

Recent Significant Orders of the IPC

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Connections
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Sherry's Topics

- Labour relations exclusion
- Exemptions
 - Personal privacy
 - Publicly available
 - Third party information
 - Relations with other governments
- Public interest override
- Custody or control

Don's Topics

- Corrections
- Frivolous or vexatious requests
- Cabinet records exemption
- Updates on abortion records and OHIP billings orders
- Openness and administrative tribunals



Labour Relations Exclusion, Exemptions, and the Public Interest Override

Labour Relations Exclusion

- PO-3777 – Request for records relating to procurement process for an external consultant to conduct an investigation into a workplace harassment complaint
- Legal Aid Ontario denied access on the basis of the labour relations exclusion
- IPC found that the labour relations exclusion applies
 - The institution collected, prepared, maintained or used each record as an employer for the purpose of retaining a consultant to investigate the workplace harassment complaint against the requester, who was an employee at the time the records were created
 - The institution did not improperly conflate records generated by the procurement process and those generated through its investigation of the complaint

Labour Relations Exclusion

- MO-3503 – Request for information relating to a criminal charge against the requester – at mediation, requester clarified that the request included contents of a file relating to a complaint he filed against a police officer
- Toronto Police Services Board decided that some information was not responsive, some fell under the personal privacy exemption, and that the labour relations exclusion applied to the complaint file
- IPC determined that some information should be disclosed, but that the complaint file falls under the labour relations exclusion
 - In line with *Ontario (Solicitor General) v Ontario (Assistant Information and Privacy Commissioner)*, the exclusion still applies even if the investigation that is the subject of the records has been concluded

Personal Privacy

- PO-3822 – Request from divorced father of a ten-year-old child for birth certificate applications for his child
- Ministry of Government and Consumer Services confirmed that two applications had been made and were denied, but denied access to the identity of the individual who had made the applications or the dates of the applications
- IPC found that disclosure of the individual's name and dates of the applications would not be an unjustified invasion of privacy – ordered disclosure
 - By court order, only the requester is authorized to hold the child's birth certificate – therefore, as a matter of fairness, he is entitled to know who attempted to obtain a birth certificate
 - On balance, disclosure would not be an unjustified invasion of privacy

Personal Information or Business Information?

- 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 some information under the personal privacy exemption
 - One affected party, who was an employee of the fire hall, did not consent to his personal information being disclosed – other two affected parties consented
- 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 professional capacity
 - It is possible to identify and disclose withheld information about the workplace incident that reveals only information about the affected party in a business or professional capacity

Publicly Available

- 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
- IPC found that the existing system makes motor vehicle collision reports available to everyone, and that a pricing structure to access such reports is in place
 - In line with MO-1573, 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

Relations with Other Governments

- PO-3817-I – Request for records relating to a specific meeting between Ontario Parks and Haudenosaunee First Nation
- Ministry of Natural Resources withheld portions of records on basis of various exemptions – First Nation raised application of the exemption for relations with other governments during inquiry
- IPC found that the First Nation may raise the application of the exemption, and that the exemption applies to the claimed records
 - Ministry would have claimed the exemption on its own accord if it had concluded that it was available in these circumstances
 - Not permitting the First Nation to claim the exemption would not serve the interests of the ministry
 - Bill 127 amendments (not yet in force at time of the order) recognize the status of First Nations as governments and importance of intergovernmental relations
 - Disclosure would inhibit productive negotiations and weaken intergovernmental relations

Public Interest Override

- MO-3476 – Request for information about street checks and racial data
- Peel Regional Police (PRP) Services Board denied access to six records under various exemptions, including discretionary law enforcement, advice or recommendations, solicitor-client privilege and personal privacy
- IPC partially upheld the police’s claim of the advice or recommendations exemption, but found that the public interest override applies to four records falling under the exemption
 - “[T]he public interest in the street check process, including the discrepancies between race data collected on the PRP forms and the street check database, outweighs the police’s need to ensure that their employees provide free and frank advice.”



Custody or Control

Custody or Control

- MO-3471 – Request for access to communications sent or received by staff of a city councillor concerning the councillor's Twitter account
- City of Toronto denied access on the basis that it does not have custody or control over any responsive records
- IPC upheld the City of Toronto's decision
 - Found that the records were personal and/or political records relating to the councillor's activities as an elected representative and were not under the control of the city
 - City councillor was not acting as an officer or employee of the city when the records were created
 - Even if records relate to a city matter in a general sense, the city does not have authority to regulate the use or content of any such records, and could not reasonably expect to obtain a copy upon request
 - Records not in furtherance of city business

Custody or Control

- MO-3607 – Request for all emails from the personal email accounts of the Mayor, Deputy Mayor and a councillor relating to a specific land development
- Township of Springwater denied access on the basis that it does not have custody or control over any responsive records that may exist
- IPC dismissed the requester's appeal
 - Applied the established custody and control factors, previous orders (e.g. MO-3281, MO-2821), and the *National Defence* test
 - In the absence of any reason to believe that personal email accounts are being used to conduct township business in the context of this appeal, emails to and from such accounts are not in the custody or control of the township

Custody or Control

- PO-3814 –request for communications and records sent and received between MPP Liz Sandals and her constituency office regarding a specific incident and specific individuals.
- Cabinet Office denied the request on the basis that it did not have custody or control of the records under section 10(1) of FIPPA.
- IPC upheld the Cabinet Office’s decision
 - Cabinet Office did not have physical possession of the records because they related to Ms. Sandals’ role as an MPP and not her subsequent role as a minister.
 - The incident in question was not “related to” a Cabinet Office matter.
 - As a result, found that Cabinet Office did not have custody or control of the records requested

Corrections,
Frivolous or Vexatious Requests, and
Cabinet records exemption

Corrections

- MO-3581 – Request for corrections to personal information in police officers' notebooks
- Waterloo Regional Police Services Board denied the correction request and advised the requester that he could attach a statement of disagreement to the records
- Requester submitted that parts of the notes were deliberately inaccurate or incomplete to support the officers' use of force during the arrest of the requester
- IPC upheld the police's decision
 - “[W]hile the officers’ notes may be incomplete or inaccurate in the sense that they do not accord with the video surveillance of the incident, there is insufficient evidence to conclude that any inconsistency or inaccuracy is other than those errors that are typical of a witness’ recollections of an incident”
 - Also, much of the information at issue comprises statements of opinion

Frivolous or Vexatious

- **PO-3738-I** – Request for records relating to the restructuring of General Motors (GM) in 2009
- The Ministry of Economic Development, Employment and Infrastructure denied access to some information under various exemptions, including third party information
- GM argued that the request was frivolous or vexatious, but the ministry did not agree
- IPC determined that GM is not entitled to rely on the frivolous or vexatious provisions when the ministry did not claim them, and that the request is not frivolous or vexatious or an abuse of process
 - Frivolous and vexatious provisions included in the Act for the benefit of institutions
 - GM may, however, argue that a request constitutes an abuse of process

Cabinet records exemption

- PO-3839-I – Request was for meeting minutes, meeting notes and briefing notes produced by the Premier’s Advisory Council on Government Assets relating to wine and spirit retailing and distribution in Ontario.
- IPC denied access pursuant to sections 12, 13, 17 and 18 of FIPPA.
- The IPC found that **most of the records were exempt from disclosure under section 12 – Cabinet Records**. These records included draft and final briefing materials and due diligence materials created by the Advisory Council.
- Records, including drafts and working papers, would reveal the substance of Cabinet deliberations because of close working relationship between the Council and the Premier and Cabinet.
- The remaining records at issue were the Stakeholder Meeting Notes, which were not found to be exempt under section 12(1) because they did not reveal the substance of Cabinet deliberations nor permit the drawing of accurate inferences regarding those deliberations.

Update on Abortion Records and OHIP Billings Orders

Abortion Records - Update

- PO-3222 – Request for information about the number of claims and amounts billed for abortion services under OHIP
- Ministry of Health and Long-Term Care denied access on the basis that such records were covered by the exclusion for records relating to the provision of abortion services
- IPC found that the records were covered by the exclusion
- Ministry disclosed the records “outside of the *FIPPA* framework” after the requester filed an application for judicial review

Abortion Records - Update

- *ARPA Canada and Patricia Maloney v R, 2017 ONSC 3285* – Requester filed an application to strike down the abortion records exclusion as violating section 2(b) of the *Charter* (freedom of expression)
- Ontario Superior Court found that the exclusion infringes the *Charter* and declared it to be invalid
 - Substantially impedes meaningful public discussion
 - No room for discretion (e.g. for non-identifiable information)
 - Insufficient statistical data available to allow for meaningful debate
 - No apparent countervailing considerations (e.g. safety concerns)
- Exclusion has since been amended to limit scope – statistical information that doesn't meet certain conditions is not excluded

OHIP Billings – Update

- PO-3617 – Request for names, specialties and payments of OHIP’s top 100 billers
- Ministry of Health and Long-Term Care disclosed payment amounts and specialties of some physicians, but withheld names and some identified specialties under personal privacy exemption
- IPC found that records do not contain PI as they relate to a business or profession – ordered Ministry to disclose them
- OMA and two physician groups sought judicial review of the IPC’s order
 - Argued that the IPC adjudicator ignored earlier IPC decisions concluding that OHIP payments were personal information
 - Claimed that the IPC adjudicator should have considered 2005 “Cory Report”
 - Suggested that the requester failed to establish proper rationale for disclosure

OHIP Billings – Update

- In June 2017, the Divisional Court dismissed the application for judicial review
 - Confirmed that the IPC adjudicator was not bound by stare decisis, and that he reconciled varying decisions in an appropriate fashion
 - Refused to criticize the IPC adjudicator for failing to rely on a report that was not provided to him by any of the parties
 - Clarified that the requester does not need a reason to obtain the information – public is entitled to information held by government
- Ontario Court of Appeal granted leave to appeal

Openness and Administrative Tribunals



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Grant v. Toronto (City), 2018 CarswellOnt 6955

- Applicant in a Local Planning Tribunal hearing asked to be anonymized in the tribunal records to protect her privacy interests on the basis that (a) the tribunal has a policy function rather than a judicial function and requires less transparency, and (b) personal privacy protections under FIPPA.
- **Privacy Issue:** Whether the tribunal records should be anonymized to protect the applicant's personal privacy interests?
- **Findings:** The Tribunal denied the applicant's request. The tribunal found that it does have a decision-making function more similar to judiciary than policy. The tribunal also found that s. 42(1) of FIPPA provides that the disclosure of personal information is permitted for the purpose for which it was obtained or compiled by an institution for a consistent purpose.

Toronto Star v. AG Ontario, 2018 ONSC 2586

- The Toronto Star (“Star”) brought a civil application in the Superior Court of Justice seeking a declaration that the application of of FIPPA to 14 adjudicative tribunals infringed their section 2(b) *Charter* rights
- **Privacy Issue:** Whether the application of section 21 of FIPPA to the 14 named tribunals’ adjudicative records violated section 2(b) of the *Charter*, and if so, was the violation justified?
- **Findings:** Section 21 infringed section 2(b) *Charter* rights when applied to adjudicative records in two ways:
 1. The personal privacy exemption infringed the charter substantively because it presumptively protects personal information from disclosure contrary to the open courts principle and was not a justifiable infringement and;
 2. The procedural requirements of *FIPPA* infringed the charter because they delay the time in which a requester could access records, but was a justifiable infringement.
 3. The government was ordered to amend section 21 of FIPPA to comply with the Charter.

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