

Update from the IPC: Exceptions from the Right of Access & Strategic Priorities

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MGCS

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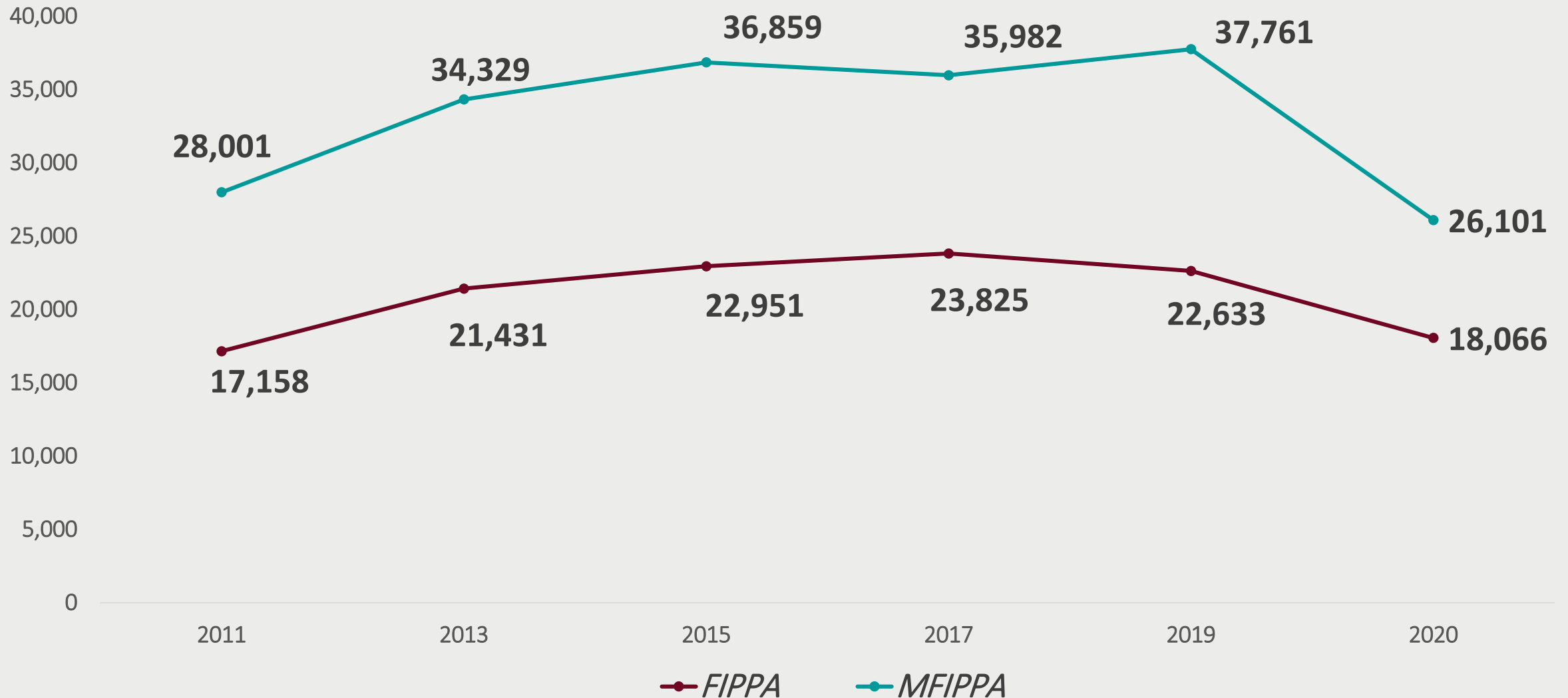


Access to information: A pillar of democracy

“The overarching purpose of access to information legislation ...
is to facilitate democracy.”

— Justice La Forest
Dagg v. Canada (Minister of Finance), 1997

Access requests filed under *FIPPA/MFIPPA*



Exceptions to the right of access

- Ontario's access and privacy laws give individuals the right to access records held by public sector organizations unless:
 - the records are **exempt** from the right of access
 - the request is frivolous or vexatious
 - the records are **excluded** from the laws
 - another law contains an overriding confidentiality provision



The Labour Relations and Employment Exclusion

What are labour relations and employment matters?

- **Labour relations** can refer to:
 - matters arising out of a collective bargaining relationship
 - conditions of work beyond those relating to collective bargaining
 - not necessarily restricted to employee-employer relationships
- **Employment matters** include:
 - human resources or staff relations matters
 - may also include volunteers

Example: Order PO-2038

- **Order PO-2038**, request for records regarding OPP disciplinary proceeding
- Request was denied based on labour relations and employment matters exclusion
- The IPC upheld the denial of access
 - although officer was no longer employed with the police, the exclusion still applied
- Further, disciplinary proceedings under the *Police Services Act* could be characterized as “employment-related actions.”

How does an institution determine whether the exclusion applies?

- Through at least one of the following parts of **section 65(6)**
 1. proceedings or anticipated proceedings
 2. negotiations or anticipated negotiations
 3. meetings, consultations, discussions or communications



Examples of determining whether exclusion applies

1. **Proceedings or Anticipated Proceedings** – [Order MO-2428](#), requester sought copies of 911 calls made by a police officer, that led to charges of discreditable conduct by his employer
2. **Negotiations or Anticipated Negotiations** – [Order PO-2520](#), a contract entered into by a college (an institution) and a numbered company relating to the college's labour negotiations
3. **Meetings, Consultations, Discussions or Communications** – [Order PO- 2614](#), records were requested that included details about the resolution of sexual harassment complaints filed with a university

Exceptions to the exclusion

- The labour relations and employment exclusion does not apply to:
 - agreements between institutions and a trade unions
 - agreements which end a proceeding before a court, tribunal or other relevant entity
 - agreements resulting from negotiations about employment matters
 - expense claims submitted by an employee of an institution to seek reimbursement

Best practices for public sector institutions

- Consider releasing records, even though they might be excluded.
- Claim any exemptions in addition to labour relations and employment exclusion to avoid multiple appeals.
- Be ready to produce the records in question if an appeal moves forward to mediation or adjudication.
- Consult our publication on labour relations and employment exclusion for more best practices.

The Labour Relations and Employment Exclusion



Solicitor-Client Privilege Claims

IPC protocol for solicitor-client privilege exemption

- Used when the institution claims the solicitor-client privilege exemption, and does not provide the IPC with copies of the records.
- Designed to ensure that sufficient evidence is provided to allow our adjudicators to decide whether the records are exempt under the solicitor-client privilege exemption.

IPC protocol for appeals involving solicitor–client privilege claims where the institution does not provide the records at issue to the IPC

The Office of the Information and Privacy Commissioner of Ontario (IPC) has developed this protocol for use at the adjudication stage where an institution has claimed the solicitor–client privilege exemption as the basis for denying access to the records at issue.¹

Where access is refused on the basis of an exemption from the right of access, the institution bears the burden of proving that the exemption applies. This is equally true for the solicitor-client privilege exemptions.²

In some cases where the exemption claimed is the solicitor-client privilege exemption, the institution does not provide the IPC with copies of the records. The remainder of this protocol applies to such situations, and is designed to ensure that sufficient evidence is provided to allow the adjudicator to decide the claim of privilege.³ The institution must provide sufficient information about the record that shows why the claimed privilege is applicable to it.⁴

The steps described in this protocol are for general information. The adjudicator deciding an appeal may deviate from these steps where appropriate in the circumstances. Also, as in any adjudication, the requester is generally given an opportunity to make representations on the institution's exemption claim.

¹ See the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, s. 12; *Freedom of Information and Protection of Privacy Act (FIPPA)*, s. 19.

² See *MFIPPA*, s. 42, *FIPPA*, s. 53.

³ However, this protocol does not apply for exemption claims other than solicitor-client privilege.

⁴ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.

Steps: solicitor-client privilege exemption

1. Adjudicator will first ask the institution to provide a copy of the records to the IPC.
2. If the institution does not provide the records, it may need to submit an affidavit listing the records with a description of each.
3. If the affidavit does not show that the exemption applies, the institution **may** have the opportunity to provide more evidence — or the IPC may simply find that the institution has not proven the exemption and will order disclosure of the record.



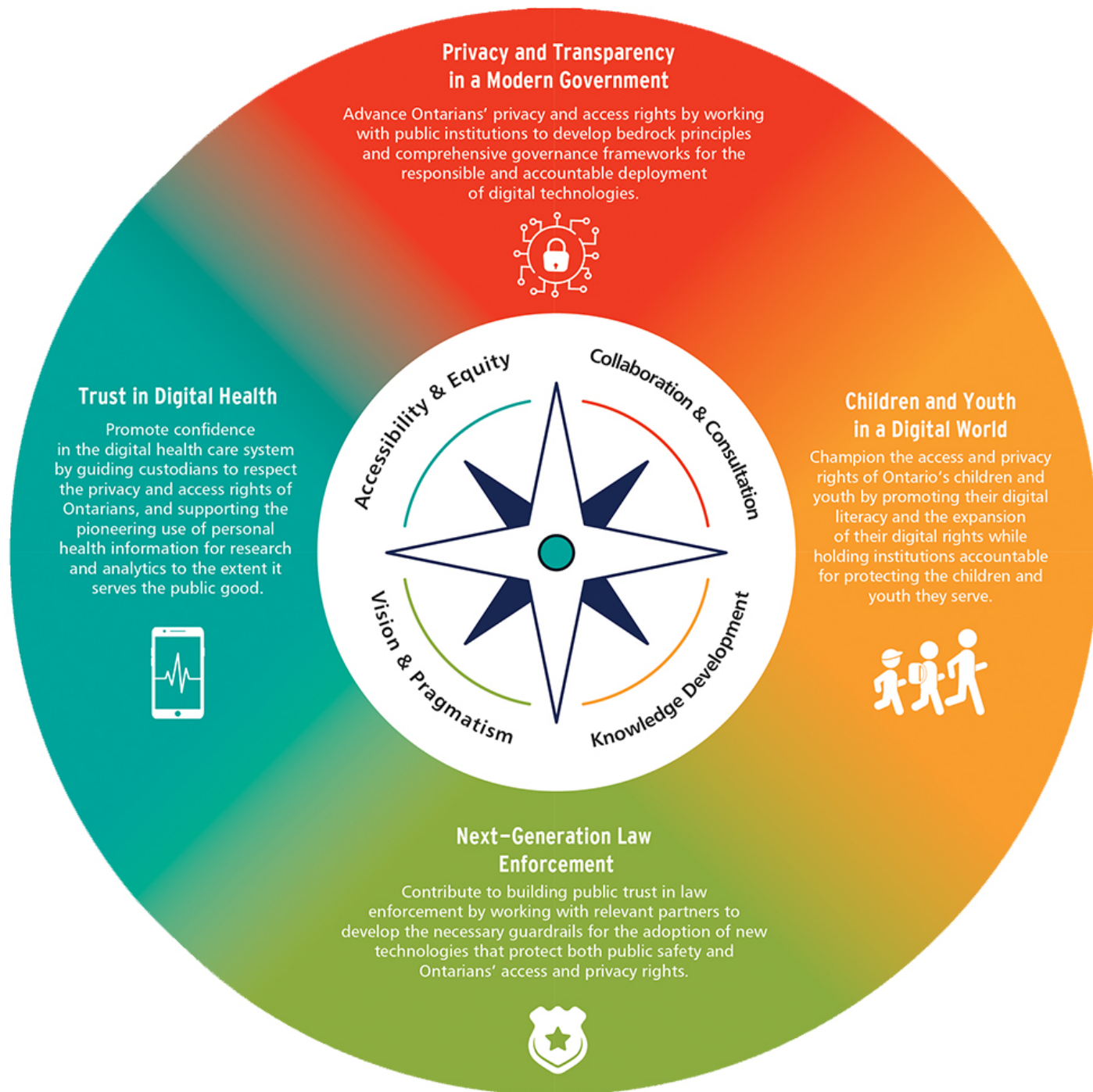
Information that can be included in an affidavit

- Description of the nature of each record and the date
- Statement on why each record satisfies the privilege exemption
- Information about each party to the communication such as place of employment and position (i.e., lawyer and staff of institution)
- Statement as to why any privilege in an email or other document has not been waived or lost by disclosure to others

Order MO-3509-F: solicitor-client privilege

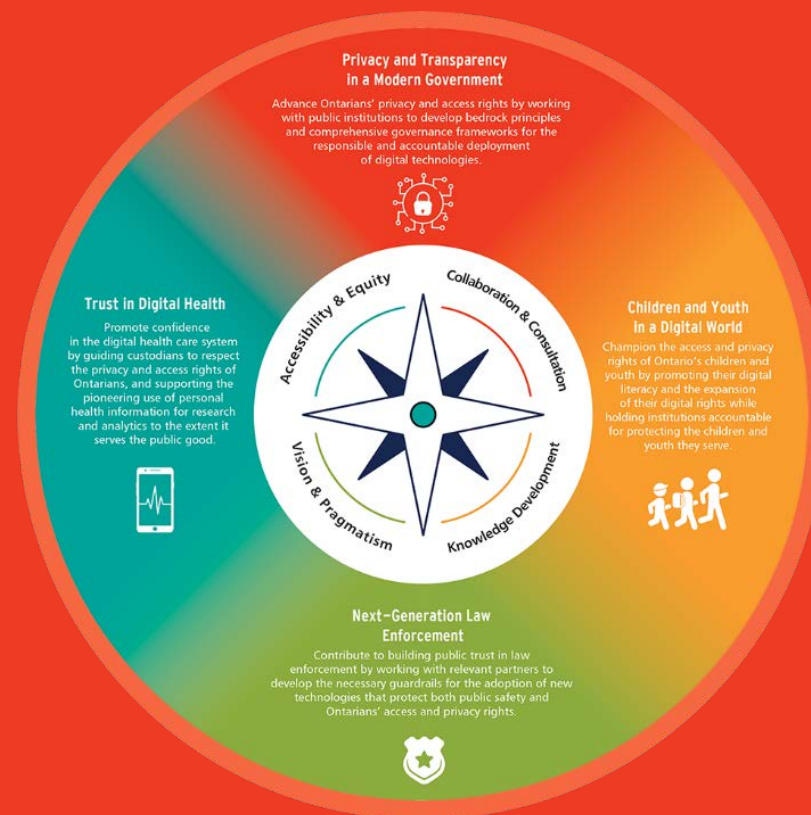
- **MO-3509-F**, request for records relating to a complaint made to the Law Society of Upper Canada about a lawyer in the context of various litigation matters
- Access denied citing solicitor-client privilege but some records were released
- IPC upheld the claim of solicitor-client privilege for some of the remaining records
- Disclosure would reveal legal advice relating to litigation
- IPC relied on an affidavit provided by the institution — however, the IPC still rejected the solicitor-client privilege claim for some of the records

IPC Strategic Priorities 2021-2025



Privacy and Transparency in a Modern Government

Advance Ontarians' privacy and access rights by working with public institutions to develop bedrock principles and comprehensive governance frameworks for the responsible and accountable deployment of digital technologies.



Working from home

Guides public institutions on home working arrangements during the pandemic

- Remote access
- Work-issued and personal devices
- Communicating by email
- Home workspaces
- Paper records
- Access to information rights

Working from home during the COVID-19 pandemic

Many government and public sector organizations had to close their offices with little advance notice because of the public health crisis brought on by COVID-19. People are working from home, many in makeshift conditions that were never planned or anticipated. This creates the potential for new challenges and risks to privacy, security, and access to information

Although this is an unprecedented and rapidly changing situation, Ontario's access and privacy laws continue to apply. As a result, your organization must take timely and effective steps to mitigate the potential risks associated with this new reality. This fact sheet outlines some best practices to consider when developing a work-from-home plan that protects privacy and ensures access to information.

WORK FROM HOME POLICIES

You should work with your information technology, security, privacy, and information management staff to review and update any existing work-from-home policies to adequately address the risks to access, privacy and security, as they may have evolved since originally drafted.

If you do not have such policies in place, you should create them by adapting your existing privacy, security, and data access policies to the unique features of the current context where virtually everyone is working from home.

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