

Update from the IPC – *MFIPPA* Challenges and Opportunities

**Brian Beamish
Commissioner (Acting)
Office of the Information and
Privacy Commissioner of Ontario
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Closed Meeting Exemption



Closed Meeting Exemption – 6(1)(b)

To qualify for the closed meeting exemption, the following test must be met:

- A council, board, commission, etc. held a **meeting**
- A **statute authorized** holding the meeting in the absence of the public
- Disclosure of the record would reveal the **actual substance** of the deliberations of the meeting.

City of St. Catharines

Order M0-2425-1

- The closed meeting exemption, s. 6 (1)(b) of *MFIPPA*, allows a municipality to refuse to disclose a record if it reveals the **substance of deliberations** in an **authorized** closed meeting.
- The city used this exemption to **deny access** to a financial management services report which was submitted to city council in a closed meeting.
- The IPC found that the city council did not have the **authority** to consider the subject matter of most of the report in a closed meeting.
- Council should have only gone in camera for portions of the report dealing with “disposition of land”.

Judicial Review of M0-2425-1

- In a subsequent review, the Superior Court disagreed with the IPC and decided that the closed meeting was properly authorized.
- Given portion of report qualified for closed meeting, entire report could be considered.
- However, the court agreed that the IPC's decision to order disclosure of the rest of the report was **reasonable**.
- Hence, the order and the subsequent divisional court decision stand for the following:
 - 1) that the city was **entitled** to go into closed meeting as it planned to discuss the sale of land.
 - 2) However, as only a **small part** of the requested report would reveal the substance of the deliberations, it was found that most of the report was not exempt.

Town of Tillsonburg

Order MO-3074

- The closed meeting exemption was used to deny access to several records pertaining to IT issues and the cancellation of a contract.
- Upon appeal to the IPC, the town was unable to provide sufficient evidence that it went into a closed meeting. For example,
 - no **motion to move** into a closed meeting, or
 - no evidence of the **reasons** why this meeting went into an in-camera session.
- The IPC did not accept the town's application of the closed meeting exemption and ordered the record to be provided to the appellant.

Order MO-3074

Adjudicator Cathy Hamilton stated:

However, in both sets of representations submitted by the town...it did not provide copies of these motions [to go in-camera], nor did it indicate what the general nature of the matters to be considered was...I have not been provided any information about the subject matter of the meetings and I am not prepared to speculate.



Councillor Records



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City of Toronto

Order MO-2842

- A Toronto newspaper requested **communications between a city councillor and other individuals** regarding the prospect of bringing a NFL team to Toronto.
- The city said they didn't have any responsive records and if the councillor had any records, they would not be in the **city's custody or control**.
- The IPC agreed that city councillors are **neither officers nor employees** of the city.
- Only when councillors are given the authority to act on behalf of the city in relation to specific records could the records be in the city's custody. In this case, the councillor was acting on their **own accord**.

Recommended Changes

- Traditionally there has been a **distinction** made between constituency records and those records that were created when conducting city business.
- This practice has not worked well. Much of what is characterized as political or constituency, does relate to **municipal business** and should be subject to *MFIPPA*.
- The IPC has asked both the Minister of Government Services and the Minister of Municipal Affairs and Housing to study amendments to *MFIPPA* to **clarify** the status of these records.
- There are many valid reasons why councillor information such as expenses should be made **publicly accessible** — transparency fosters greater trust.

Frivolous / Vexatious Requests

City of Vaughan

MO-2488

- High number of requests: **54 requests** with **372 parts** in total (an average of 6.5 parts per request).
- Requests excessively broad and unusually detailed: open ended wording (“**any and all**”, “**including but not limited to**”).
- Purpose of the request for an objective other than access: the appellant **already possessed** many of the emails requested.
- Timing of the requests: the close timing of **appellant’s lawsuit** and requests was a relevant factor in favour of finding an abuse of the right of access.

What makes a request frivolous/vexatious?

- Number of requests
- Nature and scope of requests – excessively broad/identical to previous requests
- Timing of requests – connected to some other event
- Purpose of requests – “nuisance” value/harass government/burden system
- Nature and quality of interaction/contact between requester and foi staff

Conditions on Frivolous/Vexatious Requests

The adjudicator imposed conditions on the City of Vaughan regarding the processing of the appellant's requests:

- For a period of one year, only **one transaction** by the appellant may proceed at any given point in time;
- The City may decide the **order** in which it wishes to process the remaining requests the appellant would like to keep open;
- After the one year period, the appellant or the City may apply to the IPC to ask that the conditions be **varied**. Otherwise, the conditions continue in effect until such time as a variance is sought and ordered.

Appellant Conditions

In addition, the adjudicator imposed conditions on the appellant:

- The appellant must **specify** the exact information or records sought, and if possible, the location in which the records may be found;
- Each request must only deal with **one subject matter** and must seek specific information, and will not include the phrases “any and all” and “but not limited to”;
- Apart from the request, the appellant or a representative of the appellant cannot otherwise **contact the City** (verbally or written), unless the City initiates the contact to clarify the request;
- Otherwise, the City is **not required** to respond to the appellant.

Town of Espanola

MO-3049

- A municipality claimed that **three requests** for access to its cheque registry and credit card expenses were frivolous or vexatious pursuant to s. 4(1)(b) of *MFIPPA*.
- Municipality argued that **due to its small size and budget**, it cannot employ a full-time FOIP coordinator, and the person with those duties often finds it difficult to respond to requests within the 30 day limit.
- The IPC found that **the requests were not frivolous or vexatious** and ordered the town to provide a decision letter in response to the requests.

Town of Espanola

MO-3049

- The IPC provided suggestions to improve the efficiency of the town's FOIP system given its small size:
 - **Publish** responses to FOI requests on the town's website;
 - Be more **proactive** about releasing information;
 - Seek a **time extension** in accordance with s. 20(1) *MFIPPA*;
 - Utilize **fee provisions** set out in s. 45(1) *MFIPPA*;
 - **Provide reasons** for refusing access as required by s. 20.1(1)(b) when claiming that the request is frivolous or vexatious.

Advice & Recommendations



John Doe v. Ontario (Finance)

2014 SCC 36

- Requestor seeks options paper with “**pro and cons**” relating to proposed change to corporate tax legislation.
- IPC orders disclosure, finds that record does not reveal “**single suggested course of action.**” [Order PO-2872]
- IPC also rules government must show advice “actually communicated to decision-maker.”

Advice and Recommendations

John Doe v. Ontario (Finance), 2014 SCC 36

- SCC overturns IPC:
 - **Options paper** must be fully protected, not just information revealing a “single suggested course of action.”
 - “Advice and recommendations” broad, protects the **deliberative process**, including all options and their “pros and cons.”
 - Also, government need not show advice actually communicated to decision-maker, as long as information part of deliberative process.

Outsourcing Record Management



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Government of Ontario

Special Privacy Investigation – PC12-39

- Complaint about the government outsourcing the **storage of personal information** in the U.S. as part of the Licensing Automation System (LAS) database of the Ministry of Natural Resources.
- Could the Ontario government guarantee the **privacy and security** of the personal information? The IPC found that reasonable steps had been taken to protect the records.
- The outsourcing contracts included **robust protections** relating to the ownership of the data, the collection, use and disclosure of the data, the security of the information, and the requirements to notify the ministry should the outsourcing agent be compelled to disclose any confidential information.

Recommendations for Outsourcing

- You can **outsource services**, but you **cannot outsource accountability**.
- **Understand** the program and details of the outsourcing arrangement.
- Look carefully at the **notice of collection**.
- Consult with legal to determine whether the contractual provisions include robust measures to **protect privacy** and security of personal information.

Community Safety “Hubs”



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Community Safety “Hubs”

- **Personal information is shared** between agencies, either verbally or written, possibly without the consent of the individual and/or may have been originally collected for different purposes.
- Hubs may include representatives from the police, municipalities, hospitals, social services, schools and school boards, etc., established to address individual cases that display a potential issue for community safety **based on risk factors** that the disclosing agency cannot mitigate alone.
- Following a hub meeting, an **intervention** takes place to mitigate the risk factors (e.g. home visit, connecting with services, etc.) by the agency designated by the Hub.

Hub Privacy Risk Examples

- Lack of **legal authority** to collect, use or disclose personal information with some or all of the agencies within the hub;
- Disclosing personal information to **too many agencies**, or disclosing **more than is necessary**;
- Collection, use and disclosure of personal information **without the individual's knowledge** (i.e. indirect collection s. 29(1), lack of notice s. 29(2));
- Insufficient **governance** and **oversight** mechanisms.
- Inadequate **anonymization** techniques.

IPC Position on Hubs

- While it may be possible to design a hub that respects privacy, the IPC has **consistently cautioned** institutions that hubs may raise several privacy issues.
- Need for clear and robust procedures to ensure sharing of personal information is limited
- Perform a **Privacy Impact Assessment** to ensure that the risks to privacy are examined and mitigated.
- **Consult with the IPC** early on if you are considering establishing or participating in a hub.

IPC Letter to Minister Naqvi

- Sept. 25, 2014: Premier Wynne's **mandate letter** to MCSCS identifies four issues: crime prevention planning, police record check practices, body-worn cameras, and the coordination of frontline mental health services.
- Oct. 3, 2014: The IPC sends a letter Minister Naqvi offering our assistance to the Ministry in addressing the **privacy implications** that may arise out of these four issues.
- We emphasized that **consultation and collaboration** with our office would be critical.
- Regarding crime prevention planning specifically, we offered our assistance in ensuring that information sharing hubs be designed in a manner **consistent** with Ontario privacy legislation.

Moving Forward on the Access Front

Proactive Disclosure of Contracts

- Publicly funded contracts should be disclosed **routinely and proactively**.
- Strengthen **transparency and accountability** around government spending and improve public confidence.
- Significantly reduce the number of freedom of information requests and appeals.
- Too many institutions are denying freedom of information **requests for contracts** using sections of *FIPPA* and *MFIPPA* relating to third party information, delaying release.
- Should be pushed out similar to salary information.

Pushing Data Out

Project Number	Description	Closing Date	Awarded To	Awarded Date	Awarded Amount
RFD 14-167	Notice of Project	October 16, 2014	JB Landscape Construction	October 20, 2014	\$11,865.00
RFP 13-128	Notice of Project	October 17, 2013	Lagan Technologies	February 21, 2014	\$871,437.00
RFP 13-147	Notice of Project	December 20, 2013	Pitney Bowes of Canada Ltd.	February 06, 2014	\$40,174.60
RFP 13-149	Notice of Project	December 02, 2013	Brinks Canada Ltd.	December 18, 2013	Part A: \$52,292.20, Part B: \$6,495.00 (Brantford Power)

OFFICE OF MAYOR JOE FONTANA - GIFTS & SOUVENIRS

Date Posted	Payable To	Description	LT 1 Amount
2014-01-17	CITY OF LONDON STORES	CITY OF LONDON LAPEL PINS	\$ 353.40
2014-03-10	RICHARDSON, BONNIE L.	LONDON FRAMED PRINTS	\$ 1,000.00
2014-03-12	OUTSIDE THE BOX	LOCAL CHOCOLATE - GIFTS	\$ 43.50
2014-04-16	INDEPENDENT LIVING CENTRE	BRONZE SPONSORSHIP	\$ 250.00
2014-04-16	RAEVANS FARMS	MAPLE SYRUP	\$ 180.00
2014-04-30	A GIFT OF ART	METAL TREES	\$ 457.92
2014-04-30	LONDON HEALTH SCIENCES	42K FOR CANCER - DONATION	\$ 225.13
2014-04-30	CITY OF LONDON STORES	PEN, PENCIL & ROLLERBALL SET	\$ 18.70
2014-04-30	CITY OF LONDON STORES	CITY OF LONDON MUGS	\$ 118.20
2014-04-30	CITY OF LONDON STORES	CITY OF LONDON LAPEL PINS	\$ 353.40
2014-05-05	SHOPPERS DRUG MART	MY SISTERS' PLACE GIFT BOXES	\$ 93.06
2014-05-05	CITY OF LONDON STORES	CITY OF LONDON MUGS	\$ 118.20
2014-05-22	CITY OF LONDON STORES	GOLF UMBRELLA 64" GREEN/WHITE	\$ 48.11
2014-05-23	CITY OF LONDON STORES	CITY PEN, PENCIL & ROLLERBALL SETS	\$ 149.63
2014-05-23	CITY OF LONDON STORES	CITY PEN, PENCIL & ROLLERBALL SETS	\$ 93.52
2014-05-28	LONDON ELGIN MIDDLESEX CRIME STOPPERS	JAIL A THON DONATION	\$ 50.00
2014-05-30	GIFTS & SOUVENIRS ACCOUNT - REIMBURSE	CITY PEN, PENCIL & ROLLERBALL SETS	\$ (149.63)
2014-06-04	ARKAN MARKETING	GIFTS FOR UKRAINE DELEGATION	\$ 280.55
2014-06-09	CITY OF LONDON STORES	CITY OF LONDON GOLF SHIRTS	\$ 40.30
2014-06-09	CITY OF LONDON STORES	CITY OF LONDON GOLF SHIRTS	\$ 40.30

OFFICE OF MAYOR JONI BAECHLER - GIFTS & SOUVENIRS

2014-07-29	CITY OF LONDON STORES	PEN, PENCIL & ROLLERBALL SET-	\$ 187.03
2014-08-11	ARKAN MARKETING	CITY OF LONDON TSHIRTS	\$ 66.14
2014-08-13	CITY OF LONDON STORES	PIN LAPEL-RECTANGULAR TREE	\$ 186.50

DOCUMENT	DESCRIPTION	DATE POSTED
2013 Public Sector Salary Disclosure	Record of City of Cambridge 2013 Salaries and Benefits for employees paid \$100,000 or more in the year	2014-03-27
2012 Public Sector Salary Disclosure	Record of City of Cambridge 2012 Salaries and Benefits for employees paid \$100,000 or more in the year	2013-02-25
2011 Public Sector Salary Disclosure	Record of City of Cambridge 2011 Salaries and Benefits for employees paid \$100,000 or more in the year	2012-03-02
2010 Public Sector Salary Disclosure	Record of City of Cambridge 2010 Salaries and Benefits for employees paid \$100,000 or more in the year	2011-04-01
2009 Public Sector Salary Disclosure	Record of City of Cambridge 2009 Salaries and Benefits for employees paid \$100,000 or more in the year	2010-03-04

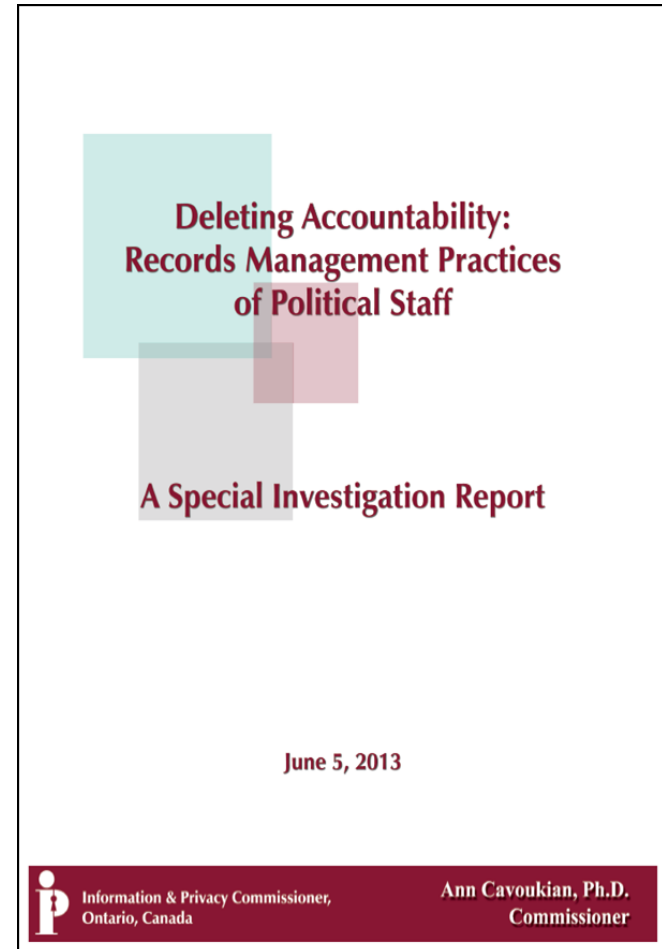
Modernizing Access to Information

Potential Changes:

- Require all records, including exempt records, be disclosed if it is clearly in the **public interest** to do so;
- Establish **minimum standards for proactive disclosure**, including identifying classes or categories of records that public entities must proactively make available to the public and, in keeping with the goals of Open Data, make them available in a usable format;
- Establish a requirement that for any new systems that are created, public entities create them with access in mind, thus making exporting data possible and easier;
- Create a legislated **duty to document** matters related to deliberations, actions and decisions.

Duty to Document

- IPC investigated several former staff members of the Minister of Energy's office and subsequently, former staff from the Premier's office, for **deleting emails and records** pertaining to the cancellation of gas plants.
- Highlighted the significant need for legislative requirements for **record retention** and a "duty to document."



Bill 8: Public Sector and MPP Accountability and Transparency Act

Introduced this past summer by Ontario Government, if passed Bill 8 will:

- **Amend** *FIPPA* and *MFFIPA* to require all institutions subject to the Acts to securely retain records,
- **Prohibit** the wilful destruction of records with the intent to deny access to records.
- Introduce a fine of \$5,000 for the willful **destruction** of records.
- Expand the Ontario Ombudsman's role to include municipalities, school boards and publicly-assisted universities.
- **Legislate** the online posting of expense information.

Open Government Engagement Team

Open by Default Report

Highlights need for improvement of the FOI framework:

- Reform *Acts* by basing them on the principals of **Open by Default** and requiring the proactive publication of certain types of information.
- Reform the FOI process so that government systems can receive, process and respond to **information requests online** and in machine-readable formats.
- Publish **FOI responses online** as soon as they are released to the requestor(s).

Open by Default



Open By Default: Make Data A Public Asset

Implement an Open by Default data policy that requires:

- Publish **all** government data in commonly accepted open standards, unless there are privacy, security or legal reasons for not doing so.
- Publish data in a **timely** manner.
- Data should be **free of charge** and in commonly-used formats.
- Ensure no data is destroyed.
- Waive **intellectual property** for data the government collects or creates.
- Extend these principles to agencies and broader public sector.

Open By Default: Fees

- Require ministries to pay for all costs associated with freedom of information requests when:
 - The ministry fails to meet **required timelines** for response (ex. 30 days) or;
 - **No fees** chargeable for responding to freedom of information requests for information on new IT systems.

Contact Us

Brian Beamish

Commissioner (Acting)

Information & Privacy Commissioner of Ontario

2 Bloor Street East, Suite 1400

Toronto, Ontario, Canada

M4W 1A8

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

Web: www.ipc.on.ca

E-mail: info@ipc.on.ca