

REACHING OUT  
TO ONTARIO

# Key Developments in Access and Privacy

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Information and Privacy Commissioner of Ontario

David Goodis  
Assistant Commissioner

Waterloo

May 31, 2019



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ROTO is an ongoing program where we visit communities across Ontario and host events to discuss the latest developments in access and privacy with stakeholders and the public



- St. Catharines
- Ottawa
- Sault Ste. Marie
- Kingston
- Barrie
- London
- Thunder Bay
- Windsor
- Hamilton
- Waterloo

# IPC's Mandate

- *Freedom of Information and Protection of Privacy Act (FIPPA)*
  - Covers 300 provincial institutions
- *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*
  - Covers 1,200 municipal organizations
- *Personal Health Information Protection Act (PHIPA)*
  - Covers individuals and organizations involved in the delivery of health care services
- Expanded Mandate: *Child, Youth and Family Services Act*

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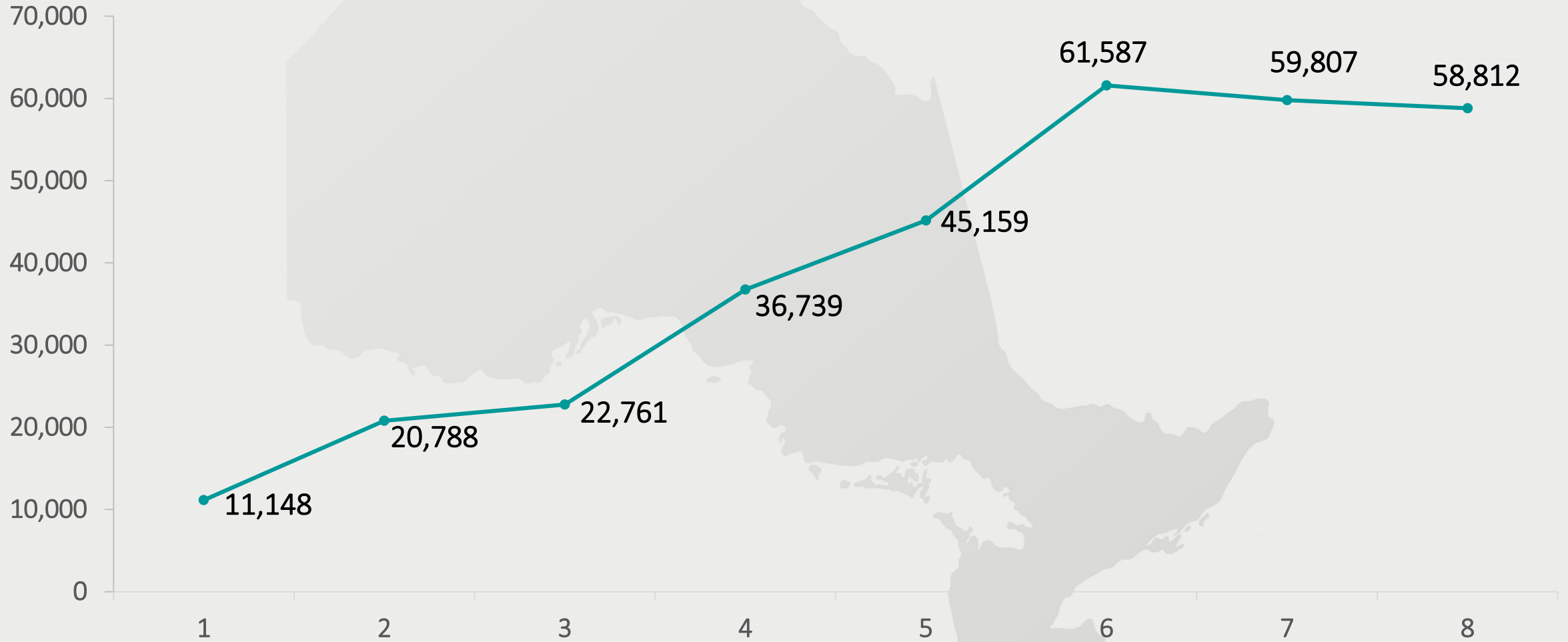
ACCESS



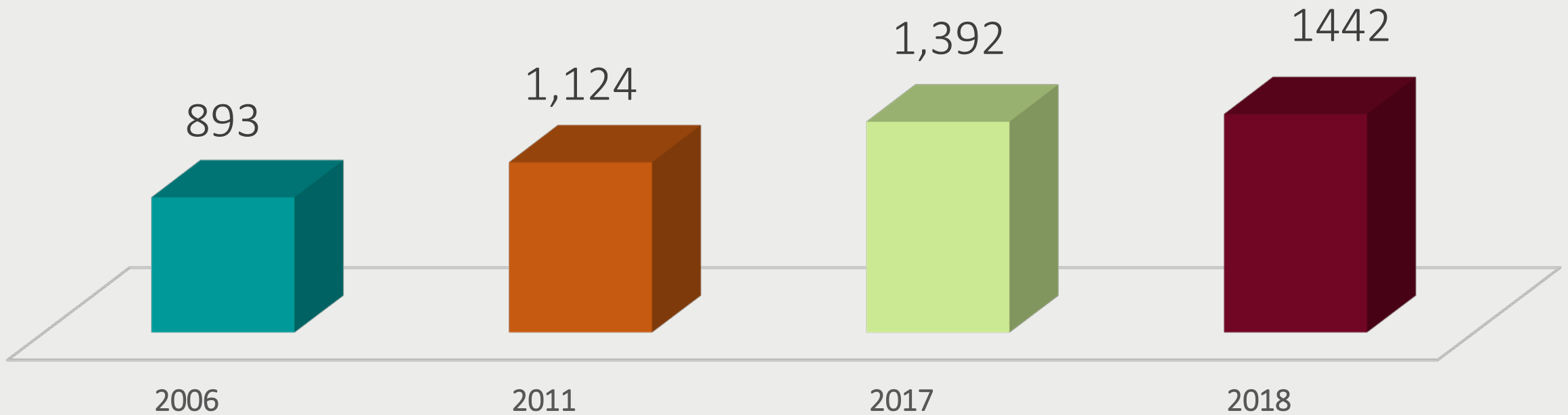


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# Access Requests Per Year



# Appeals Received per Year



# Mediation: Critical to Our Success

- Usually, 75 per cent of appeals and almost all privacy complaints are closed before adjudication/investigation
- Goal is to find a resolution which satisfies the needs of all involved
- Saves significant time and resources for all parties

# OHIP Billings

- Toronto Star sought access to top 100 OHIP billing physicians, their names and their medical specialties, for 2008-2012
- Ministry disclosed the dollar amounts and most of the specialties, but withheld all of the physicians' names and some specialties under the personal privacy exemption



# OHIP Billings

"...the concept of transparency, and in particular, the closely related goal of accountability, requires the identification of parties who receive substantial payments from the public purse..."

IPC Order PO-3617

☰ TORONTO STAR

Opinion · Editorials


## Let the light shine on top-billing doctors in Ontario

By **STAR EDITORIAL BOARD**  
Tues., Aug. 7, 2018

f t ✉ ...

If Ontario doctors were playing a baseball game, rather than fighting for the right to keep the names of the highest-billing doctors a secret, they would have struck out by now.

They lost their argument before an adjudicator of Ontario's information and privacy laws, and at the Ontario Divisional Court and, on Friday, at the Ontario Court of Appeal.



# OMA Application Rejected

- Ontario Divisional Court dismissed OMA application
  - IPC not bound by previous IPC rulings - varying decisions reconciled appropriately
  - court refused to criticize IPC for failing to rely on report that was not provided to it by any of the parties
  - clarified that *FIPPA* requester does not need reason to obtain information – public is entitled to information held by government

# Ontario Court of Appeal Upholds IPC

- ONCA dismissed OMA appeal
- Adjudicator not bound by previous decisions
- Charter values are only considered in circumstances of genuine ambiguity, and there is no such ambiguity
- An individual's gross professional or business income is not a reliable indicator of the individual's actual personal finances or income [not PI]

# Supreme Court of Canada Denies OMA Leave

- SCC Denies OMA leave to appeal – March, 2019
- IPC's 2016 decision stands
  - sharing names of physicians who bill OHIP with the public falls in line with growing public expectation for transparent government and accountability as to how their money is spent
  - billings of other professionals and consultants not considered personal information and is accessible to the public under Ontario's access legislation
  - Ontarians have a right to scrutinize government spending and decision-making; right to access government-held information is a cornerstone of a healthy democracy
  - individuals need to know what their government is doing to hold it accountable

# Algoma Public Health

- **Order MO-3295** - Algoma Public Health (APH) received a request for final report of 2015 KPMG forensic review
- Report relates to whether conflict of interest regarding appointment of APH's former interim CFO, and whether any funds were subsequently misappropriated or lost by APH
- APH decides personal privacy exemption applies, but decides full report should still be disclosed on basis of **public interest override (first time ever!)**
- IPC upholds APH decision to disclose
- April 2019: Ontario Court of Appeal affirms APH/IPC decision

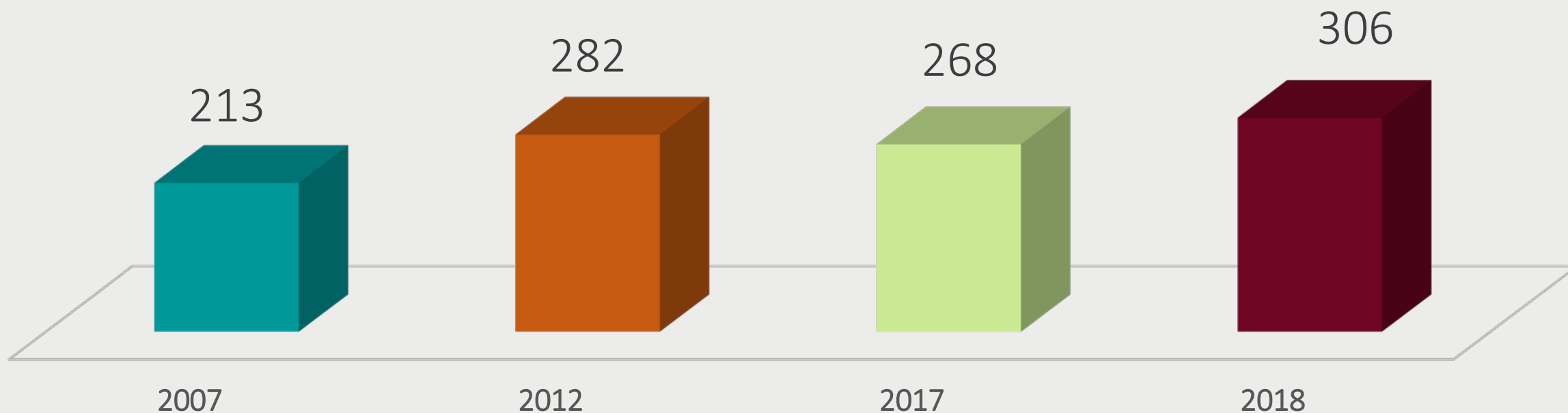


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# PRIVACY



# Total Privacy Complaints Opened Per Year



# What Smart Cities May Offer

A community that uses connected technologies to collect and analyze data to improve services for citizens:

- less congestion and traffic accidents
- increased safety for cyclists and pedestrians
- better environment
- efficient use of public resources
- better informed citizens



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# Keep in Mind

- Smart City issue far more than Sidewalk Toronto
- These are CITIES
- The private sector needs to realize that involvement with public sector changes the rules



# Privacy Risks of Smart Cities

- Privacy not barrier to smart cities, but they require strong **privacy protections**
- Without adequate safeguards, excessive **personal information** may be collected, used, disclosed
- Potential hazards:
  - tracking individuals as they go about their daily activities (**surveillance**)
  - use/disclosure for other purposes without consent (**function creep**)
  - security breaches (**cyberattacks**)





# Which Privacy Laws Apply?

## *Municipal Freedom of Information and Protection of Privacy Act*

- No **collection** of personal information unless:
  - authorized by statute
  - used for law enforcement
  - when necessary for a lawfully authorized activity
- No **use** or disclosure unless for the same, or a consistent, purpose

## *Personal Information Protection and Electronic Documents Act*

- Data collected by **private sector** for commercial purpose
- Organization must get meaningful consent
- Individuals must be given clear information explaining what organization will do with their information



# Smart Cities Challenge Update

- Guelph/Wellington County wins over 500,000 category
- \$10 million prize to be paid by Infrastructure Canada, as project attains milestones
- Guelph/Wellington proposal: Canada's first circular food economy
- Three goals
  - 50% increase in access to affordable, nutritious food
  - 50% increase in economic revenues by reducing and reimagining food waste
  - 50 new circular food businesses, collaborations, social enterprises
- All winners must complete comprehensive PIA and submit to local privacy commissioner for review and comment

# Data Analytics

- Changing how we think about, use data
- New combinations of data may reveal hidden patterns and insights
- Data integration (sharing, linking, analyzing data) can enhance:
  - policy development
  - system planning
  - resource allocation
  - performance monitoring



# Privacy Risks of Data Integration

- Not consent-based, lack of **transparency**
- Multiple massive government databases of PI
- Surveillance and **profiling** of individuals
- Increased cybersecurity risks
- Potential **discrimination** based on inaccurate data/flawed algorithms

# New Data Integration Bill

- Culmination of collaborative process between IPC/Ontario gov't
- Legislative framework to enable **centralized** approach to data integration
- Benefits of centralized approach:
  - **no duplication** of linked datasets across multiple government agencies
  - consistent application of privacy controls
  - independent **oversight**
  - public trust and accountability



# Budget Bill Amends *FIPPA*

- Schedule 31 of 2019 budget bill amends *FIPPA* to include Part III.1 (Data Integration)
- Part III.1 sets out privacy-protective framework to enable data integration:
  - designated units within ministries may indirectly collect PI from service providers and funded agencies
    - special “inter-ministerial” units may collect from other ministries
  - units may link PI but must then de-identify
  - responsible minister to establish data standards approved by IPC
  - IPC may conduct reviews of units, new **order-making powers**

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# The Philadelphia Model

- Review of police sexual assault files to look for deficiencies and biases
- Since implementation in Philadelphia 17 years ago, “unfounded rape” rate dropped to four per cent
- U.S. national average is seven per cent



# MOU for Use by Ontario Police

- IPC worked with police and stakeholders to develop model Memorandum of Understanding and Confidentiality Agreement
- Sets the terms for the review of sexual assault cases by police and external reviewers
- In 2018, the Ontario Association of Chiefs of Police endorsed this approach to sexual violence case review
- The IPC has reviewed elements of the OACP's guidance document that sets best practices for police response to sexual violence

MEMORANDUM OF UNDERSTANDING respecting the External Sexual Assault Case Review Program made this 1st day of November, 2017 (the "Effective Date").

BETWEEN:

SEXUAL ASSAULT CENTRE KINGSTON  
(Hereinafter referred to as "SACK")

-AND-

PAMELA CROSS, BA, LLB  
(Hereinafter referred to as "Pamela Cross")

-AND-

OTTAWA RAPE CRISIS CENTRE  
(Hereinafter referred to as "ORCC")

COLLECTIVELY REFERRED TO AS THE "KINGSTON VAW ADVOCACY GROUPS"

-AND-

KINGSTON POLICE  
(Hereinafter referred to as "Kingston Police")

COLLECTIVELY REFERRED TO AS THE "PARTIES"

WHEREAS the Kingston Police as a municipal police service are governed by the *Police Services Act*, R.S.O. 1990, c. P. 15 (*PSA*) and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M. 56 (*MFIPPA*);

WHEREAS, under section 1 of the *PSA*, police services shall be provided in accordance with principles, including the need for co-operation between the providers of police services and the communities they serve; the importance of respect for victims of crime and understanding of their needs; the need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society; and the need to ensure that police forces are representative of the communities they serve;

WHEREAS, under section 4(2) of the *PSA*, core police services include crime prevention, law enforcement, and providing assistance to victims of crime;

WHEREAS, under section 41(1) of the *PSA*, the duties of the Chief of the Kingston Police include ensuring that the Kingston Police provide community-oriented police services and that its members carry out their duties in a manner that reflects the needs of the community;

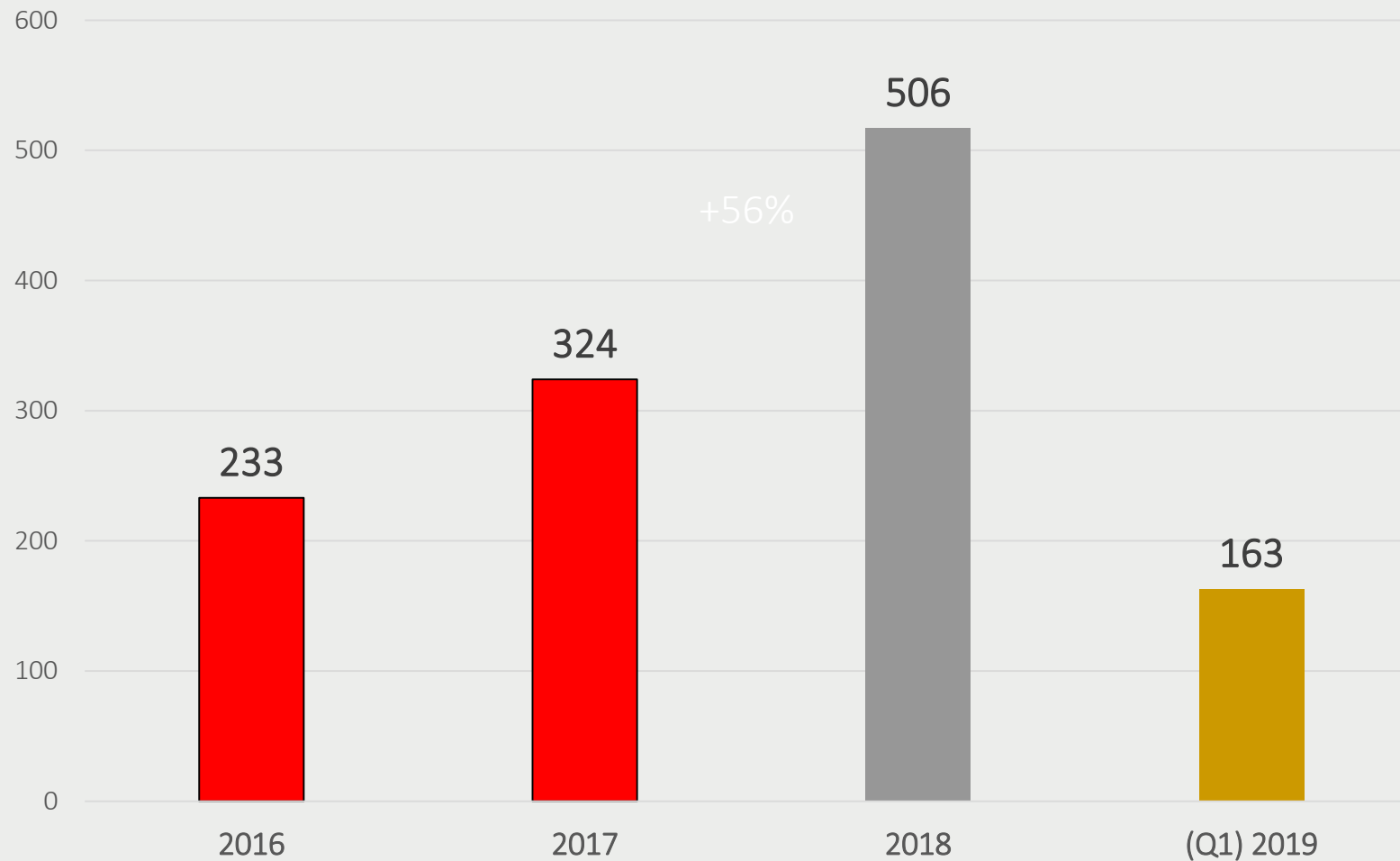
WHEREAS the duties and functions of the Kingston Police include investigating reports of sexual assault and supervising and monitoring those investigations, including for the purpose of identifying deficiencies, errors and anomalies in and improving the efficiency of individual sexual assault investigations and the sexual assault investigative process as a whole;

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# HEALTH PRIVACY

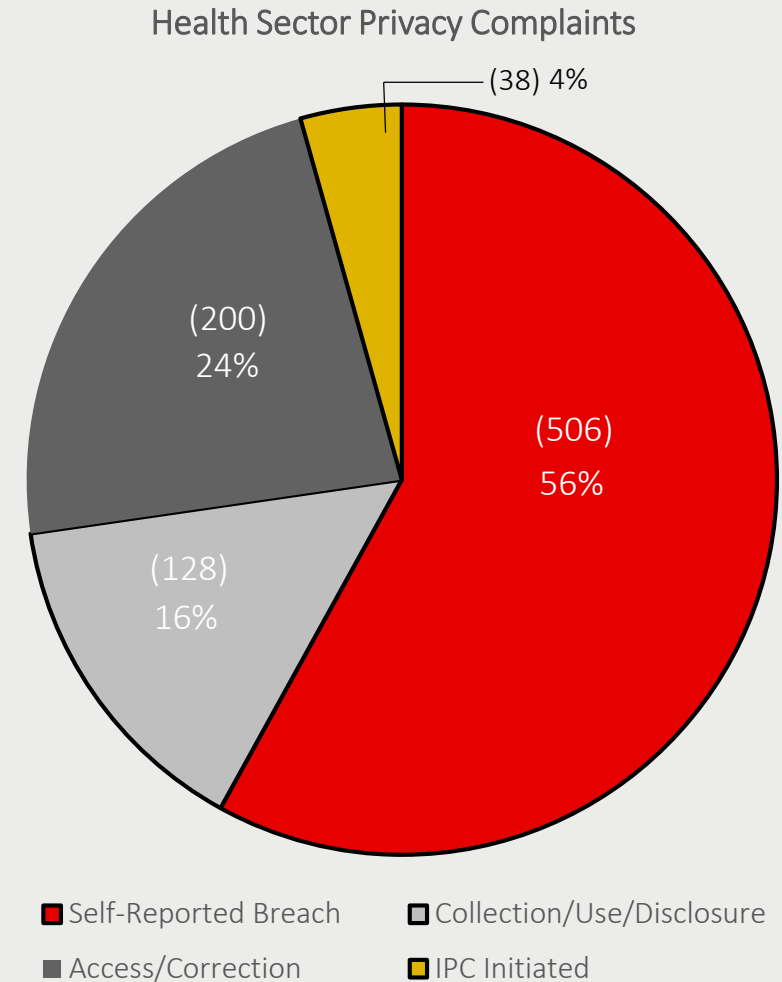


# Self-Reported Breaches Before and After Mandatory Breach Reporting



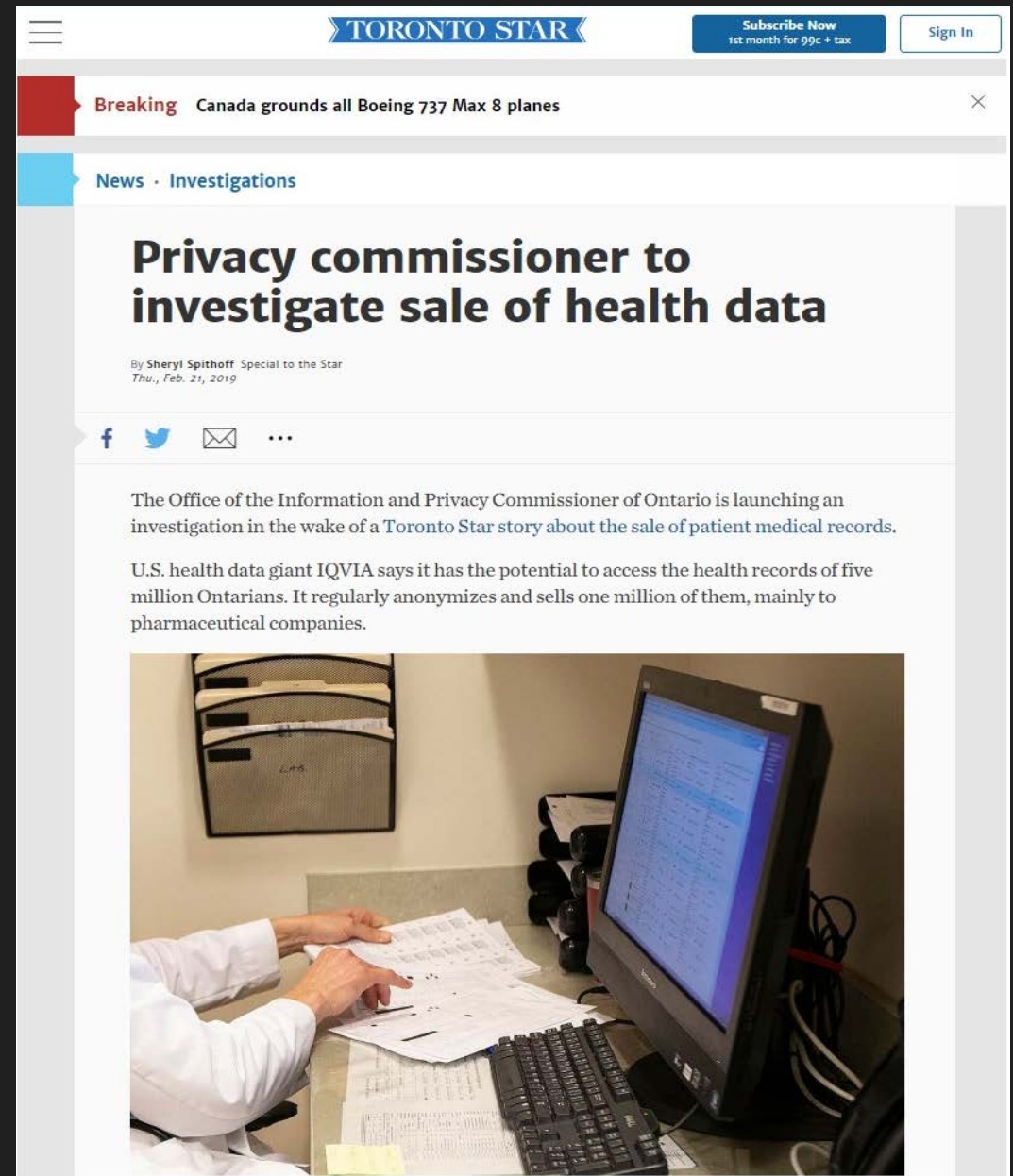
# Health Sector Privacy Complaints 2018

- Of the 506 self-reported breaches in 2018:
  - 120 were snooping incidents
  - 15 were ransomware/cyberattack
- Remaining 371 self-reported breaches were related to:
  - lost or stolen PHI
  - misdirected information
  - records not properly secured
  - other collection, use and disclosure issues



*“The article indicates that information from patient records is being provided to private sector organizations. We have reason to believe that these arrangements may be contrary to the law.”*

— IPC statement to the Star



The screenshot shows the top of a Toronto Star news page. At the top right, there is a navigation menu with a hamburger icon, the 'TORONTO STAR' logo, a 'Subscribe Now' button (1st month for 99¢ + tax), and a 'Sign In' button. Below the navigation is a red 'Breaking' banner with the text 'Canada grounds all Boeing 737 Max 8 planes'. Underneath is a blue 'News · Investigations' banner. The main headline is 'Privacy commissioner to investigate sale of health data' in large, bold black font. Below the headline, it says 'By Sheryl Spithoff Special to the Star Thu., Feb. 21, 2019'. There are social media sharing icons for Facebook, Twitter, and Email. The article text begins with 'The Office of the Information and Privacy Commissioner of Ontario is launching an investigation in the wake of a Toronto Star story about the sale of patient medical records.' The next paragraph reads: 'U.S. health data giant IQVIA says it has the potential to access the health records of five million Ontarians. It regularly anonymizes and sells one million of them, mainly to pharmaceutical companies.' Below the text is a photograph of a person in a white lab coat sitting at a desk, looking at a computer monitor and papers. The monitor displays a data-rich interface, likely a medical records system. There is a keyboard and a mouse on the desk.



- CBC Marketplace investigation reveals Toronto plastic surgeon, Dr. 6ix, may have been filming patients in states of undress without their consent
- Surveillance camera discovered in a consultation room
- He is now under investigation by both College of Physicians and Surgeons of Ontario and IPC

## MARKETPLACE

### 'It's creepy': Security cameras spotted in plastic surgeon's consult room



Marketplace investigation sparks probes by Ontario privacy commissioner and College of Physicians and Surgeons

Caitlin Taylor, Makda Ghebreslassie - CBC News ·

Posted: Dec 14, 2018 4:00 AM ET | Last Updated: December 14, 2018



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# RESOURCES



# Part X of the *Child, Youth and Family Services Act*: A Guide to Access and Privacy for Service Providers

- Overview for service providers on the rules for collecting, using, disclosing, safeguarding personal information under Part X

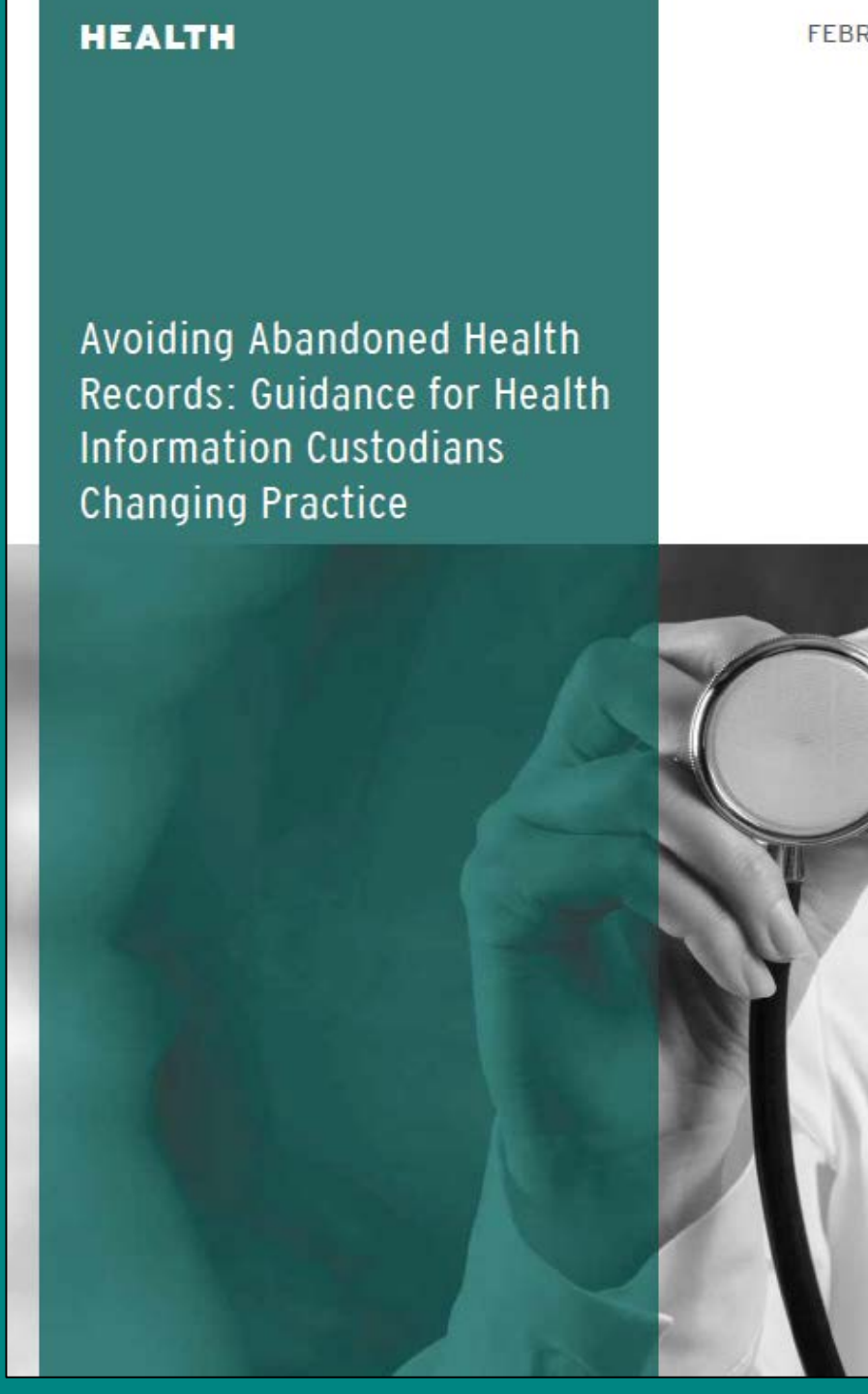
Part X of the *Child, Youth and Family Services Act*: A Guide to Access and Privacy for Service Providers



# Avoiding Abandoned Records

- **Who is the custodian?**
  - in the event of death? bankruptcy? transfer?
  - in a group practice?
- **What obligations do custodian have?**
  - must retain, transfer and disposed of records in a secure manner
  - must take reasonable steps to prevent privacy breaches
  - must notify individuals of a transfer
- **How to avoid abandoned records?**
  - succession plan setting out roles and responsibilities

Avoiding Abandoned Health  
Records: Guidance for Health  
Information Custodians  
Changing Practice



# Fees, Fee Estimates and Fee Waivers

- A number of important orders and court decisions have been issued since the original guide was first published in 2003
- This updated version explains:
  - factors to consider when calculating fee
  - how to provide a reasonable fee estimate and interim decision
  - how interim access decisions affect timelines
  - what decisions may be appealed
  - how a fee waiver is determined

ACCESS

JUNE 2018

Fees, Fee Estimates and Fee  
Waivers





# Responding to a Health Privacy Breach

This publication replaces the guidance document, *What to do When Faced With a Privacy Breach: Guidelines for the Health Sector*

HEALTH

OCTOBER 2018

Responding to a Health Privacy Breach: Guidelines for the Health Sector

# Resources for Schools

- Answers to common questions about privacy and access to information in schools
- Helps school officials and teachers understand rights and obligations related to students' personal information

A Guide to Privacy and Access  
to Information in Ontario  
Schools



Information and Privacy  
Commissioner of Ontario  
Commissaire à l'information et à la  
protection de la vie privée de l'Ontario



# Access Fact Sheet: Third Party Information Exemption

- An institution must first determine if the third party exemption applies before withholding records.
- Three-part test:
  - the record contains certain types of business information
  - the information was supplied in confidence, either implicitly or explicitly
  - disclosure could cause harm to the third party

## Third Party Information Exemption

Public institutions typically have information about outside, or “third party” organizations. Often this information is collected from organizations doing business with institutions. While Ontario’s *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act* give people the right to access records held by institutions, there are exceptions to that right, including where disclosure could harm a third party’s business interests. This exception is commonly referred to as the “third party exemption.”

When an institution receives a request for records that include information related to a third party, it must determine if the third party exemption applies to justify withholding the records.

### DETERMINING IF THE EXEMPTION APPLIES

The exemption applies if the record satisfies all three parts of this test:

1. the record contains certain types of business information
2. the information was supplied in confidence, either implicitly or explicitly
3. disclosure could cause harm to the third party

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# RECENT DECISIONS

David Goodis  
Assistant Commissioner



# Supreme Court of Canada and Voyeurism

- High school teacher secretly recorded his female students' chests with a camera pen while they were engaged in normal activities at school
- Jarvis charged with voyeurism [*Criminal Code*, s. 162(1)(c)]
- Offence where person **(i) surreptitiously** observes/records another person in situation where **(ii) reasonable expectation of privacy**, if observation/recording for **(iii) sexual purpose**
- Jarvis acquitted at trial: students had reasonable expectation of privacy, but videos not for sexual purpose

# Video Surveillance: Voyeurism

- ON Court of Appeal dismissed Crown's appeal; three judges say sexual purpose, but 2-1 majority says students **did not have a reasonable expectation of privacy** [acquittal]
- Supreme Court of Canada finds students did have reasonable expectation of privacy, all elements satisfied, Jarvis **convicted** [*R. v. Jarvis*, 2019 SCC 10]
- IPC intervened before SCC
- “privacy is **not an all-or-nothing concept**...being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording” [Wagner C.J., para 41]

# Video Surveillance: Voyeurism

- Another voyeurism case before ON Court of Appeal [*R. v. Trinchi*, 2019 ONCA 356]
- Two people in long-distance romantic relationship engaged in an intimate webcam video chat; both were naked, both knew they were on video
- One party, unbeknownst to the other, took still photos of his partner from the live video stream
- When relationship ended, screenshots emailed to many people
- Individual charged with multiple offences, but on voyeurism question, court concludes **taking surreptitious screenshots satisfies requirements for voyeurism offence** [*Criminal Code*, s. 162(1)]

# Personal Email Accounts of Elected Officials

- **Order MO-3607** – request to Township of Springwater emails related to land development from **non-township email accounts** of Mayor, Deputy Mayor, and a councillor
- Township denied access on basis of no custody or control
- No evidence they used personal email accounts to conduct township business
- Any emails to conduct township business are available on township email accounts
- **Emails in personal email accounts are not in township's custody or control**

# Can Councillors' Records Be Accessed Through *MFIPPA*?

- **Order MO-3471** – request to City of Toronto for communications sent or received by staff relating to city councillor's Twitter account
- IPC rules records are **personal/political**, relating to councillor's activities as an elected representative
- not accessible (outside city's custody or control)





# Comments to the Media – Authorized or Not?

- ***PHIPA* Decision 82** - hospital responded to media requests for information about deceased patient who had been subject of a decision by the Health Professions Appeal and Review Board
- Patient's family complained that hospital's statements contravened *PHIPA* by disclosing health information without consent
- IPC found repetition of facts about patient, when taken from HPARB's **published decision**, not breach of *PHIPA*
- Some of hospital's statements went beyond HPARB's decision – these are **unauthorized** disclosures under *PHIPA*

# Request for Assisted Death Records

- **Order PO-3862** – request to Health Sciences North for records relating to assisted death
- Hospital **refused to confirm or deny existence** of records because doing so would be invasion of privacy and could compromise law enforcement activities and security at the hospital
- IPC ordered release of the records - could not be expected to have an effect on hospital **security or law enforcement**
- Requester not seeking access to any information that could be used to identify patients or staff
  - remember “identifying” information about medical assistance in dying excluded from *FIPPA* under s. 65(11)

# Third Party Information Exemption

- **Order MO-3577** - Journalist appealed a Region of Waterloo decision to deny access to portions of project agreement for light rail transit in Kitchener-Waterloo
- IPC finds **financial model** in agreement is in custody or control of region
- Section 10(1) exemption for third party information does not apply to the withheld information because it is **negotiated**, not supplied
- IPC orders disclosure

# Frivolous and Vexatious?

- **Order MO-3278** - Request to Waterloo for records about housing co-operative where requester resides
- Region declines to process request on basis it was frivolous and vexatious under s. 4(1)(b)
- IPC finds insufficient evidence to establish bad faith or purpose other than to obtain access
- Region ordered to make access decision

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# PRIVACY COMPLAINTS



# School Photos

- **Privacy Complaint MC16-5** – complaint from a parent about a school board’s picture-taking program because students’ personal information was shared with the photographer
- **Conclusions/Findings:**
  - collection and use of students’ photographs for education-related purposes permissible
  - however, use of photos for ID cards in association with Canadian Centre for Child Protection goes beyond original purpose
- **Recommendations:**
  - parents/guardians can:
    - **opt out** of receiving marketing from photographers and the ID card program
    - request the photographer **destroy** their children’s personal information, so long as it does not interfere with the board’s administrative requirements

# Tribunal Decisions

- **Privacy Complaint PC17-9** – Complaint about personal information in a published decision of the Human Rights Tribunal (HRTTO)
- **Conclusions/Findings:**
- HRTTO's decisions not covered by privacy rules in *FIPPA*, because information is in those decisions for the purpose of creating a public record [s. 37]
- **Recommendation:**
- HRTTO only include minimum personal information necessary to the purpose of the decisions
- **Note:** Proposed *Tribunal Adjudicative Records Act, 2019* will remove records of adjudicative tribunals from *FIPPA*



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# MEDIATION SUCCESS STORIES



# Toronto Transit Commission

- Toronto Transit Commission received request for all communications, emails, briefing notes, draft and internal reports relating to the Scarborough subway/LRT, from 2010 to 2017
- TTC issued **\$32,000** fee estimate, time extension of **three years**
- Through mediation and discussions including knowledgeable city staff, requester narrowed scope over time, city gave reduced fee estimate, eventually reduced to **\$700**

# Ministry of the Environment and Climate Change

- Citizens group asked Ministry of the Environment and Climate Change for records relating to concerns about wells near a quarry
- After notifying an affected party, ministry granted partial access, denied access to some based partly on personal privacy
- Third party (quarry owner) also appealed, objecting to ministry's decision to grant partial access
- Through mediation, third party consented to disclosure of **all records** at issue, also invited citizens group to view quarry site and ask questions

# What We are Working On

- **Webinar** – Introduction to the *Child and Family Services Act* on June 6
- **Genetic information** – factors to consider before increasing its availability through shared electronic systems
- **Consumer health apps** – what to consider before asking patients to use apps to manage their health care and access their personal health information
- **Updating *PHIPA* documents** – we are updating our *PHIPA* documents to reflect IPC decisions, legislative amendments, and evolving best practices

# Next Sessions

- Session A  
Latest Developments in Protecting Personal Health Information  
Room N1001 (this room)
- Session B  
Responsibilities under Part X of the *Child, Youth and Family Services Act*  
Room N1002 (next door)

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