



## Memo

**To:** Chief Executive Officers & Chief Privacy Officers of Ontario's Public Hospitals

**From:** Dykeman Dewhirst O'Brien LLP

**Date:** October 22, 2010

**Re: New Rules Announced for Hospitals:  
The *Freedom of Information and Protection of Privacy Act* ("FIPPA")**

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It is anticipated that extending the reach of FIPPA (sometimes known as "FOI legislation") to hospitals effective January 1, 2012 will have a tremendous impact on hospitals. While many hospitals have for years posted their Board minutes, strategy documents and mission, vision and values statements in the public realm, hospitals are not currently compelled by law to make internal communications publicly accessible. The introduction of FIPPA to the hospital sector will have far-reaching implications for hospital documentation and how you communicate internally.

### **Bill 122 – Broader Public Sector Accountability Act, 2010**

On October 20, 2010, the Ontario government introduced Bill 122, *An Act to increase the financial accountability of organizations in the broader public sector*, which received First Reading in the provincial Legislature. The Bill enacts the *Broader Public Sector Accountability Act, 2010*, which if passed, would create rules with respect to:

- Engagement of lobbyists
- Reporting on use of consultants
- Posting of senior executives' expenses
- Application of directives/guidelines of Management Board of Cabinet on allowable expenses and procurement practices (if and when established in future regulations)
- Duty for hospitals to demonstrate their compliance with the new rules (if and when established in future regulations or directives)
- Bringing hospitals under FIPPA
- Amendments to other Acts

This memo is an updated primer on FIPPA and what it will mean to hospitals. It does not discuss the broader range of changes noted above. We will provide updates on other aspects of the *Broader Public Sector Accountability Act, 2010* and the new Auditor General's report in a separate communiqué.

**Which health sector organizations will be affected?**

FIPPA currently applies to government and certain publicly funded institutions. The proposed new legislation extends the definition of “institution” under FIPPA to apply to public hospitals, private hospitals and the Ottawa Heart Institute. Nonetheless, other health care organizations will be interested in this development, as any communications with hospitals will become subject to FOI requests. Shared services organizations that undertake procurement on behalf of hospitals will also need to be mindful that FIPPA is proposed to extend to their members and customers.

**Practically speaking, if FIPPA applies to hospitals, will our practices change?**

They should. FIPPA will have an impact on:

- How and by what means you communicate internally
- How you communicate with external groups
- The kind of notes you take
- How long you retain your administrative documents, notes and emails
- How and when you engage quality of care committees established under the *Quality of Care Information Protection Act, 2004* and legal counsel to create privilege over communications and documentation

**Are there examples in other jurisdictions of the impact of FOI legislation on hospitals?**

Before they were divested, provincial psychiatric hospitals in Ontario were subject to FIPPA. Hospitals in British Columbia, Alberta and many other Canadian jurisdictions fall under FOI legislation, and there is much to learn from their collective experience about practical impact and best practices. There are also lessons to be learned from the university sector, which became subject to FIPPA in 2006.

**Will FIPPA apply retroactively?**

Bill 122 contemplates that FIPPA will come into force on January 1, 2012 and will apply to records in the custody or control of hospitals as at January 1, 2007 (i.e., retroactive 5 years). For that reason, it will most certainly invite scrutiny of some historical material held by your hospital, as well as material that is collected or created going forward.

**Who in the hospital will have responsibility for compliance with FIPPA?**

Bill 122 states that for public hospitals, the Chair of the hospital Board will act as the “head” of the institution for FIPPA purposes. That means hospitals will need policies to delegate FIPPA tasks to members of the hospital staff.

Each hospital will need to have a Freedom of Information and Privacy coordinator to receive and process FOI requests. There are no rules that specify who must act in that position.

## **What kind of information can be requested under FIPPA?**

There are two kinds of information that may be requested by an individual under FIPPA:

### **1. General records**

- These are records that relate to the activities of government or an institution and cover tasks ranging from administration and operations to legislation and policy.
- Hospitals might expect requests for the following kinds of general records:
  - Clinical, administrative and risk management policies
  - Board and committee minutes
  - Financial records
  - Contracts and proposals for the purchase of goods and services
  - Strategy documents and correspondence with respect to service delivery
  - Building plans
  - Types and number of clinical procedures provided

### **2. Records relating to the requester's own personal information that the hospital may hold**

- "Personal information" is a defined term and means recorded information about an identifiable individual and includes:
  - Information relating to a person's race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual;
  - Information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
  - Any identifying number\*, symbol or other particular assigned to the individual;
  - The address, telephone number, fingerprints or blood type\* of the individual;
  - The personal opinions or views of the individual, except where they relate to another individual;
  - Correspondence sent to the hospital by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence;
  - The views or opinions of another individual about the individual; and
  - The individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.
- Hospitals might expect requests for the following kinds of "personal information" records:
  - Patient/client relations or complaint documentation
  - Parking records
  - Attendance records for conferences or educational sessions
  - Student records
  - Employment records

Note also that any “record” is available for request. The definition of “record” is quite broad and includes hard copies of documents, electronic documents (including e-mails), voicemail messages and handwritten notes. Your hospital will need FIPPA-focused training to help your staff become more cautious about how they create new records that may be requested under FIPPA.

**What about health records? Will they be subject to a FOI request?**

No. Records of personal health information you keep about your patients/clients will continue to be covered under the *Personal Health Information Protection Act, 2004* (PHIPA).

**Will FIPPA affect our hospital's fundraising activities?**

Bill 122 proposes that FIPPA will not apply to records that relate to the operations of a hospital foundation or to records relating to charitable donations made to a hospital.

Bill 122 also contemplates an amendment to FIPPA that would affect a hospital's ability to disclose personal information in its records for the purpose of its own fundraising activities or the fundraising activities of an associated foundation (presumably where those records are not personal health information under PHIPA). Bill 122 would amend FIPPA to add further rules regarding fundraising, including requiring: a written agreement between the hospital and the individual whose records would be disclosed for fundraising purposes; information not be disclosed unless it is reasonably necessary for fundraising activities; and opportunities for notice to the individual be provided periodically.

**Will FIPPA apply to records relating to “sensitive” clinical services the hospital provides?**

Bill 122 proposes that FIPPA will not apply to records relating to the provision of abortion services. But there are no other restrictions relating to other kinds of sensitive or potentially controversial services provided by a hospital (however, records about a particular patient/client receiving such services is subject to the PHIPA rules).

**Will the introduction of FIPPA to hospitals have any impact on employees/labour relations?**

There are existing provisions in FIPPA to protect confidential labour relations communications and meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In the hiring process, it may be prudent to have applicants sign a consent form acknowledging that the employer will be collecting information in compliance with FIPPA. It is also possible that information provisions in collective agreements will need to be reviewed, and potentially dovetailed with FIPPA (the more stringent provisions will apply).

### **How does an individual make a FOI request?**

The FIPPA process for accessing a general record or a record pertaining to personal information can be summarized in two steps:

1. A request form is completed by the individual requesting the information. Alternatively, a letter may be written by the individual describing the information requested.
2. The request is then sent to the Freedom of Information and Privacy coordinator at the institution (so each hospital would need to designate someone) along with a \$5 application fee made out to the "Minister of Finance".

### **How would a hospital respond to a FOI request?**

Institutions have specific response obligations under FIPPA. Written notice must be given to the requester within thirty (30) days of receipt of the request as to whether or not access to the record will be granted.

Where access is to be granted, the record should be provided. Where access is denied, reasons for the denial must be given. Where an extension of time is needed, notice must be given to the requester setting out:

- the length of time needed;
- the reason for the extension; and
- that the requester may ask the Information and Privacy Commissioner/Ontario to review the extension.

As with PHIPA, the hospital may charge fees for processing and copying information requests. These fees are prescribed by regulation. The hospital would be entitled to ask for partial payment in advance for fee estimates over \$100.

### **What are the exemptions to FOI requests?**

There are certain **mandatory exemptions** to disclosure of information under FIPPA. Currently, access to the following records is not permissible under FIPPA:

- third party information if supplied in confidence and where disclosure could prejudice the interests of a third party; and
- personal information about individuals other than the requester him or herself.

The other exemptions to disclosure under FIPPA are **discretionary** and include:

- information about inter-governmental relations, if the information was received in confidence;
- third party information that includes confidential information where the disclosure could reasonably be expected to prejudice their competitive or contractual position;
- confidential information supplied to or a report of a mediator or other person appointed to resolve a labour relations dispute;
- advice or recommendations within the organization;

- information that could prejudice the financial or other specified interests of the organization;
- information subject to solicitor-client privilege;
- information that could endanger the health or safety of an individual;
- information already available to the public or soon to be published; or
- frivolous and vexatious requests.

**Will there be additional exceptions for hospitals under FIPPA?**

Yes. Bill 122 also contemplates that a head of an institution under FIPPA may refuse to provide access to records that relate to:

- assessing the teaching materials or research of a hospital employee (or of a person associated with the hospital); and
- determining suitability, eligibility or qualifications for admission to a hospital's academic program.

Further, the Bill 122 would amend FIPPA so that it would not apply to:

- ecclesiastical records of a church or religious organization that is affiliated with a hospital;
- a hospital foundation's operational records, nor records of charitable donations made to hospitals;
- the administrative records maintained in a regulated health professional's private practice (e.g., physicians, nurses, registered massage therapists);
- research records (including as they relate to clinical trials) where the research is conducted or proposed by a hospital employee or a person associated with a hospital (e.g., physician who has privileges at the hospital);
- records relating to meetings, communications, etc. around applications for hospital privileges appointments, and anything that's part of a personnel file;
- teaching materials collected, prepared or maintained by a hospital employee or a person associated with a hospital (e.g., physician who has privileges at the hospital), as long as they are for use at the hospital; or
- quality of care information under the *Quality of Care Information Protection Act, 2004*.

Practically speaking, responding to FOI requests and analysing whether an exemption to disclosure applies will be time- and resource-consuming and may require consultation with legal counsel. FIPPA has been in existence since 1988; there is a large body of orders issued by the Information and Privacy Commissioner/Ontario and court decisions applicable to disclosure requests which must be taken into consideration when determining whether an institution is entitled to refuse to grant a FOI request.

**Who hears FOI appeals and what decisions can be appealed?**

Under FIPPA, an individual has thirty (30) days from the date the institution made its decision to appeal the decision to the Information and Privacy Commissioner/Ontario.

For example, an individual may appeal:

- an institution's decision to refuse access to a general record or personal information;
- the fees the institution proposes to charge to process the FOI request;
- the institution's failure to meet the prescribed thirty (30) day response period (which has triggered a "deemed refusal" pursuant to s. 29 (4) of FIPPA); and
- other procedural issues relating to the individual's FOI request.

### **What are the privacy protection obligations of an institution under FIPPA?**

As an institution under FIPPA, hospitals would have additional duties to protect the personal information in their custody/control. FIPPA sets out rules for the collection, retention, use, disclosure and disposal of personal information. Where an individual feels that his/her personal information has not been adequately protected by the hospital, he/she may complain directly to the Information and Privacy Commissioner/Ontario, who may investigate the matter further.

### **Will a hospital need to keep all communications forever? Can we throw out or shred documents?**

The introduction of FIPPA to hospitals will mean that every hospital should review its records retention policy.

Importantly, personal information that is collected by an institution, such as a letter of complaint from a patient or family member, must be retained under FIPPA for at least one year. This will require changes to the hospital's retention policy.

### **Where can I find more information about FIPPA?**

This primer is intended to provide you with basic information about FIPPA; we will update this as more information is known.

In the meantime, the Information and Privacy Commissioner/Ontario offers the following introduction to FIPPA (obviously prepared prior to Bill 122), *A Mini Guide to Ontario's Freedom of Information and Protection Act*, online at:

[http://www.ipc.on.ca/images/Resources/up-mini\\_p\\_e.pdf](http://www.ipc.on.ca/images/Resources/up-mini_p_e.pdf)

It is anticipated that groups such as the Ontario Hospital Association will also provide further information and tools to its members about these significant developments.

## **What will my hospital's FIPPA compliance strategy need to include?**

As with the introduction of the *Personal Health Information Protection Act, 2004*, hospitals will need a robust compliance strategy for FIPPA. The compliance strategy tasks will include, at minimum:

- Striking an internal FIPPA compliance team
- Appointing someone as the "Freedom of Information and Privacy Coordinator"
- Preparing a FIPPA compliance plan
- Writing a FIPPA Policy
- Writing or reviewing a Records Retention Policy
- Providing FIPPA-focused training to help your personnel become more cautious about the creation of new records that may be requested under FIPPA (including but not limited to hospital schedules, and notebooks in which many of us make detailed notes as our usual practice in meetings and to record telephone calls)
- Preparing FIPPA educational materials for distribution to the public

## **DDO Health Law Services**

Our lawyers are experts in privacy and access to information issues. We can help you

- Write an FOI policy
- Write a Records Retention policy
- Review and assess the documentation you already hold that will soon be subject to FIPPA
- Train your staff on the new era of communication – including how to document on a go forward basis, how to use email, and in what circumstances verbal discussions should take place
- Train your board on the impact of FIPPA on the hospital
- Analyse and respond to FOI requests
- Respond to complaints to the Information and Privacy Commissioner/Ontario

We would be happy to assist you to develop a FIPPA compliance strategy. And if you would like an electronic copy of FIPPA with the proposed amendments from Bill 122 highlighted, please contact one of the lawyers below:

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