



# FIPPA: Thorny Issues

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# 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!*

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