



Getting Ready for FIPPA February 16, 2011

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Today

1. Introduction /Overview
2. FIPPA v. PHIPA
3. Application of FIPPA
4. Exclusions & Exceptions
5. How to Prepare

Overview

- *Broader Public Sector Accountability Act, 2010 (BPSAA) amendments to the Freedom of Information and Protection of Privacy Act (FIPPA)*
- Brings hospitals under the Freedom of Information (FOI) regime beginning January 1, 2012

Purposes of FIPPA

1. To provide a RIGHT OF ACCESS to information held by institutions
 - Information should be available to public
 - Exemptions must be limited and specific
 - Independent body to review decisions on disclosure of government information (IPC)

Purposes of FIPPA (Cont'd)

2. To PROTECT THE PRIVACY of individuals whose personal information is held by an institution and provide a right of access
 - Personal information (PI) – recorded information about an identifiable person
 - Limits institution's collection, use and disclosure of PI

FIPPA v. PHIPA

- FIPPA does not generally apply to **Personal Health Information (PHI)** in the custody or control of a health information custodian (s. 8, PHIPA)
 - Including mixed records
 - Subject to exceptions

FIPPA v. PHIPA

- Records containing PHI → follow PHIPA
 - General access rules under FIPPA apply to information that is not health related (severable portions)
- thus, specific records may be subject to access provisions under both legislative regimes

FIPPA v. PHIPA

- FIPPA provides the general public with a right of access to institutional records in custody or control of institution (unless excluded or exempted) (FIPPA - Part II)
- FIPPA governs the c/u/d, access and correction of **Personal Information** (PI) for individuals, including personal information banks (FIPPA – Part III)

Application – Freedom of Information

- S. 10(1): every person has a right of access to a record or a part of a **record** in the **custody** or under the **control** of an institution unless:
 - a) the record or the part of the record falls within one of the **exemptions**; or
 - b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Who Makes FOI Decisions?

- “Head” of institution is responsible for making access decisions
 - Public hospital → Chair of the Board
 - Private hospital → Superintendent
 - May delegate powers and authority to an officer of the institution in writing (s. 62)
- Has obligation/discretion to refuse access based on exceptions
- Head responsible for c/u/d of PI and other obligations under FIPPA

Record

- Any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, including:
 - a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

Record (Cont'd)

- b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

Record (Cont'd)

- Practically speaking, this may include:
 - Paper and electronic files and documents
 - Emails (including those on networks, desktops and personal devices)
 - Photographs, video and audio recordings
 - Non-final drafts and working notes
 - Expense claims/accounts
 - Minutes of meetings, agendas and communication books
 - Handwritten notes and personal notes
 - Spreadsheets and sketches

Custody or Control

- Custody: Requires a measure of responsibility for the care, maintenance or preservation of the record and not mere possession
- Control: The right to govern use or disposal of a record, even if not in the possession of the institution

Custody or Control

- If a record is in the custody or control of an institution it means a person can request access
- The access request triggers a search for the record, but not necessarily the disclosure
- For Hospitals, FIPPA applies only to records that came into the custody or control of the Hospital on or after January 1, 2007

Exemptions under FIPPA

- Number of mandatory and discretionary “exemptions” under FIPPA (ss. 12 – 23)
- Mandatory
 - head must refuse to disclose and must sever information (unless public interest override)
- Discretionary
 - head may refuse disclose/may release despite exemption
 - must demonstrate that exercised discretion on proper grounds (tests/jurisprudence)
- Identify where interests of third parties/affected persons may be impacted

Exemptions - Examples

- Application subject to specific tests:
- S. 17 – third party exemption
- S. 18 – economic and other interests
- S. 18.1 – information with respect to a closed meeting (unclear if applies)
- S. 19 – legal privilege
- S. 20 – danger to health and safety
- S. 21 – personal privacy

Exemptions Under FIPPA

- Documents containing information described in an exemption are still subject to FIPPA, but can be exempt from disclosure
- Exemptions are not based on type of document - the contents of each record must be reviewed to determine if an exemption is applicable
- Exempted information is “severed” from record

Non-Application of FIPPA

- Certain types of records are NOT subject to FIPPA (s. 65), for example:
 - Proceedings, negotiations and communications relating to labour relations or employment, with some exceptions (i.e. agreements with trade unions, collective agreements)
 - Information relating to adoption

Non-Application - Hospital Specific

- FIPPA does **NOT** apply to:
 - Information that came into the custody or control of the Hospital on or after January 1, 2007;
 - Quality of Care information under QCIPA;
 - PHI as defined in PHIPA;
 - Ecclesiastical records of a church or affiliated religious organization;
 - Records relating to a Hospital Foundation;

Hospital Specific Exclusions (Cont'd)

- Administrative records of a regulated health professional;
- Records relating to charitable donations made to the Hospital;
- Records relating to the provision of abortion services;
- Records relating to applications for hospital appointments, the appointments or privileges of persons who have hospital privileges;

Hospital Specific Exclusions (Cont'd)

- Records respecting or associated with research, including clinical trials; and
- Records of teaching materials for use at the Hospital.

Access Procedures

- Any person may request access in writing
- Must provide sufficient detail
- Mandatory application fee (\$5) and fee schedule
- May transfer to another institution if not within custody or control
- Time lines for responses/notices, etc.
- Notice to affected persons

Information to Be Published

- Certain information must be published by hospitals on internet or otherwise be made available to the public:
 - Head must prepare and make available descriptions of hospital's records and personal information banks
 - Certain manuals, directives, guidelines and annual reports
- Must provide annual report with statistics relating to access requests (IPC to provide instructions to hospitals)

Other provisions under FIPPA

- Protection of individual privacy (Part III)
 - rules for collection, use and disclosure of PI (different than under PHIPA)
 - Security, accuracy, disposal
 - personal information banks
 - Individual access and correction requests
- Appeal process (Part IV)
- General provisions
 - Fees
 - Exclusions

How to Prepare

- Create FIPPA compliance team
 - Understand obligations and how to fit within organizational structures
 - Delegation authority
 - FOI coordination and contact person
 - Identification of internal resources
- Undertake inventory of records and processes
- Develop FIPPA compliance plan

How to Prepare (Cont'd)

- Compliance Plan
 - Develop internal processes and forms
 - Processing FOI requests and appeals
 - Document management and retention
 - Policy and procedure development or review/amendment
 - FIPPA policies and public notices (FOI and privacy of personal information)
 - Document management policies
 - Contract and procurement process review and amendment
 - May be subject to FOI

How to Prepare (Cont'd)

- Development of public information and processes to collect audit information
- Education and training for staff
- Preparation of FIPPA educational information for public

How to Prepare – Record Keeping

- Standardize record keeping procedures through the development of detailed policies and guidelines
- Consider:
 - Meeting minutes
 - Board reporting
 - Use of in-camera meetings
 - Email restrictions
 - Triggers for establishing privilege
 - Etc.

How to Prepare – Record Keeping (Cont'd)

- Start categorizing and segregating records in accordance with the categories outlined in the Act
- Train staff on appropriate record keeping and email use

Ongoing

- Live by the Globe & Mail rule: If you wouldn't want it on the front page, don't put it in the record
- Mark all information intended to be confidential
- Maximize opportunities to establish privilege over sensitive records

Ongoing (Cont'd)

- Avoid unnecessary requests by making public information readily accessible (on website, etc.)
- Work with requestors to facilitate the search and disclosure process
- Enforce fees in accordance with the Act to discourage unnecessarily large requests

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