One year later: Ontario Hospitals and the *Freedom of Information and Protection of Privacy Act*

Ayanna Ferdinand Catlyn* and David Dowe**

January 2012 marked the month the *Freedom of Information and Protection of Privacy Act* opened its scope to hospitals in Ontario. In its efforts to create greater transparency and accountability in Ontario’s public and private hospital sector, the Ontario legislature passed amendments to FIPPA in 2010 to render FIPPA applicable to hospitals, retroactive to 2007. By doing so, Ontario hospitals were introduced to a sophisticated legislative framework with rich history and case law.

At the time of writing an earlier article, *Almost Right: The Application of the Freedom of Information and Protection of Privacy Act to Hospitals*, much of the anticipation arising from FIPPA’s application to hospitals focused on hospital-specific activities, namely operational quality care reviews and governance quality care reporting. With almost a year of experience dealing with FIPPA’s application to hospitals, unexpected access requests were received and addressed among hospitals. To date, and contrary to expectations, requests relating to quality care reviews and quality care reporting have not emerged as issues. This paper examines three of the most popular access requests. These access requests may be summarized as: (1) access requests for pricing and contracts for products; (2) access requests for personal information; and (3) access requests for general administrative records.

**Popular Hospital Requests**

1. **Procurement Records**

Vendor corporations have used FIPPA in an attempt to ascertain valuable information about how much hospitals pay for certain goods and services. These types of requests seek access to hospitals’ pricing information and the records generated through the Request for Proposals (RFP) process, presumably, to gain a competitive advantage over the course of subsequent RFPs. Requests have ranged for access to pricing information for certain hospital supplies, submissions submitted in response to RFPs, scoring evaluation sheets completed to evaluate vendor submissions, and final executed agreements between vendors and hospitals. Generally, most requested pricing and procurement information is subject to disclosure, although such access requests may be subject to two exemptions from disclosure – Third party information (Section 17) and Economic and other interests of Ontario (Section 18). In addition to an analysis of these

---

1 R.S.O. 1990, c. F. 31 [hereinafter “FIPPA”].
access requests, it is critically important to include commentary on the principles of accountability and transparency.

Section 17 of FIPPA is a mandatory exemption which requires hospitals to deny access to information which would otherwise disclose commercially valuable information which was supplied in confidence by a third party. Decisions of the Information and Privacy Commissioner of Ontario (“IPC”), who oversees the application of FIPPA, have consistently ruled that pricing information and information found in executed agreements are generally not captured by the third party information exemption, since this information is the product of negotiation and is therefore not “supplied” by the third party. However, when the economic interests of the hospital and not a third party may be affected by the disclosure of records, section 18 may be considered.

Section 18 of FIPPA provides hospitals with the discretion to deny access to records containing certain commercial information belonging to the hospital and having actual or potential monetary value and information “where the disclosure could be expected to prejudice” the hospital’s economic interests or competitive position. The IPC stated that the “purpose of section 18 is to protect certain economic interests of institutions” and, specifically regarding section 18(1)(c), she underscored the following:

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

In certain limited and specific instances, hospitals have refused access to information which would reveal significant value-adds received as part of agreements, which would either be rescinded or not be provided in the future should they be disclosed to the public. While information about how much public institutions pay is typically disclosed, it may be withheld when an institution receives significant savings which benefit the taxpayers of Ontario, and when disclosure of that information would mean a real and probable threat to those savings.

2. **Personal Information**

During the same year the Ontario legislature rendered FIPPA applicable to hospitals, it also introduced the *Broader Public Sector Accountability Act, 2010*. The BPSAA requires hospitals to, *inter alia*, report on a public website information regarding expense claims for certain hospital executives. This requirement is a step towards increased accountability and transparency for hospitals that, in fact, attempts to work with FIPPA to achieve these same goals. In light of the BPSAA requirement for public disclosure of expense claims, the types of access

---

2 For examples, see IPC Orders PO-1805, PO-2018, MO-1706.
3 *Ibid* at s. 18(1)(a)
4 *Ibid* at s. 18(1)(c).
5 IPC Order PO-3032 (January 6, 2012) at para 23.
6 *Ibid* at para 24
7 S.O. 2010, c. 25 [hereinafter “BPSAA”].
8 *Ibid* s. 8.
requests experienced by hospitals have adopted a new level of granularity not revealed in IPC orders to date and, therefore, highlight the persistent question of what constitutes personal information worthy of falling within an exception to access pursuant to FIPPA.

For example, hospitals have received requests for the receipts corresponding with expense claims posted on the hospitals’ public websites. In these cases, the public is interested in ensuring that hospitals remain accountable and transparent with the expense claims of their employees. The IPC has made the distinction that expense claims are incurred by an individual in their “professional capacity” rather than their “personal capacity” and are to be disclosed, while withholding personal credit card numbers and home addresses.9

Hospitals have, however, received requests for records that do not so easily fit within this description of personal information. There are cases where requests have sought access to employees’ health spending account claims made to health insurance providers. While the total dollar amount of health benefits an employee receives can be disclosed without being considered an “unjustified invasion of personal privacy” for the reasons of accountability and transparency noted above, the particular and detailed individual claims likely meet the definition of personal information, and disclosure would constitute an unjustified invasion of personal privacy. This is described in FIPPA at section 21(3)(a):

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

Uniquely, these types of health expenses have not been dealt with in previous Orders of the IPC. These provisions of FIPPA are designed to balance the public’s right to access important information, with the privacy rights of individuals employed in the public and broader public sector.

3. Administrative Records

Vendor corporations, media and law offices are not the only sources of request for hospitals. Indeed, private individuals have also sought access to general administrative hospital records, including policies and procedures, and other internal hospital documents such as email correspondence. Prior to the application of FIPPA to hospitals, these types of documents were only available in accordance with a hospital’s discretion or through the more onerous and expensive process of litigation and were otherwise therefore unavailable to most individuals. FIPPA has provided an avenue for individuals who represent themselves or are contemplating litigation to access important records, through a less costly alternative, in order to pursue actions against hospitals without the assistance and costs of legal counsel.

These general documents which speak to how a hospital operates and are designed to guide the actions of employees over the course of their employment (such as procedures) are generally subject to disclosure. The discretionary “Advice and recommendations” exemption at Section 13 of FIPPA may, at first consideration, appear to be at play when dealing with policies and procedures. In previous requests dealt with by the IPC, it has been argued that these documents

9 PO-2936
provide employees with “advice” on how to act in certain circumstances. However, the IPC has been clear in previous Orders that policies and procedures are not subject to the “advice or recommendations” exemption because they are intended to be “made within the deliberative process of government decision-making and policy-making.”

**Conclusion**

The concerns about bringing hospitals under FIPPA and the possible chilling effect this would have on quality of care reviews has simply not emerged to be the issue it was originally framed to be. The past year has revealed that the public’s interest in accessing hospital records has focused more on ensuring their spending practices remain transparent, that vendors are interested in pricing information and procurements records, and that individuals have more of an interest in administrative records over those relating to quality improvement. While this represents only a sampling of a year’s worth of requests, it may be indicative of what is to follow in the future.

*Ayanna Ferdinand Catlyn is General Counsel and Corporate Secretary for Bridgepoint Health in Mississauga.*

**David Dowe, Senior Advisor, Information and Privacy, oversees compliance with the Freedom of Information and Protection of Privacy Act and the Personal Health Information Protection Act at Trillium Health Partners in Mississauga, Ontario.*

---

10 MO-2207.