

Access and Privacy Update

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Information and Privacy Commissioner of Ontario

AMCTO Zone 4 Spring Meeting

May 2, 2017



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Commissaire à l'information et à la
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Our Office

- The Information and Privacy Commissioner (IPC) provides an **independent** review of government decisions and practices concerning access and privacy
- The Commissioner is appointed by and reports to the Legislative Assembly; and remains independent of the government of the day to ensure **impartiality**



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The Three Acts

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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Mission, Mandate and 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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Agenda

- **Access**
 - Third Party Information and Contracts
 - Frivolous and Vexatious Requests
- **Privacy**
 - Records and Information Management
 - Instant Messaging and Personal Email Accounts
 - Publishing on the Internet
 - Video Surveillance
- **IPC Update**
 - Recent work on Legislative Reform
 - New IPC Resources



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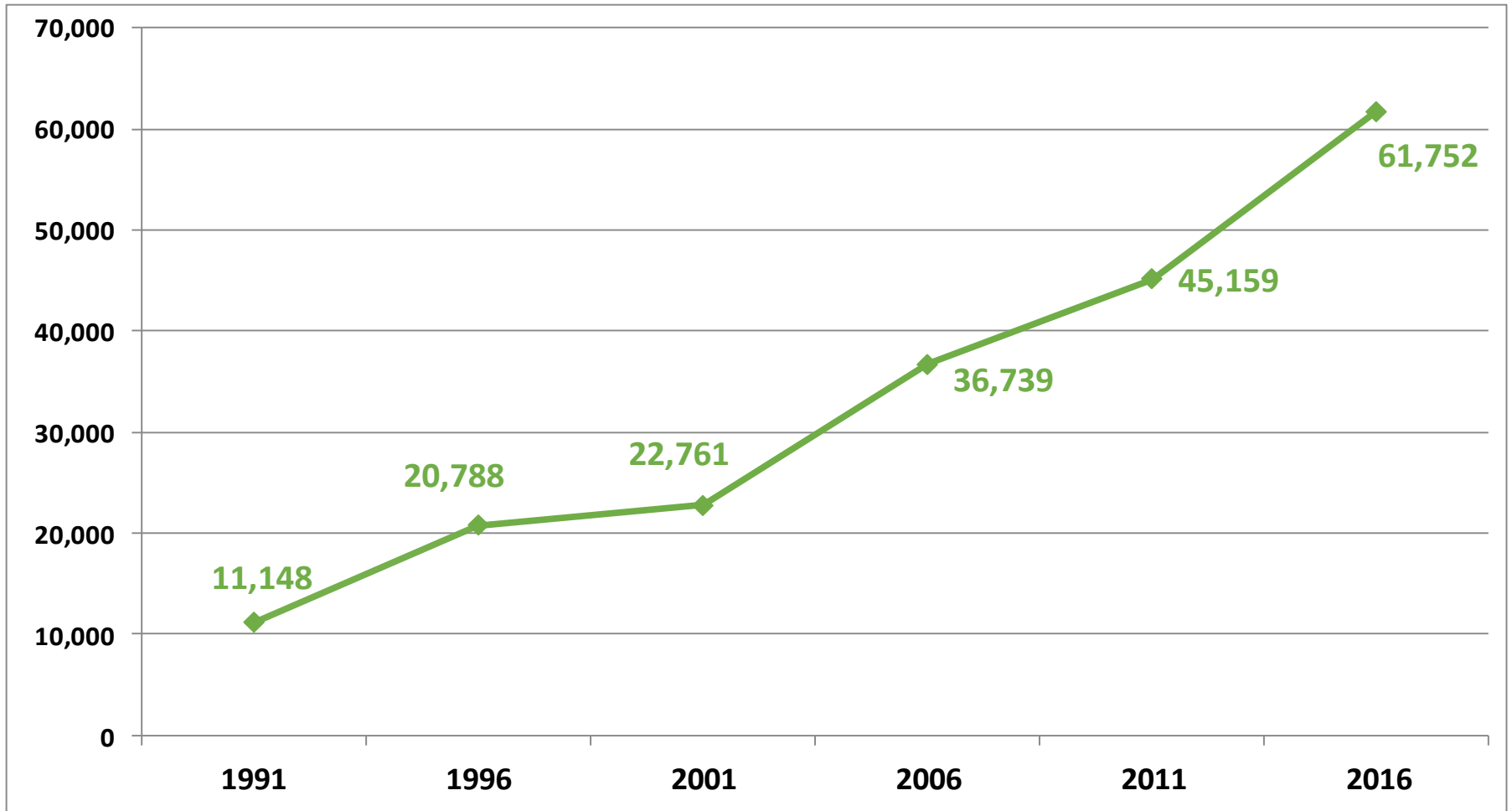
Access



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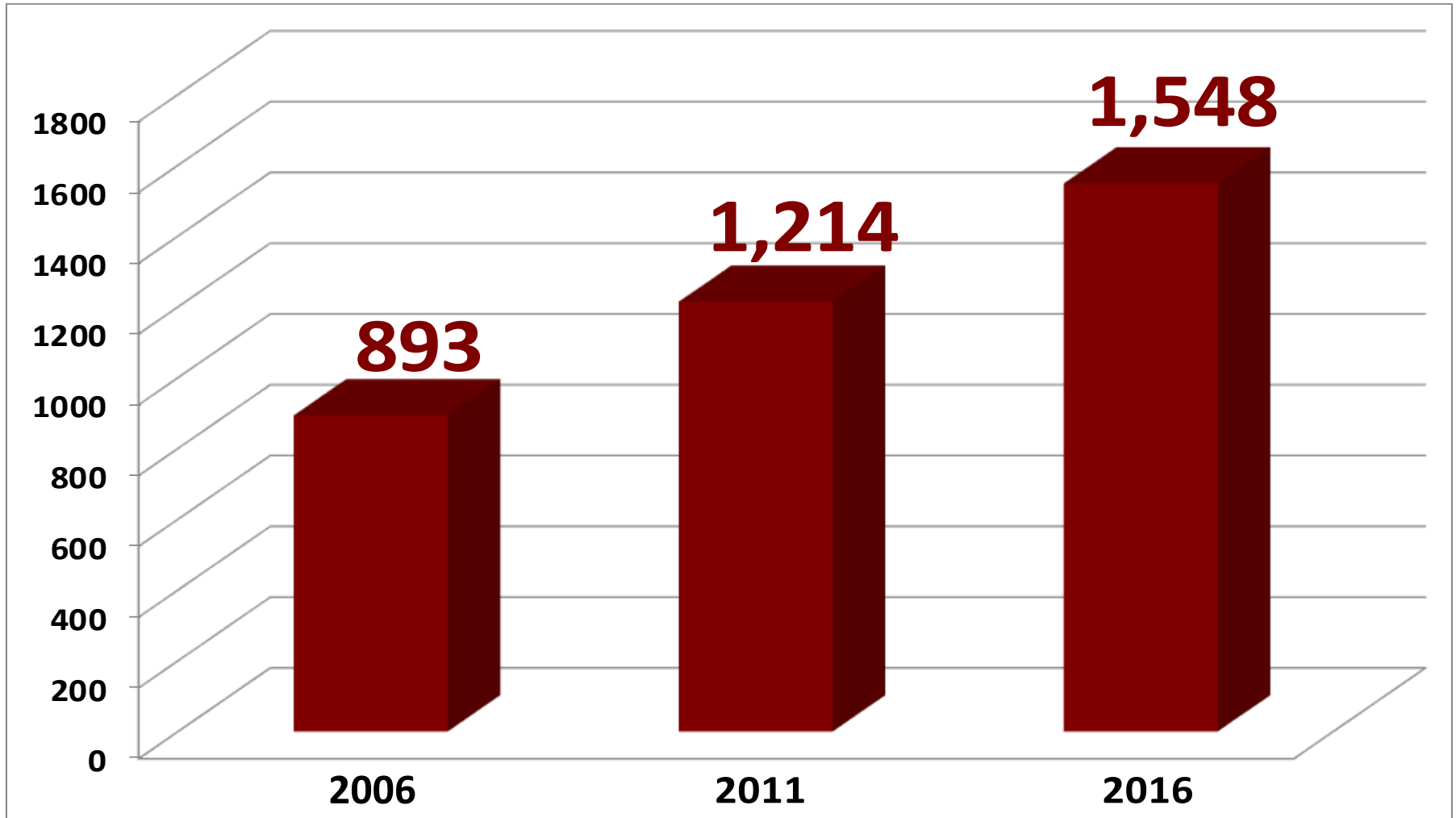
Total Access Requests Per Year



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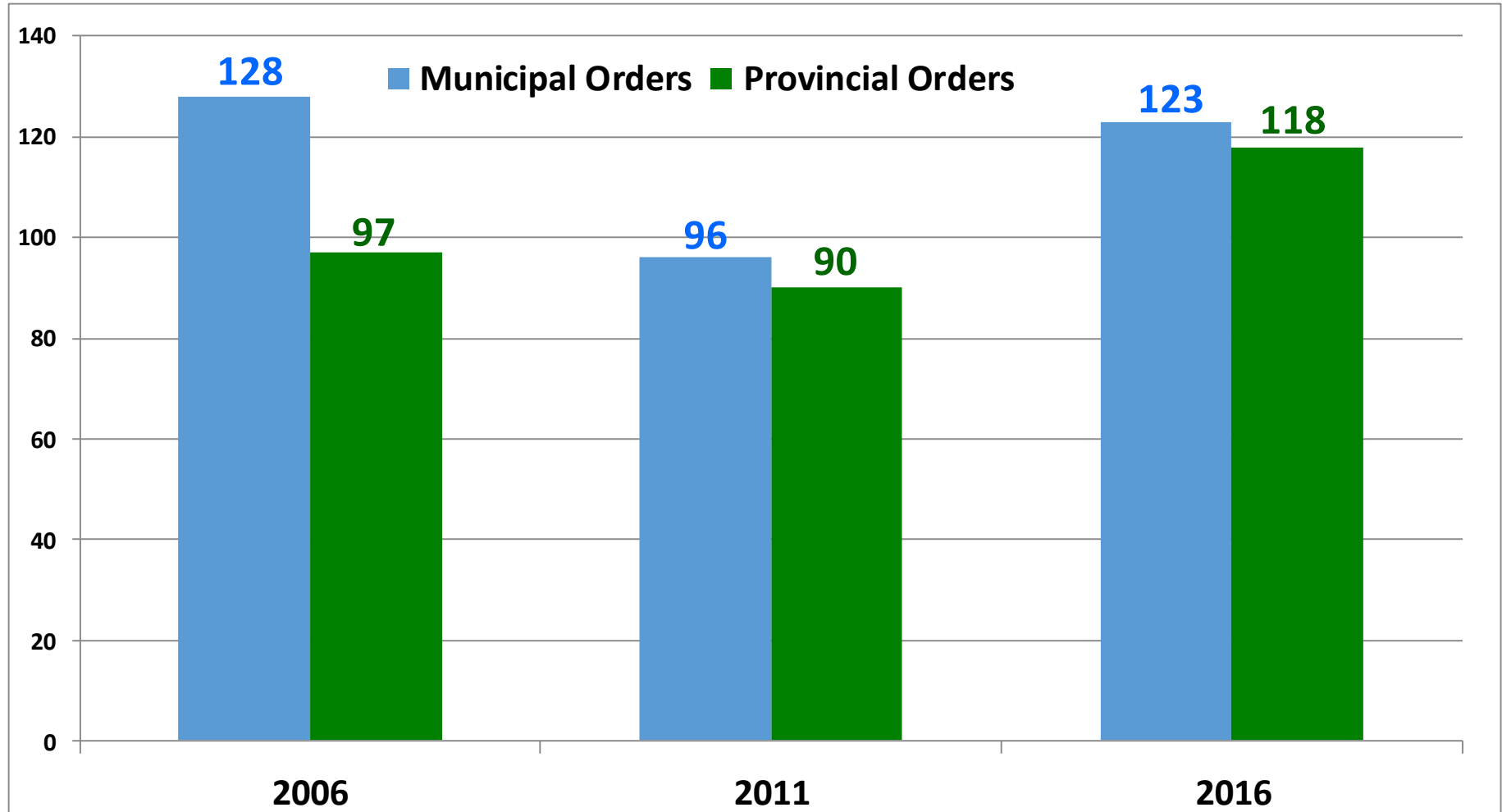
Total Appeals Received Per Year



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Total Access to Information Orders



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Third Party Information

- Section 10(1) of *MFIPPA* sets out a **mandatory exemption** for third party information
- Third party information **shall not be disclosed** if:
 - it reveals a trade secret or scientific, technical, commercial, financial or labour relations information,
 - is supplied in confidence, and
 - where the disclosure could lead to certain types of harms



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Example: Third Party Information and Contracts

IPC Order PO-3598

- Access request to Ryerson University for an agreement between it and TD Bank relating to the issuance of university-branded credit cards
- Ryerson granted partial access to the agreement, withholding some information in reliance on the exemption for third party information at section 17(1) of the *FIPPA*
- On appeal, IPC found that **none of the information in the agreement was “supplied” to the university in confidence** and, therefore, section 17(1) does not apply
- IPC ordered Ryerson to **disclose** the agreement in its entirety to the requester



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Judicial Review of PO-3598

- *Toronto-Dominion Bank v Ryerson University*, 2017 ONSC 1507
- The Divisional Court dismissed the application and upheld the IPC's decision

*“...The adjudicator’s approach is consistent with the purpose of the Act, namely that information should be available to the public and exemptions should be **limited and specific.**”* (para 34)

- TD has sought leave to appeal the decision to the Court of Appeal



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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 explain 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**



Frivolous and Vexatious Requests

- The threshold for claiming the frivolous or vexatious exemption is high, and it will generally not be successful if institutions simply claim they do not have enough resources
- Detailed documentation of interactions with the requester is key to success



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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 a period of one year, only **one transaction** by the appellant may proceed at any given point in time
- The City may decide the **order** in which it wishes to process the remaining requests the appellant would like to keep open
- After the one year period, the appellant or the City may apply to the IPC to ask that the conditions be **varied**. Otherwise, the conditions continue in effect until such time as a variance is sought and ordered.



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MO-2488 (cont'd)

In addition, the adjudicator imposed conditions on the appellant:

- The appellant must **specify** the exact information or records sought, and if possible, the location in which the records may be found
- Each request must only deal with **one subject matter** and must seek specific information, and will not include the phrases “any and all” and “but not limited to”
- Apart from the request, the appellant or a representative of the appellant cannot otherwise **contact the City** (verbally or written), unless the City initiates the contact to clarify the request
- Otherwise, the City is **not required** to respond to the appellant



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Example: Frivolous and Vexatious Requests

IPC Order MO-3049

- A municipality claimed that **three requests** for access to its cheque registry and credit card expenses were frivolous or vexatious pursuant to s. 4(1)(b) *MFIPPA*
- Municipality argued that **due to its small size and budget**, it cannot employ a full-time FOIP coordinator, and the person with those duties often finds it difficult to respond to requests within the 30 day limit
- The IPC found that **the requests were not frivolous or vexatious** and ordered the town to provide a decision letter in response to the requests



IPC Order MO-3049 (cont'd)

The IPC provided suggestions to improve the efficiency of the town's FOIP system given its small size:

- **Publish** responses to FOI requests on the town's website
- Be more **proactive** about releasing information
- Seek a **time extension** in accordance with s. 20(1) *MFIPPA*
- Utilize **fee provisions** set out in s. 45(1) *MFIPPA*
- **Provide reasons** for refusing access as required by s. 20.1(1)(b) when claiming that the request is frivolous or vexatious



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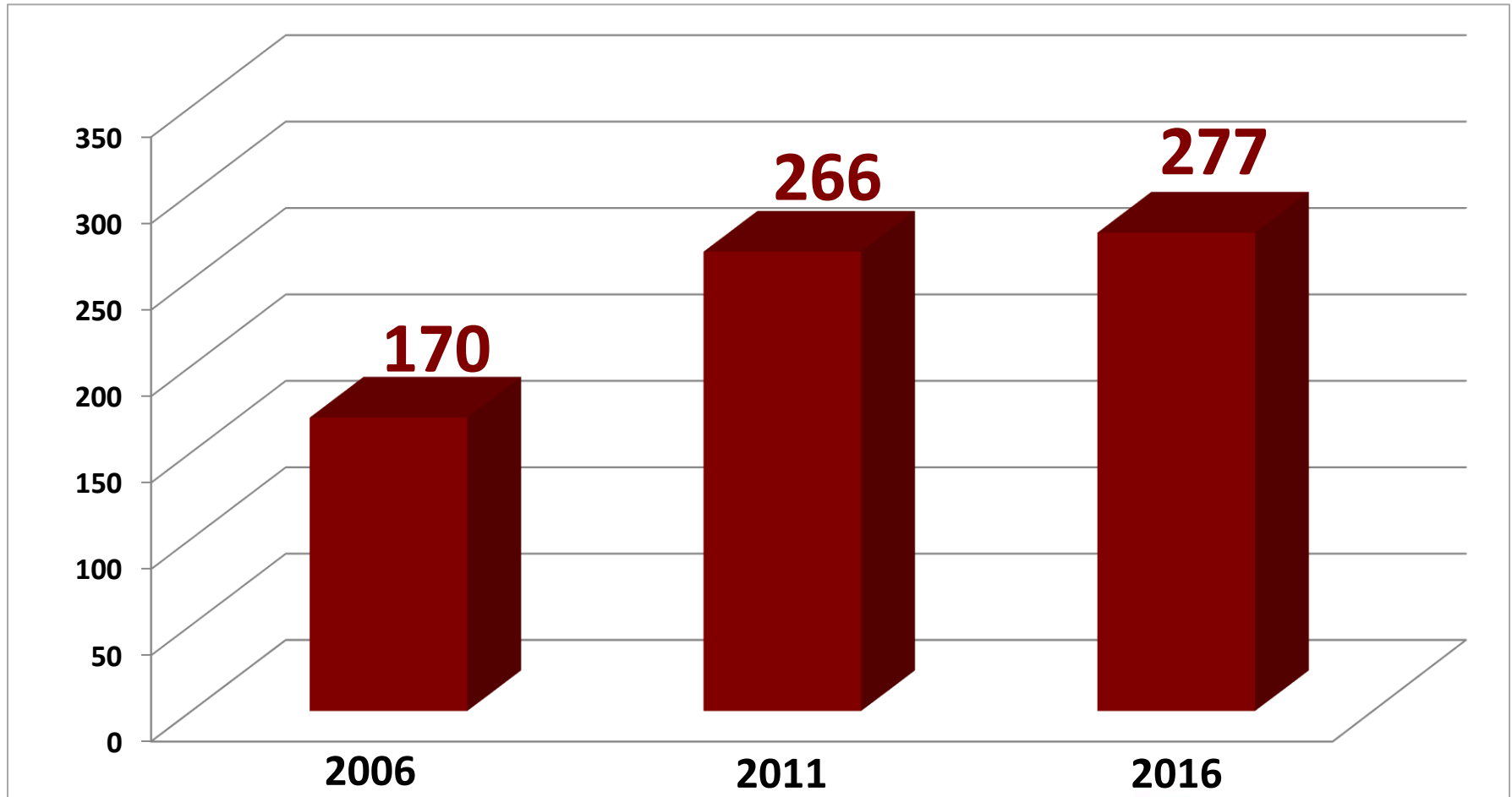
Privacy



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Total Privacy Complaints Opened Per Year



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RIM Guidance

- Effective records and information management (RIM) practices help institutions meet legal requirements and better serve the public
- Institutions are better able to:
 - respond to access requests in a timely way
 - be transparent and accountable to the public
 - ensure the confidentiality and privacy
- Publication describes best practices and how to enhance the public's ability to access information



Improving Access and Privacy
with Records and Information
Management

November 2016



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Instant Messaging & Personal Email Accounts

- Emails sent and received from personal email accounts and instant messages are **subject to access requests**
- Challenges in managing records produced using personal email or instant messaging include:
 - **Search and production** when responding to access to information requests
 - **Retention and preservation** in compliance with the acts
 - Ensuring **privacy and security** of personal information
- We advise institutions to **prohibit use** or enact measures to ensure business records are preserved



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

June 2016



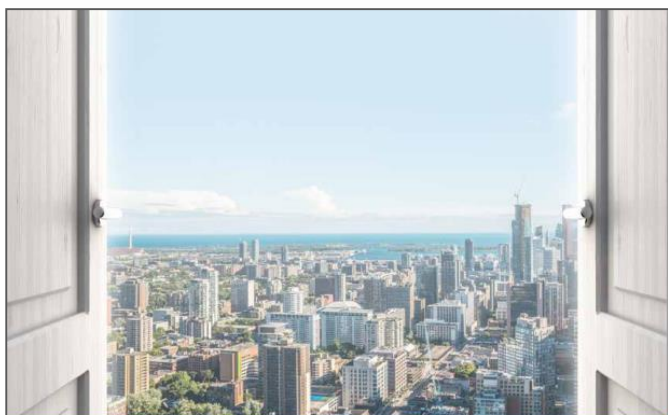
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Publishing on the Internet

IPC Guidance



Transparency, Privacy and the Internet:
Municipal Balancing Acts



- This guide provides municipalities with **privacy protective policy**, **procedural** and **technical** options when publishing personal information online
- The focus is primarily on personal information that is required by legislation to be published, but **may be applied** in any situation where municipalities make information available online

Publishing on the Internet

IPC Guidance

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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Example: 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 the *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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Example: Publishing on the Internet

- Complainant was a member of a profession regulated by an administrative tribunal. As a result of a complaint about him, the 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 a 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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Video Surveillance Guidelines



Guidelines for the Use of Video Surveillance

October 2015



- IPC published video surveillance guidelines in 2015
- This guide consolidates previous advice provided by the IPC and presents new issues and factors to consider, including **retention periods** and **notices of collection**
- It also provides **key messages** and **examples** for clarity

Video Surveillance Guidelines

- Best practices for municipalities implementing a video surveillance program include:
 - Consulting your **Freedom of Information and Privacy Coordinator** and the public
 - Conducting a **privacy impact assessment (PIA)**
 - Establishing **policies** and **procedures**
 - Establish a **privacy breach protocol**
 - **Training** employees
 - **Auditing** roles, responsibilities and practices



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Video Surveillance Guidelines

- Municipalities should be prepared to process **access requests** from the public including developing protocols for the redaction of personal information from the video, where appropriate
- Municipalities may use tools and techniques such as:
 - Digitizing analogue footage to enable the use of more powerful editing tools,
 - Blacking out or blurring images of individuals, and
 - Removing the sound of voices
- Retention period for unused images should be limited to the amount of time **reasonably necessary** to discover or report an incident



IPC Update



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Recent Work on Legislative Reform



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Bill 119, Amendments to *PHIPA*

- Amendments that have been proclaimed in force include:
 - Privacy breaches meeting a threshold must be reported to IPC
 - Threshold on reporting to IPC to be prescribed in regulation
 - Six month time limit on laying charges under *PHIPA* removed
 - Fines for offences under *PHIPA* doubled from \$50,000 to \$100,000 for individuals and \$250,000 to \$500,000 for organizations
 - Persons other than Attorney General may commence prosecution, with AG's consent
- Amendments related to the provincial electronic health record have not been proclaimed in force



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Bill 89, *Supporting Children, Youth and Families Act*

- Bill 89 creates a new *Child, Youth and Family Services Act*
- Part X sets out rules for the collection, use and disclosure of personal information by child, youth and family service providers (e.g., Minister of Children and Youth Services, Children's Aid Societies)
- Child, youth and family service providers will be subject to new privacy and access rules overseen by the IPC



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Bill 89, *Supporting Children, Youth and Families Act*

- March 2017, IPC submission to the Standing Committee focused on significant privacy issues:
 - the ministry must be subject to a greater degree of accountability and oversight than what is currently provided
 - the bill should be amended to strengthen privacy safeguards and to narrow the ministry's powers to collect, use and disclose personal information to what is reasonably necessary
 - the authority to share personal information among government organizations and to disclose it to persons and entities that are not prescribed in the regulations must be removed from the legislation



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Bill 68, *Modernizing Ontario's Municipal Legislation Act*

- IPC Submission to Standing Committee on April 10
- Bill 68 proposes to expand open meeting exceptions of the *Municipal Act* and *City of Toronto Act*
- Could restrict the public's right of access - public may be excluded from more meetings
- Expanding the circumstances for closed meetings could lead to more refusals to disclose information



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Bill 68, Modernizing Ontario's Municipal Legislation Act

- No evidence that these exceptions need to be expanded
- Proposed amendments should be struck from the bill unless there is compelling evidence
- If there is evidence, IPC recommends an amendment to limit the impact of the proposed amendments on access rights
- Our amendment would ensure access requests could not be refused simply because a record was discussed in a closed meeting



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Bill 114, Anti-Racism Act

- Bill 114 requires the government to develop and maintain an anti-racism strategy, including targets and indicators
- *Anti-Racism Act (ARA)* would require public sector organizations to collect race-based personal information and use an anti-racism impact assessment framework to promote racial equity in program delivery
- The handling of race-based personal information would be subject to data standards and other privacy requirements, to be developed in consultation with the IPC



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Bill 114, Anti-Racism Act

- Privacy protections include ongoing oversight by our office, notably the authority to:
 - review the collection and use of personal information by public sector organizations, and
 - order an organization to change or discontinue any personal information handling practice that contravenes the *ARA*



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New IPC Resources



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New 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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New IPC Fact Sheet Series

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



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FOI Fact Sheet 1

The *Municipal Freedom of Information and Protection of Privacy Act* and Councillors' records
April 2016

INTRODUCTION

The Information and Privacy Commissioner of Ontario (IPC) sometimes decides appeals relating to requests for access to records created or held by municipal councillors. The *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* does not expressly refer to records of municipal councillors and, therefore, before a determination can be made on access to those records, the IPC must decide whether *MFIPPA* applies. In making this decision, the IPC examines the specific facts of each case in light of a number of principles.

The IPC has been calling for amendments to *MFIPPA* to clarify when it applies to these records, including in August 2015, when the IPC wrote to the Minister of Municipal Affairs and Housing setting out proposed amendments (this letter is available on the IPC's [website](#)).

In the absence of amendments, however, the IPC is issuing this fact sheet, which explains when and how councillors' records are subject to *MFIPPA*.

WHEN ARE COUNCILLORS' RECORDS SUBJECT TO MFIPPA?

Councillors' records are subject to *MFIPPA* where:

1. a councillor is acting as an officer or employee of the municipality, or performs a duty assigned by council, such that they might be considered part of the institution, or
2. the records are in the custody or control of the municipality.

WHEN IS A COUNCILLOR AN OFFICER OR EMPLOYEE OF A MUNICIPALITY?

A councillor is likely to have several roles, such as an individual constituent representative, a politician, or a head or member of a municipal committee or board, such as a transit corporation. Some of these roles may entail the councillor acting as an officer or employee, while others do not.



New Webinar Series

- New series on timely, in-demand topics about access to information and privacy issues
- First two presentations are now available at ipc.on.ca:
 - Situation Tables
 - Understanding Exemptions in *FIPPA* and *MFIPPA*



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Questions?



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