by the government organization do not apply in that particular case, he or she will order the records to be disclosed to the appellant. Other sorts of relief can also be ordered, including requiring that additional searches for responsive records be undertaken, upholding or denying a fee or a request for a fee waiver, or ordering the correction of information contained in a record."

Originally from Windsor, Hale earned a degree in history and then a law degree from the University of Windsor. Called to the bar in 1981, he subsequently set up his own general

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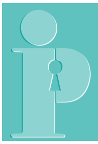

Free IPC access and privacy seminars

The IPC is conducting access and privacy seminars in three regions of Ontario this year, as part of its *Reaching Out to Ontario* program.

A small IPC team was in Belleville in late April and IPC teams will be going to Owen Sound, June 7 and 8, and to Thunder Bay, Oct. 4 and 5.

As well as a number of other meetings and presentations, the educational initiatives in Owen Sound and Thunder Bay will include:

- a seminar for Freedom of Information and Privacy Co-ordinators from area municipalities, police services, school boards, health units, libraries and other government organizations covered under the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act;* and
- a seminar for health information custodians, including health care practitioners, hospitals, homes for the aged, operators of ambulance services or other community services that fall under the new *Personal Health Information Protection Act (PHIPA),* and all other professionals or organizations that fall under *PHIPA.*

If you would like more information about either seminar in either city, please call Karen Hale at the Communications Department of the IPC at 416-326-4804, or send an e-mail to Karen.Hale@ipc.on.ca.

Profile: Donald Hale
CONTINUED FROM PAGE 4

law practice in Windsor. Moving to Toronto, Hale got married and, in 1985, joined the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) – the professional organization for performers and writers working in the film, television and radio industry in Canada – working at a number of progressively more responsible jobs within that organization. When he left, he was the senior staff person for the 10,000-member Performers' Guild, but the 70-hour-plus workweeks were taking their toll.

He joined the IPC in 1992 as an appeals officer (today, the title is mediator). In 1993, he was promoted to inquiry officer (the equivalent of today's adjudicator position).

Hale, who spent a year on secondment as an arbitrator at the Financial Services Commission of Ontario in 1999, takes time to participate in many IPC after-hours activities. He is always willing to talk about managing his floor's softball team to a 20-0 win over the rival 15th floor in the annual staff softball game last fall.

He has also been involved in an in-house training program delivering lectures to staff about the operation of the provincial *Freedom of Information and Protection of Privacy Act* and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act*. And, he has made presentations at the annual fall Access and Privacy conferences that the Ministry of Government Services (formerly Management Board Secretariat) organizes, as well as presenting at the Ontario Society of Adjudicators and Regulators' *Conference of Ontario Boards and Agencies*.

As a single father, having lost his wife several years ago, Hale is busy raising his 18-year-old, developmentally delayed son, Matthew, with whom he has a very special relationship. Hale is active with Community Living Toronto.

His favourite pastimes include spending time with Matthew, "hanging out" with his significant other, Wendy, vice-principal of a Toronto-area elementary school, and watching baseball.

Summaries

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

ORDER MO-2019
Appeal MA-050209-1
York Regional Police Services

This appeal involved a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the York Regional Police Services Board from a member of the media. The requester asked for records compiled over the past five years relating to the identification of properties in York Region that were used for illegal drug operations such as "grow houses" or illegal drug laboratories.

The police located a single responsive record – an internal summary listing of such properties – and denied access to it on the basis that it contained information that was exempt under sections 8(1)(a), (b) and (f) and 8(2)(a) (law enforcement) and 14(1) (personal privacy) of the *Act*. The requester appealed the decision to the IPC.

Assistant Commissioner Brian Beamish rejected the police contention that the information fell within the ambit of the law enforcement exemptions in sections 8(1)(a) and (b). After reviewing the representations of the police, he found that the police failed to make the necessary evidentiary link between the disclosure of the records and the harms addressed in these sections. He also rejected the police claim with respect to section 8(1)(f), which addresses the situation where disclosure may impair an individual's right to a fair trial, and section 8(2)(a), which applies where a record is a "law enforcement report."

The Assistant Commissioner found that the record contained information that qualified as "personal information," as that term is defined in section 2(1) of the *Act*. He determined that the disclosure of the addresses of the properties gave rise to a reasonable expectation that the property owners could be identified through the use of secondary sources such as reverse directories or municipal assessment rolls. As a result, the addresses of the properties used as "grow houses" could be said to represent "recorded information about an identifiable individual," as contemplated by the definition of "personal information." He went on to find that information listing the charges laid, the presence of children in the home and the fact that plants or money were seized as a result of the investigations also relates to identifiable individuals, based on the same reasoning.

As part of his consideration of the personal privacy exemption in section 14(1), the Assistant Commissioner found that the presumptions in sections 14(3)(b) and (f) did not apply to the information as it was not compiled as part of the investigation of the offences (but rather after its completion) and did not contain information describing an individual's finances. The Assistant Commissioner evaluated the relevance and weight to be afforded to the considerations listed in sections 14(2)(a) (public scrutiny of police activities) and (b) (public health or safety), along with several other considerations (public confidence in the integrity of the police and consumer protection). He then weighed these considerations against those favouring privacy protection in sections 14(2)(f) (highly sensitive information) and (i) (unfair damage to reputation) and determined that, on balance, the factors weighing in favour of disclosure were more compelling than those favouring privacy protection with respect to the **majority** of the personal information in the records.

However, the Assistant Commissioner held that the disclosure of the personal information in the records that relates to the presence of children would be an unjustified invasion of personal privacy. He found that the disclosure of the remaining personal information would not result in an unjustified invasion of personal privacy and ordered that this information be disclosed to the appellant.

The order concludes with an additional finding that, even if he had found the personal information in the records to be exempt under section 14(1), the Assistant Commissioner would have ordered its disclosure under the "public interest override" provision in section 16 of the *Act*. Assistant Commissioner Beamish reached this conclusion because the compelling public interest in the disclosure of the information clearly outweighs the purpose of the personal privacy exemption in the circumstances of this particular case.

Order PO-2439
Appeal PA-030261-3
Ontario Native Affairs Secretariat

This appeal involved a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a particular land claim. The requester asked the Ontario Native Affairs Secretariat (ONAS) for access to various economic studies, an agreement involving a mining

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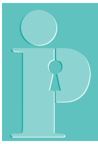

Mediation success stories

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

Discovering why fee was so high led to resolution of three appeals

A requester submitted three very broad requests to the Ministry of Finance, for records relating to cross-border shopping from 1988 to 1993, for records relating to the underground economy for the same period, and for records relating to tax reviews and analysis of cigarette manufacturers and the cigarette manufacturing sector. The ministry issued an interim decision and fee estimate for each of these three requests, each in excess of $300,000. The requester (now the appellant) appealed these estimates to the IPC.

During mediation, both parties expressed a keen interest in resolving these appeals through mediation. The appellant was amenable to modifying his requests, and the ministry was prepared to provide complete details of the basis for the fee estimates.

The appellant and the ministry exchanged some preliminary information about the focus of the requests and the kinds of records held by the ministry. A conference call was then arranged involving the relevant program staff of the ministry and the ministry FOI co-ordinator, the appellant and the mediator. The ministry began by explaining that most of the records responsive to the requests are archived electronic records. The ministry provided details about how such records are maintained on tapes, and the steps necessary to both access these archived tapes and search through them for the relevant records. Ministry staff also provided a branch-by-branch breakdown of the records to be searched, and the fees associated with each search.

It was apparent that the bulk of the search fees related to the archived electronic records, which are not indexed, and to the cost of hiring an external consultant to review the electronic tapes, as expertise to do this no longer exists within the ministry.

After considerable discussion, the appellant agreed to submit a new request in light of the information provided to him during this conference call. His new request would focus on existing paper records from one specific branch, and the appellant suggested that he may submit subsequent requests based on his analysis of these initial records.

At the conclusion of this telephone call, the appellant agreed to close these three appeals.

Communication, effort and compromise the keys to resolving this appeal

The Town of South Bruce Peninsula received a 14-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an experiment conducted in the year 2000, on the use of chlorine dioxide in drinking water. The requester also provided the town with a summary of his personal income tax records for three years and requested a fee waiver.

The town granted the requester access to records responsive to 10 parts of his request. With respect to the remaining four, the town directed the requester to other agencies on the basis that these bodies would have a greater interest in the requested records. The town also advised that the cost for providing the requested information would be $126.16.

In response to his request for a fee waiver, the town provided the appellant with a certified copy of a resolution passed by council, as well as a certified copy of a bylaw which establishes fees for services provided by the municipality. The town also advised the requester that, upon receipt of the fee, it would provide him with a copy of a record responsive to one of the four outstanding parts of the request. The town reiterated its position that it did not have any more responsive records.

The requester (now the appellant) appealed the fee and fee waiver decisions. In addition, the appellant appealed the town's decision that it did not have records responsive to the remaining parts of his request.

During the course of mediation, the mediator referred the town to the fee provisions prescribed in the regulations under the *Act*. As a result, the town agreed to reduce the fee to $100 and the appellant was satisfied with this resolution.

The appellant continued to assert his belief that the town should have records responsive to the remaining parts of his request. The appellant wrote to the town, setting out the reasons and

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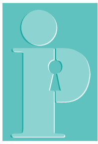

Summaries

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company and several engineering studies respecting a proposed town site.

The ONAS located the responsive records and granted access or partial access to some of them. It denied access to others on the basis that they were exempt under sections 13(1) (advice or recommendations), 15(a) and (b) (relations with other governments), 17(1)(a), (b) and (c) (third party information) and 18(1)(d) (economic interests of Ontario) of the *Act*.

During adjudication of the appeal, Adjudicator Bernard Morrow sought the representations of five affected parties and Indian and Northern Affairs Canada (INAC), a department of the Government of Canada, on the application of the exemptions listed above, as well as section 23 of the *Act* (public interest override). The scope of the request was narrowed to include six records and ONAS withdrew its reliance on section 15(b).

Under section 15(a), the adjudicator found that all of the records relate to "intergovernmental relations" as they pertain to the tripartite land claim settlement negotiations involving the governments of Canada and Ontario, as well as the First Nation. He then went on to consider whether the disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations; specifically, ongoing and future land claims negotiations involving the governments of Ontario and Canada.

The adjudicator concluded that he had been provided with sufficient evidence to uphold a finding that the parties to the land claims negotiations entered into them with the understanding that the information shared, such as that reflected in the records, would be held in confidence. He found specifically that "if the expectation of confidentiality is dashed, along with [it] goes the trust that is crucial to productive negotiations."

The adjudicator found that the ministry and INAC provided him with sufficiently detailed and convincing evidence to establish that "the disclosure of the information contained in the records could reasonably be expected to lead to an erosion of trust and a decreased willingness to share documentation, which would seriously compromise the willingness of the parties to participate in land claim negotiations now and in the future."

He also reviewed the possible application of the "public interest override" provision in section 23 to the information in the records. The adjudicator acknowledged that "[g]overnment openness and transparency are key values underlying the access to information provisions of the *Act*" and that the town site that is the focus of the records is no longer under consideration. The adjudicator found that because the town site is no longer under consideration, any public interest in the records is diminished. He also referred to the public interest in successful land claims negotiations, which entail an expectation of confidentiality by the parties, and found that the public interest favours non-disclosure.

Accordingly, Adjudicator Morrow concluded that the public interest override provision in section 23 had no application to the circumstances of this appeal and upheld ONAS's decision not to disclose the records on the basis that they were exempt under section 15(a).

Mediation Success Stories

CONTINUED FROM PAGE 7

providing documentation in support of his position. In response, the town restated its position that additional responsive records did not exist, but agreed to provide the appellant with a number of other documents. The appellant reviewed these documents and advised the mediator that he would be prepared to resolve this appeal if the town would provide him with written responses to three questions he had relating to the town's involvement in the experiment. The town agreed to provide such a letter and included confirmation that further searches were conducted in all possible areas and no additional records were located.

After reviewing the letter from the town, the appellant advised that he was satisfied and the appeal was resolved. Throughout the course of the appeal, the parties communicated and worked together to achieve a resolution in the spirit of the *Act*.

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