



Memo

To: Chief Executive Officer & Chief Privacy Officer
Ontario's Public Hospitals

From: Dykeman Dewhirst O'Brien LLP

Date: 9 November 2009

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

As many of you have heard, the Ontario Hospital Association is working with the Ontario government to extend the reach of FIPPA (sometimes known as "FOI legislation") into 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.

This is a primer on FIPPA and what it will mean to hospitals. FIPPA currently applies to government and certain publicly funded institutions. The Ontario Hospital Association has requested that the hospital sector become subject to FIPPA. Of course, we will need to wait to see the proposed amendments to FIPPA to determine whether special rules will be applied to hospitals. We will provide you with further information once the amendments to FIPPA are finalized.

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.
- If FIPPA applies to you, 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

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.
- If FIPPA applies to you, 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
 - Research records
 - Employment records
- *It is important for hospitals to note that, where the personal information at issue is "personal health information", we expect that the privacy rules and access procedures set out in the *Personal Health Information Protection Act, 2004* (PHIPA) will take precedence and continue to apply.

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. The hospital will need FIPPA-focused training to help its personnel become more cautious about the creation of new records that may be requested under FIPPA.

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. Unlike PHIPA, 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. 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.

Practically speaking, we caution that responding to FIPPA requests for information 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 trying to take advantage of an exemption under the legislation.

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?

If defined as an "institution" under FIPPA, hospitals would have additional duties to protect the privacy of the personal information they possess. FIPPA sets out rules for the collection, retention, use, disclosure and disposal of personal information. Where an individual feels that their personal information has been put at risk and has not been adequately protected by the hospital, then they may complain directly to the Information and Privacy Commissioner/Ontario, who may investigate the matter further.

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. In the next months, we will provide additional information if and when the government initiates changes to extend FIPPA to hospitals. The Information and Privacy Commissioner/Ontario offers the following introduction to FIPPA, *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

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