FIPPA: Thorny Issues

Kathryn Frelick and Shane Smith
August 26, 2011
Overview – Thorny Issues

1. Contentious Issues Management
2. Specific Exemptions
   – Advice or Recommendation
   – Third Party
3. Labour and Employment
1. Contentious Issues Management

• May be situations where information being requested is sensitive, embarrassing, controversial or potentially exposes hospital or others to risk or negative consequences
  – Release to requestor = release to world
  – Legitimate interest in notifying key personnel (internal or external stakeholders) of request and keep informed of decision

• Request is subject to same requirements under FIPPA and timelines
Contentious Issues Management - Elements

- Process for screening/flagging contentious requests (may not always be obvious)
- Notification of key personnel (internal or external stakeholders, advisors) so that can prepare/manage potential consequences
- Parallel process – no impact on processing on FOI request or timing
- Provides a “heads up” not a “sign off”
What information can you provide?

- The fact that an FOI request was received
- Nature of the records
- The extent to which the records (or part of the records) will be disclosed to the requestor (until decision made, may not know)
- The identity of the requestor must be protected (type of requestor may be shared)
Who to notify?

• Consultation process with senior leadership lead who is knowledgeable about issues/coordinate

• Additional resources/notifications as necessary:
  – Chair or delegate, President and CEO, senior leadership team, communications/public affairs/media relations, risk management, privacy, human resources, medical staff organization, legal counsel, external stakeholders (LHIN, Ministry)
Example

• Request for “all records” related to recent *C. difficile* outbreak (media request)

• FOI coordinator notifies senior management lead right away, communications and internal stakeholders notified; CEO contacts external stakeholders

• FOI processes request per FIPPA – access decision

• In meantime, hospital prepares communication/media plan and strategy and take steps to manage issues (if records are or are not released)
2. Specific Exemptions

• Section 13 (Advice or Recommendations)
  – Discretionary exemption – head has option of applying or not applying the exemption

• Section 17 (Third Party Exemption)
  – Mandatory exemption – if head finds that falls within exemption, the head must refuse access to record (or part of record)
Section 13 – Advice or Recommendations

- **Recommendations**: formal recommendations about courses of action to be followed. Usually specific in nature and proposed primarily in connection with a particular decision.

- **Advice**: Less formal suggestions about particular approaches to take or courses of action to follow.
Section 13 – Advice or Recommendations

• Discretionary exemption for records where disclosure would reveal the advice or recommendation of officers, employees of the institution or consultants retained by the institution (does not apply to outside sources)

• Includes situations where accurate inferences regarding recommendations or advice could be drawn from the record in question
When Does the Exemption Apply?

• All elements must be present:
  1. Must be advice or recommendation
     • Mere information will not be exempted
  2. Must be communicated by officer, employee, or consultant retained by hospital
     • Example: A draft or memo to file that is not communicated will not be exempted
  3. Must be made in the course of a deliberative process of decision-making or policy making
However .... Certain types of information excluded

- Exemption does not apply to certain types of information including:
  - Factual material
  - Statistical surveys
  - Valuator’s reports
  - Environmental impact assessments
  - Test reports
  - Performance reports
  - Feasibility studies

- Field research reports
- Program proposals
- Interdepartmental task force reports
- Report of a body attached to the Hospital
- Reasons for a financial decision of an officer
- Record more than 20 years old
- Basis for decisions

- Report or study means a completed document; does not include working papers such as notes and preliminary drafts
Section 17 – Third Party Information

• Records may contain information about another organization or individual (i.e. vendors and suppliers, advisors, community organizations and partners)

• Third party must be notified and given opportunity to make representations before access decision (may also consent)

• Note - If relates to another institution (i.e. LHIN, Ministry, hospital) determine whether to forward or transfer request (i.e. where other institution has greater interest in making decision on access)
Section 17 – Third Party Information

• **Mandatory** exemption from disclosure for certain third party information where disclosure could reasonably be expected to cause certain harms

• Right of appeal to the IPC
Section 17 – Third Party Information

• Intended to protect confidential “informational assets” of businesses that provide information to government institutions [Boeing Company v. Ontario (Ministry of Economic Development and Trade)]

• Balancing – purpose to shed light on the operations of government → limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace
Section 17 – Third Party Information

• Not all types of third party information

• May not protect information that third party would consider to be confidential

• FIPPA obligations apply regardless of contractual confidentiality obligations
Section 17 – Third Party Information

• Relationship management issue
  → Limits of confidentiality
  → Onerous test – need detailed and convincing evidence from third party to support decision
Section 17 – Third Party Information

• Three threshold tests, **ALL** must be met:

  **Test #1:**

  Record must contain one or more of the following types of information:
  – Trade Secret
  – Scientific Information
  – Technical Information
  – Commercial Information
  – Financial Information
  – Labour Relations
Section 17 – Third Party Information

Test #2:

Information must be supplied in confidence to the hospital by a third party

– “Supplied”
  • Information created or gathered by the institution, including information derived from negotiations, will generally not be considered to have been “supplied” (i.e. contracts)

– “In confidence”
  • Intention to maintain confidentiality may be express or implied, but expectation of confidence must be reasonable and have an objective basis
Section 17 – Third Party Information

Test #3:

Disclosure of information could reasonably be expected to cause certain harms:

– Prejudice significantly competitive position or interfere significantly with contractual or other negotiations
– Result in similar information no longer being supplied
– Result in undue loss or gain
– Labour relations information
Section 17 – Third Party Information

• Disclosure must give rise to reasonable expectation of harm (more than mere speculation)

• Harm beyond trivial – i.e. significant prejudice or interference or undue loss or gain

• Evidence must be detailed and convincing

• Hospital responsible for decision, but often reliant upon information from third party
3. Labour and Employment

- FIPPA has general exemptions that exclude most employment-related records from application of Act (see section 65(6))

- Still, certain records still subject to Act, and there will be requests where you will need to make assessments as to application of exemptions

- Relevant exemptions for labour and employment purposes are likely to be – personal privacy, law enforcement, legal privilege, and economic interests
General Information

• How long do you need keep different employment records?

• Given non-application to most records, no significant impact on how long you keep records

• Nevertheless, recommend only keeping records as long that have some purpose (subject to legislative requirements)
Job Competition

• Request made by unsuccessful applicant for records relating to a job competition

• Would normally encompass the following types of records - job postings, selection criteria, scoring sheets, applications and resumes, interview questions and answers, evaluations
Job Competition

• Excluded from application of FIPPA by virtue of s.65(3)

• These types of records meet the 3-part test
  – collected, maintained, prepared or used by Hospital
  – in relation to meetings, consultations, discussions, or communications
  – about employment-related matters in which the Hospital has an interest
Settlement Agreements

• Request made for copy of settlement agreement between Hospital and former employee
Settlement Agreements

• Act specifically includes agreements with a union and agreements with employee which end a proceeding relating to employment related matters

• Thus, settlement subject to FIPPA access request and need to determine what, if any exemptions apply

• Recent case found that the solicitor-client privilege exemption applied, which results in discretionary exemption of entire document

• Also, portions may be excluded based on other exemptions, such as personal privacy
Employment Contracts

• Request made for copy of employment contracts of senior executives of Hospital
Employment Contracts

- Employment contracts are subject to access requests because agreements with employees are specifically subject to FIPPA (section 65(7)(3))
- Will require application of personal privacy exemption (section 21)
- Certain parts of contract will be subject to disclosure while other elements will not be disclosed due to being an unjustified invasion of personal privacy
Questions?

Thank you!

Need further assistance?

If you are enrolled in Miller Thomson’s Legal Retainer Program this includes inquiries related to FIPPA

Please contact us for more information about our value added programs and other legal services (kfrelick@millerthomson.com or ssmith@millerthomson.com)
www.millerthomson.com

Added experience. Added clarity. Added value.

Follow us...