

# What's Happening at the IPC

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# Agenda

- The Adjudication Process at the IPC
- Section 38(b): balancing requesters' rights of access with affected parties' rights to privacy
- Some recent cases:
  - S.2 – business v. personal information
  - S.10(1)(b) (FIPPA) – frivolous or vexatious
  - S.14(2)(h) – information supplied in confidence
  - S.15 – information available to the public
  - S.36(2) – right of correction
  - S.52(3) – labour or employment-related records
  - S.54(c) - exercising access rights on behalf of a child

# The Adjudication Process at the IPC

# Overview of Inquiry Process

- Generally, an inquiry involves an Adjudicator soliciting written representations from the parties on the issues in the appeal, one party at a time;
- Representations from one party are shared with other parties to the appeal unless there is an *overriding confidentiality concern*; and
- Adjudicator issues a binding order disposing of the issues in the appeal.

# Inquiry - Step 1

- 1st party Notice of Inquiry (NOI) sets out the facts and issues in the appeal and seeks representations from the party who bears the onus of proof, usually the institution;
- 1st party has 3 weeks to make submissions;
- Adjudicator decides whether to invite representations from the second party or issue an order if first party has not met its onus.

# Inquiry - Step 2

- Second party (usually the appellant) is also invited to make representations in response to the same or a modified NOI, and is provided with a copy of first party's non-confidential representations;
- Second party has three weeks to submit representations, setting out their position on the issues identified in the NOI.

# Inquiry - Step 3

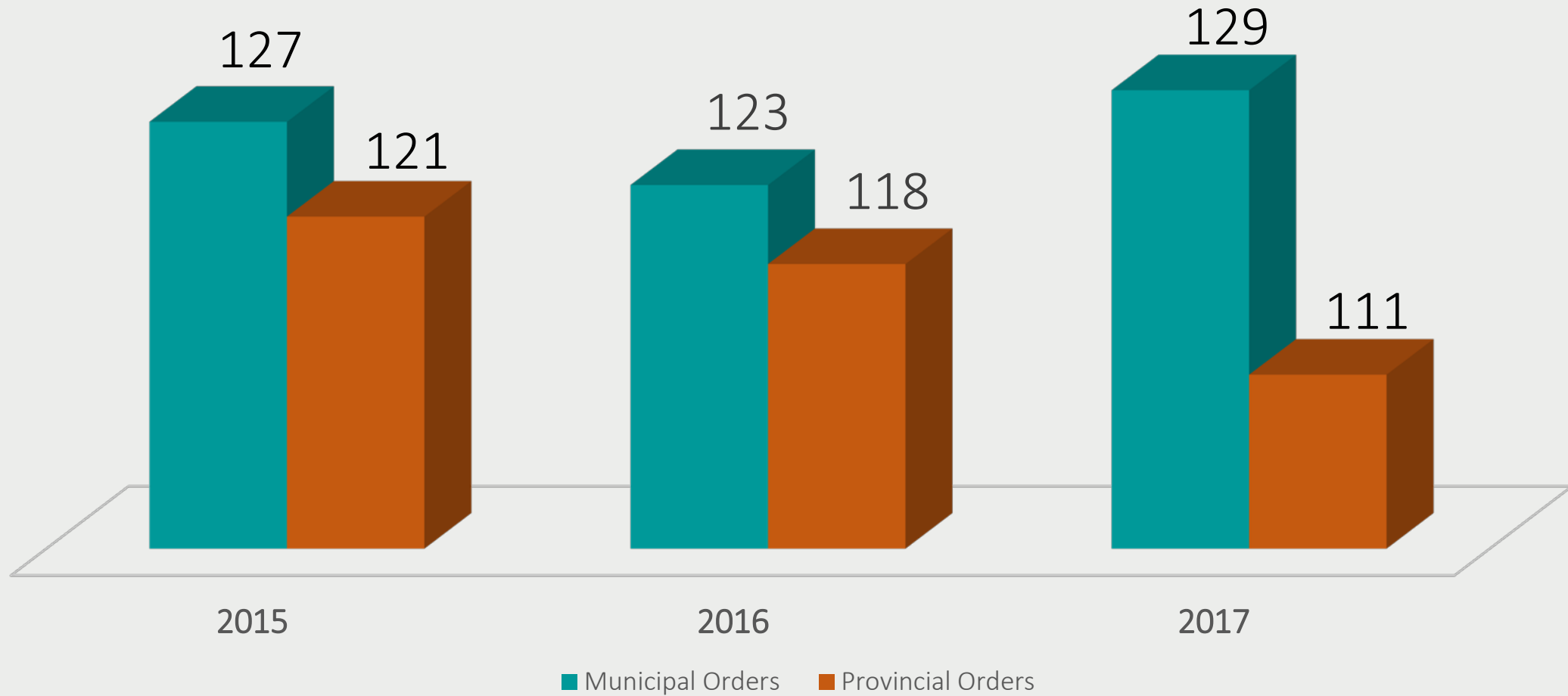
- In some cases, the Adjudicator may send a further NOI to the first party, along with a copy of the second party's non-confidential representations, seeking their reply submissions;
- First party has 2 weeks to submit reply representations but may not raise any new issues in reply;
- Following this step, the Adjudicator issues an order addressing the issues in the appeal.

# Representations

- Effective representations:
  - **Address all** of the issues identified in the NOI;
  - Are **detailed** and do not just repeat the words of the exemption;
  - Give the adjudicator the **factual context** to understand the reason for the position being taken;
  - Highlight the **confidential portions** of the representations, and give reasons why they need to be kept confidential;
  - Provide supporting **affidavits** sworn by knowledgeable individuals where adjudicator requests them.



# Access to Information Orders\*



\*does not include 58 PHIPA Decisions issued between 2015 and 2017

# The IPC's Decision Maker's Group

- Currently 16 adjudicators plus Team Lead and Director of Adjudication
- Three Adjudication Review Officers
- Each adjudicator has a mix of municipal and provincial files, and some also issue decisions under the *Personal Health Information Protection Act (PHIPA)*

# How long does it take to adjudicate an appeal?

- Inquiry process may take 4 months to complete; after that, the adjudicator is ready to issue an order
- An order can take from a few days to a few months to write
- Each adjudicator currently has about 15-25 files at the “order stage”
- From beginning of inquiry process to issuing final order, time required to adjudicate an appeal can vary from a few months to more than a year

# Factors affecting length of time in adjudication:

- Can the case be decided without an inquiry (reverse onus) or after first stage?
- Sharing issues
- Affected parties
- Requests for extensions or holds
- Caseload of adjudicators
- Volume of records
- Need to clarify representations or get supplementary representations
- Records do not clearly indicate which exemptions are being claimed, and an Index of Records was not provided

Section 38(b) cases – balancing requester's right to access with affected party's rights to privacy

# Section 38(b)

- Important to remember difference between 14(1) (mandatory) and 38(b) (discretionary) privacy exemptions
- If the record contains the personal information of the requester and other individuals, the applicable exemption is 38(b)
- Applying section 38(b) means weighing a requester's right of access to his or her own personal information against the other individual's right to protection of privacy, taking into consideration the factors and presumptions in sections 14(2) and (3)

# The presumption in 14(3)(b)

- Under 14(3)(b), disclosure of any personal information collected in a policing matter is presumed to be an unjustified invasion of privacy
- Under the old approach, section 14(3)(b) was treated as a “veto” against access, whether applying section 14(1) or 38(b)
- This meant requesters could not get access to information in police records, when their information is mixed with other people’s information

# Section 38(b) – the new approach

- New approach in Order MO-2954
  - section 38(b) recognizes “higher right of access” to own information
  - When applying 38(b), the presumption in 14(3)(b) is not a “veto” against access – it must be weighed along with factors in 14(2)
- Implications of this approach:
  - Affected parties may be notified by adjudicator
  - Representations should address any relevant factors in 14(2), even if 14(3)(b) applies



# Examples of new approach to 14(3)(b)

- Order MO-3312: 14(3)(b) privacy interest of affected parties is low; outweighed by requester's interest in seeing what information she gave police
- Order MO-3271: 14(3)(b) privacy interest of affected party outweighs interest of requester in knowing why police came to his house

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Some recent cases

## s. 2 – business v. personal information

- MO-3503 – request for information relating to requester’s criminal charge, including the personal information of a security guard who witnessed relevant events. The requested information included the guard’s address, date of birth, telephone number, and ethnicity.
- The requester argued that the information was not personal because the guard was acting in a professional capacity at all material times.
- The IPC held that the guard’s name should be disclosed:
  - The guard’s name was presumptively personal information since it appeared with other personal information per s. 2(1)(h).
  - However, the guard’s name identified the individual in a professional capacity, and in association with the guard’s business contact information, so it did not constitute personal information per s. 2(3).

- PO-3824 - Request for information about a police investigation into the unauthorized installation of a camera in a fire hall
- Ministry of Community Safety and Correctional Services withheld information under the personal privacy exemption
- IPC upheld the ministry's decision in part, finding that some of the information is not personal information because it relates to an individual in their workplace capacity
- But other information is about a workplace dispute between employees and is more personal in nature:
  - “information relating to employment disputes typically reveals information of a personal nature because it deals with issues of performance and conduct.”

## s.10(1)(b) – frivolous or vexatious

- PO-3798 – mother of son who died in fatal accident made multiple requests to the MCSCS for records of a local OPP detachment relating to incident
- MCSCS took position that 13 requests over 4 years was frivolous or vexatious
- On appeal, the adjudicator did not uphold MCSCS's position
- Although requests started out broadly, became narrower as repeated
- This request was for a specific record
- Although adjudicator did not uphold, she stated she may have reached a different conclusion had she been given better evidence, such as more detail about the other requests, duplication in the records, impact on institution etc.

## s. 14(2)(h) – information supplied in confidence

- MO-3593 – Request for police reports and officers’ notes concerning two related neighbour disputes. Police denied access on the basis that the information was supplied in confidence by a witness.
- Requester claimed this factor didn’t apply because the requester knew the identities of the witnesses.
- IPC found that the neighbours supplied information in confidence:
  - “I am satisfied that the information provided to police by the affected parties was provided with an expectation that the police would keep the information confidential, even though there is no direct evidence that any explicit confidentiality assurance was provided by police.”

## s. 15 – Information available to the public

- MO-3514 – Request for motor vehicle collision report related to a car accident the requester was involved in
- York Regional Police Services Board denied access under the exemption for information that is published or available
- IPC upheld the institution's decision, as motor vehicle collision reports are available to the public through a regularized system of access
- The fact that some information may be redacted from the publicly available records in certain situations does not mean that the records cannot be considered generally available to the public
- The fee was not so high as to amount to a barrier to public availability

## s. 36(2) – right of correction

- MO-3329 – access request for various records about the requester and her sons.
- The appellant requested the correction of a number of police reports that contained the opinions of police officers conducting the investigation.
- The IPC held that the information should not be corrected:
  - “records of an investigatory nature cannot be said to be “incorrect” or “in error” or “incomplete” if they simply reflect the views of the individuals whose impressions are being set out.”
  - To be corrected, the information at issue must be (1) personal and private information and (2) inexact, incomplete or ambiguous.



# s. 52(3)1 – labour or employment-related records

- MO-3384 – Request for access to records about police investigation into allegations made by the requester against a former co-worker.
- The requester, an employee of the police service, brought a civil suit against the police service over conditions in the workplace.
- Requester acknowledged she intended to use the records in her civil suit; police service argued the s. 52(3)1 exclusion of *MFIPPA* applied.
- IPC did not accept the police's argument:
  - The police were acting in a law enforcement capacity investigating a possible violation of law when compiling these records and not as an employer engaged in matters falling under the employer-employee relationship.
  - The police were obliged to conduct this investigation whether or not the appellant was employed by them.

# s. 54(c) – exercising access rights on behalf of a child

- MO-3351 – A parent wanted to obtain statements her child made to the police about allegations of abuse against the parent. The child was in the custody of Children’s Aid Society.
- The IPC held that the requesting parent could not exercise the child’s access rights under s. 54(c):
  - The parent did not have “lawful custody” of the child.
  - Even a custodial parent may not be allowed to rely on s.54(c) if:
    - They are acting to further their own interests, and not the interests of the child
    - Adjudicator Shaw: “it would be perverse to interpret section 54(c) so as to permit a custodial parent, as a matter of right, and without separately considering the child’s privacy interests, to exercise the child’s right of access to allegations of the child against that very parent.”

# HOW TO CONTACT US

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