

Accessing Information from Public Institutions

Brendan Gray, Health Law Counsel



Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

Privacy Law Basics

OBA

October 2, 2019

DISCLAIMER

THIS PRESENTATION IS:

- PROVIDED FOR INFORMATIONAL PURPOSES,
- NOT LEGAL ADVICE, AND
- NOT BINDING ON THE IPC.

Topics

1. What is the IPC?
2. *FIPPA/MFIPPA*
3. *PHIPA*



What is the IPC?

Information and Privacy Commissioner of Ontario (IPC)

- The IPC is an officer of the legislative assembly.
- Some of the IPC's functions are protected by parliamentary privilege.
- Until very recently, the IPC only had authority under three acts:
 - *Freedom of Information and Protection of Privacy Act (FIPPA)*
 - *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*
 - *Personal Health Information Protection Act, 2004 (PHIPA)*

Information and Privacy Commissioner (IPC) (cont')

- But now there are more acts (some are in force and some are not in force) with an oversight role for the IPC, including
 - *Child, Youth and Family Services Act, 2017*
 - *Anti-Racism Act, 2017*



FIPPA/MFIPPA

Public Institutions

Provincial

- health
- education
- policing/administration of justice
- natural resources
- colleges and universities
- hospitals (not including patient health records)

Municipal

- municipalities
- boards of health
- police
- public transit
- school boards
- most other local boards

Principles of Access

Ontario's access legislation sets out basic access principles:

- information should be **available to the public**
- exemptions from right to access should be **limited and specific**
- disclosure should be **independently reviewed**



Requests under *FIPPA*

- three types of requests:
 - general information
 - personal information
 - correction
- request must be made in writing, \$5 fee
- if requester's identity is considered personal information, it cannot be disclosed without consent
- statutory 30 day response time



Exemptions: Limited and Specific

DISCRETIONARY

- advice or recommendations (s. 13)
- law enforcement (s. 14)
- economic interests (s. 18)
- solicitor-client privilege (s. 19)
- danger to safety or health (s. 20)
- species at risk (s. 21.1)
- information soon to be published (s. 22)

MANDATORY

- cabinet records (s. 12)
- third party information (s. 17)
- someone else's personal information (s. 21)

Third Party Exemption (s. 17(1))

Information must be:

- Of a specified nature (trade secret/scientific, technical, commercial, financial or labour relations)
- Originally supplied by someone (usually the third party) to the institution and supplied in confidence (implicitly or explicitly)
- Such that its disclosure could reasonably be expected to cause one of the specified harms

Third Party Exemption cont'd: Specified Harms

Where disclosure could reasonably be expected to:

- Significantly prejudice competitive position/interfere with contractual or other negotiations of the third party
- Deter third parties from supplying similar information to the institution in the future where it is in the public interest that it be supplied
- Result in undue loss/gain to any person/organization
- Reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute

Personal Privacy Exemption (s. 21)

- An institution must not disclose personal information of anyone other than the requester, subject to certain limited exceptions. One exception is where disclosure would not result in the unjustified invasion of the other person's privacy
- Personal information includes, for example, information relating to race, age, sex; blood type; address; telephone number
- There are a number of factors for determining whether disclosure would result in an unjustified invasion of someone's personal privacy
- There are some circumstances where an unjustified invasion of personal privacy would be presumed, e.g. relates to medical, psychiatric or psychological diagnosis
- Where an institution has a request for a record that would attract the personal privacy exemption, the institution may refuse to confirm or deny the existence of the record if to do so would constitute an unjustified invasion of personal privacy

Right of Appeal

A requester may appeal any decision of the institution, including a decision to:

- deny access
- charge a fee and/or deny a fee waiver
- “deemed refusal” – failure to provide a decision in 30 days
- extend time for a decision beyond 30 days
- deny a correction request

A third party may appeal the institution’s decision to disclose information that affects its interests

Appeal to IPC must be made within 30 days of notice of decision

Stages of the Appeal Process



Intake

Mediation

Adjudication

Privacy Complaint Process

- Individuals who feel their personal information has been handled inappropriately by a government institution may file a complaint with the IPC.

Intake

- privacy complaint files are screened by the IPC Registrar and analysts to ensure they fall within our jurisdiction

Intake Resolution

- some privacy complaints may be resolved without a formal investigation

Investigation

- if complaint is not dismissed or informally settled, it will be assigned to an investigator

Final Privacy Complaint Report

- at the end of the investigation, the investigator will send a finalized Privacy Complaint Report to the parties
- investigator may follow-up to ensure recommendations have been implemented

PHIPA

Application of *PHIPA*

- The *Personal Health Information Protection Act, 2004* came into force on November 1, 2004
- The majority of *PHIPA* governs “personal health information” in the custody or control of:
 - “Health Information Custodians,” or
 - “Agents” of health information custodians
- However, *PHIPA* also has broader application
 - For example it contains restrictions on the use and disclosure of personal health information by non-health information custodians that receive personal health information from health information custodians

Definition of Personal Health Information

Defined as identifying information about an individual in oral or recorded form that:

- Relates to an individual's physical or mental health, including information that consists of the health history of the individual's family
- Relates to the provision of health care to the individual, including the identification of a person as a provider of health care to the individual
- Identifies an individual's substitute decision-maker
- Relates to payments or eligibility for health care
- Is the individual's health number
- Is a plan of service under the *Home Care and Community Services Act, 1994* for the individual
- Relates to the donation of body parts or bodily substances

Definition of Health Information Custodian

Health information custodians include:

- A health care practitioner who provides health care
- A person who operates a group practice of health care practitioners who provide health care
- A centre, program or service for community health or mental health whose primary purpose is the provision of health care.
- A hospital, psychiatric facility and independent health facility
- A pharmacy, ambulance service, laboratory or specimen collection centre
- A long-term care home, care home or home for special care
- A medical officer of health of a board of health
- Minister/Ministry of Health and Long-Term Care

Definition of Agent

- An agent is a person that, with the authorization of a health information custodian, acts for or on behalf of the custodian in respect of personal health information
- It is irrelevant whether or not the agent:
 - is employed by the health information custodian
 - is remunerated by the health information custodian
 - has the authority to bind the health information custodian
- A health information custodian remains responsible for personal health information collected, used, disclosed, retained or disposed of by an agent

Duties Imposed on Health Information Custodians and their Agents

- A number of duties are imposed on health information custodians and their agents under the *PHIPA*
- These duties generally fall into four categories:
 - Collection, use and disclosure of personal health information
 - Security of personal health information
 - Responding to requests for access to and correction of records of personal health information
 - Transparency of information practices

Right of Access to Records of Personal Health Information

- Individuals have a right of access to their records of personal health information subject to exclusions and exceptions
- A health information custodian must respond to a request for access within 30 days, subject to a possible 30 day extension
- When granting access, health information custodians must:
 - Make the record of personal health information available for examination and, upon request, provide a copy to the individual
 - Take reasonable steps to be satisfied as to identity
 - Provide an explanation of any term, code or abbreviation used in the records of personal health information if reasonably practical
- A fee may be charged for access provided an estimate is first provided and the fee does not exceed reasonable cost recovery (see IPC Orders HO-009 and HO-014)

Access to Records of Personal Health Information, cont'd

- Requests for access must be in writing and must provide enough information to allow the custodian to identify and locate the record
- Nothing in *PHIPA* prevents a custodian from granting access to a record in response to an oral request
- Nothing in *PHIPA* prevents a custodian from communicating with an individual about his or her record of personal health information

Requests for Correction of a Record of Personal Health Information

- Individuals may request correction of their record of personal health information if they believe it is inaccurate or incomplete
- A health information custodian must respond to a request for correction within 30 days following receipt, subject to a possible 30 day extension
- A health information custodian must correct the record of personal health information if the individual demonstrates that the record is incomplete or inaccurate unless:
 - It consists of a record that was not originally created by the health information custodian and the health information custodian has insufficient expertise, knowledge or authority to correct the record; or
 - It consists of professional opinion or observation that the health information custodian has made in good faith

HEALTH

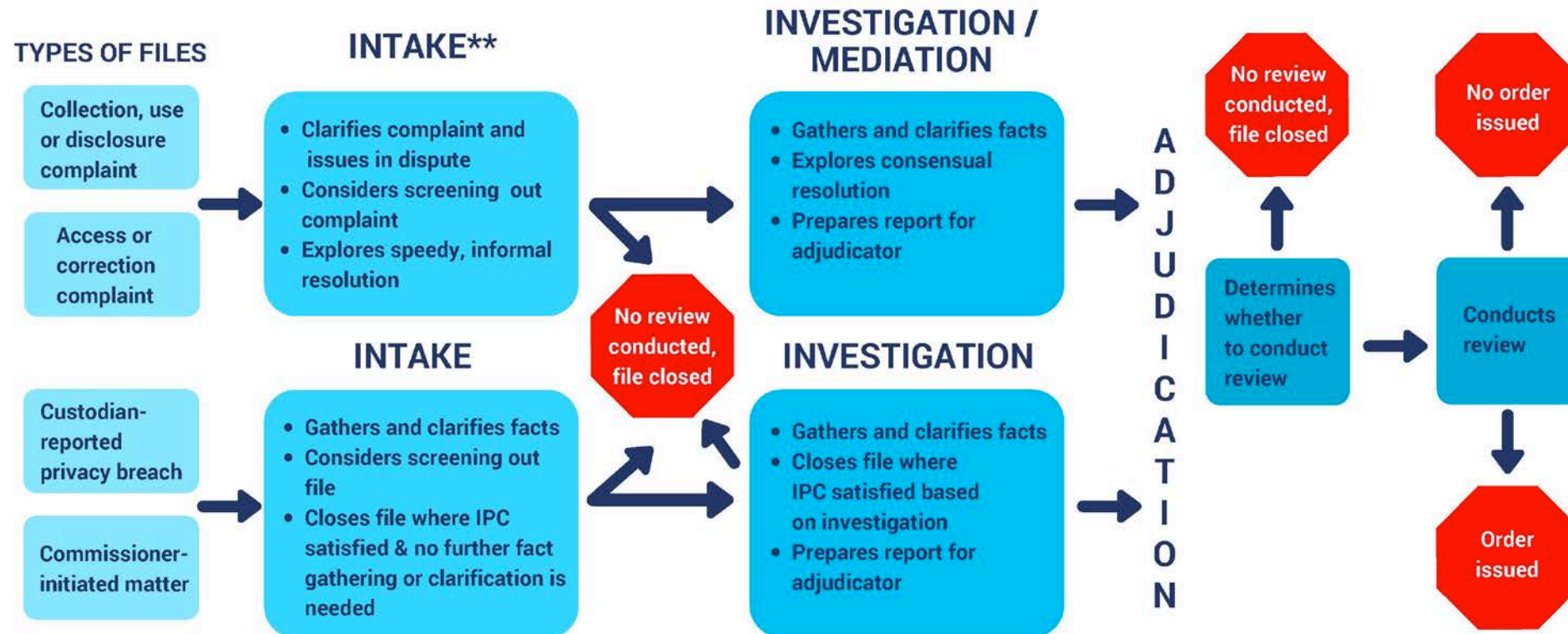
MARCH 2017

Code of Procedure
for Matters under the *Personal Health
Information Protection Act, 2004*



Stages of PHIPA Files

PHIPA Processes Flowchart



* The above process may be varied at the discretion of the IPC to achieve the fair, just and timely resolution of proceedings before the Commissioner or his delegates. Note specifically that urgent matters may be expedited to the adjudication stage.

** In addition to the general procedures outlined in the above flowchart, Intake also adjudicates time-sensitive complaints related to deemed refusals, failures to provide access and expedited access requests.

CONTACT US

Information and Privacy Commissioner of Ontario

2 Bloor Street East, Suite 1400

Toronto, Ontario, Canada M4W 1A8

Phone: (416) 326-3333 / 1-800-387-0073

TDD/TTY: 416-325-7539

Web: www.ipc.on.ca

E-mail: info@ipc.on.ca

Media: media@ipc.on.ca / 416-326-3965