Strategies on How to Document in the FIPPA Era

Overview

Documentation Strategies:
1. Risk and Quality
2. Board Documents
3. Procurement Documents
4. Labour and Employment
Overview – Access to documents

- Access under PHIPA
  - Public documents
  - Voluntary
  - Production obligations (legal proceedings)

Now under FIPPA

- General right of access to information to records (freedom of information)
- Access under FIPPA (personal information)
Production Obligations

• Legal proceedings – civil claims, criminal proceedings, tribunals, commissions, health colleges and inquests

• Civil proceedings – must disclose every document relevant to any matter in issue … that is or has been in the possession, control or power of a party

→ Risk managed approach to documentation
General Documentation Strategies - FIPPA

• Document with a purpose

• Be deliberate
  – understand exclusion or exemption criteria
  – identify and mark documents
  – support through policies, practices, terms of reference

• Be professional

• Risk managed approach – balance
General Documentation Strategies - FIPPA

• Standardize record keeping procedures through the development of policies and guidelines

• Handwritten notes or notations form part of a record

• Working copies and drafts of reports and letters are also records
Risk and Quality Documentation

• Right of access, unless subject to exception or exclusion:
  – QCIPA
    • quality of care information prepared for a designated quality of care committee (exclusion)
  – Quality of care in a hospital
    • confidential information provided to or prepared by a committee to assess or evaluate, so as to improve the quality of health care and related programs and services (exemption)
  – Legal privilege (exemption)
    • Solicitor and client or litigation privilege (specific tests must be met)
Risk and Quality Documentation

• Survey various quality and risk activities being undertaken (formal and informal)
• Review terms of reference for committees
• Build language of exemptions into policies, terms of reference and communications
• Use templates, standardized communication systems, and label information so that protected documentation stays protected
2. Board Documents

• Consider public access to board minutes and agendas

• No general exemption for in camera minutes, however, look at the rationale for closed session

• Consider language of exemptions/exclusions when preparing minutes

• Create *in camera policy*
Procurement and FIPPA

- Principles
- Disclosure Obligations and Exemptions
- Examples
  - Contracts
  - Negotiation strategy/advice
  - Unsuccessful Responses to RFP
- How to Prepare/Document
Principles

• Tension between public sector transparency and protection of sensitive third party information
Disclosure Obligations

• Every person has right to access record in the custody or control of institution

• Unless
  – Exemption
  – Frivolous/vexatious access request
Exemptions

• Section 17 – Third Party Information
• Section 18 – Economic and Other Interests
Section 17 – Third Party Information

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

• Third party must be notified and given opportunity to make representations before access decision is made
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 info:
  – Trade Secret
  – Scientific Information
  – Technical Information
  – Commercial Information
  – Financial Information
  – Labour Relations
Section 17 – Third Party Information

Test #2:

Information supplied in confidence to the hospital by a third party

– “Supplied”
– “In confidence”
Section 17 – Third Party Information

Test #3:

Disclosure of information must give rise to harm as follows:

– Prejudice significantly competitive position or interfere significantly with contractual or other negotiations
– Result in similar info no longer being supplied
– Result in undue loss or gain
– Reveal info supplied to resolve labour relations dispute
Section 18 – Economic and Other Interests

• Discretionary exemption for certain info as follows:
  – Trade secrets or financial, commercial, scientific or technical information belonging to the hospital
  – Employee research
  – Prejudice to economic interest/competitive position
  – Negotiating strategy
  – Personnel or administrative plans
  – Policy decisions/undue financial benefit or loss
  – Examination or test question
  – Quality of health care in the hospital
Example – Contract

• IPC view is terms of contracts that are result of negotiations (or could have been negotiated) are not “supplied” by one party to the other

• Contract will meet the third party exemption “supplied” test only where
  – Information provided is not susceptible to change or is relatively immutable
  – Info supplied will allow outside person to make accurate inferences about underlying non-negotiated info
Example – Negotiation Strategy and Advice

• May refuse to disclose positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of the hospital

• May refuse to disclose advice or recommendations of officers, employees or consultants retained by the hospital made in the course of deliberative process of decision-making and policy making and communicated
Example – Unsuccessful Response to RFP

• Info in an unsuccessful response would be considered to have been “supplied” (vs negotiated contract)

• Proposals likely submitted with expectation of confidentiality

• Competitive position of unsuccessful proponent could be prejudiced if competitors become aware of terms proponent was willing to offer

• Third party exemption could apply
How to Prepare/Document

• Contracts
  – State that confidentiality obligations are always subject to your disclosure obligations under law
  – State that hospital will be (or later is) subject to FIPPA and will comply with terms of FIPPA in respect of any disclosure
  – Could consider including a consent to disclosure
How to Prepare/Document

• RFP
  – Include clauses:
    • For proponent to acknowledge Hospitals FIPPA obligations
    • requiring proponent to specifically identify info submitted for which confidentiality should be preserved
    • For proponent to acknowledge that info provided in proposal may need to be disclosed where required by law even if identified as confidential
How to Prepare/Document

• Be clear and informative about your FIPPA obligations with third parties

• When a request is received
  – Each request will require independent assessment whether or not exemptions apply
  – Important for procurement team to remain involved in process and work closely with your FOI team
Labour and Employment

• Important to note that there is a general exemption that excludes most labour/employment records (s.65(6))

• Thus, the impact of FIPPA in world of labour and employment will be limited
Section 65(6) General Exemptions:

- Records relating to proceeding or anticipated proceeding that relate to labour relations or the employment of a person
- Records relating to negotiations or anticipated negotiations that relate to labour relations or employment of a person
- Records relating to meetings, consultations, discussions or communications about labour relations or employment-related matters
Documentation Strategies

• Even if largely exempt, still worthwhile to have consistent practices across organization

• Document with an eye to facilitating the application of FIPPA
  – identify the nature/purpose of the document (ex. notes from investigation meeting; interview with job candidate; performance evaluation; etc.)

• For employees/potential employees providing information:
  – Notify of possibility that information provided may be subject to disclosure under FIPPA;
  – Indicate purpose as to why personal information is being collected and how it will be used
Documentation Strategies

• If record going to be sensitive and possibility of access, think about ways to protect the record at the outset

• Watch out for e-mail

• Remember – documents and records still subject to production through litigation processes
Questions?

Thank you!