

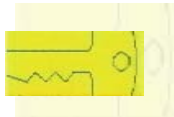


Open Justice and Privacy: The Great Debate

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FIPPA – Scope and Purpose

- *Freedom of Information and Protection of Privacy Act* (FIPPA or the *Act*) applies to tribunals named as “institutions” by regulation
- applies to broad spectrum of tribunals -- OLRB, LLBO, OHRC, disciplinary bodies, etc.
- FIPPA purposes include access and privacy protection – s. 1
- FIPPA preserves litigation access and subpoena rights (s. 64)
- prevails over confidentiality provisions in other Acts unless specifically noted (s. 67)

FIPPA and Courts

- Court records not subject to FIPPA (P-994)
- openness rules in *Courts of Justice Act* s. 135 (hearings) and 137 (paper records)
- s. 136 prohibits photography or recording of court proceedings
- electronic access to court records a complex matter – not settled in Ontario
- tribunals not subject to these rules – and usually subject to FIPPA

FIPPA and Tribunals

- access under FIPPA independent of tribunal's own disclosure mechanisms/SPPA (Order 53)
- disclosure of personal information in existing tribunal practices may contravene FIPPA rules
- privacy issues can come up in two ways:
 - (1) in an access request: privacy exemptions (s. 21(1) and 49(b))
 - (2) unilateral disclosures of personal information (s. 42) – e.g. in tribunal reasons
- different rules in the two situations – exemptions and privacy rules operate separately

Personal Information

- defined in s. 2(1)
- recorded information about an “identifiable individual”
- generally excludes information about professional, business or official capacity
- p.i. if “reasonable” to expect individual may be identified – *Pascoe* [2002] O.J. No. 4300 (C.A.)
- excluding identifiers such as name, address, telephone number can mean information is no longer personal information – FIPPA privacy exemptions and rules don’t apply

Privacy Rules

- Part III of *FIPPA*
- these rules apply to unilateral disclosures – *i.e.* **not** in the context of an access request
- do not apply to personal information maintained for the purpose of creating a record that is available to the general public – s. 37
- personal information must be maintained expressly for this purpose for this exclusion to apply (see IPC Privacy Investigation Report PC-990034-1)

Disclosure – Privacy Rules

- disclosure governed by section 42
- prohibits disclosure of personal information with a list of exceptions:
 - consent: (s. 42(1)(b))
 - comply with federal or provincial legislation (s. 42(1)(e)) – statute expressly requires disclosure (IPC Privacy Investigation Report I93-023P)
 - original or “consistent” purpose: disclose for same purpose for which originally obtained or compiled OR “consistent” purpose (s. 42(1)(c))

“Consistent” purpose

- where information directly collected – consistent purpose “only if the individual might reasonably have expected such a disclosure” (s. 43)
- impact of notice?
- may be relevant in cases involving protection of the public – *i.e.* disciplinary matters, etc.
- not the subject of any investigation reports involving tribunal disclosure practices
- could be the subject of a future report
- not reflected in s. 21 – can’t disclose in an access request situation on this basis

Disclosure – Access Requests

- FIPPA creates right of access to records under “custody or control” of “institutions” – s. 10(1)
- if FIPPA applies, right of access only denied where an exemption applies (s. 10(1)(a)) or request is frivolous or vexatious (s. 10(1)(b))
- two personal privacy exemptions:
 - s. 21(1) – personal information of others – mandatory – can’t disclose unless an exception applies
 - s. 49(b) – own personal information – discretionary – withhold to protect others’ privacy

Section 21

- exceptions to non-disclosure:
 - consent (s. 21(1)(a))
 - personal information collected and maintained specifically for public access (s. 21(1)(c))
 - expressly authorized by statute (s. 21(1)(d))
 - not an unjustified invasion of personal privacy:
 - ✓ sections 21(2), (3) and (4) all offer assistance in assessing whether an unjustified invasion
 - ✓ section 21(3) – presumptions
 - ✓ section 21(4) – not an unjustified invasion
 - ✓ section 21(2) – factors to consider

Order PO-2109

- request for weekly list of tenant's names, addresses, hearing dates, location of hearing – found to be p.i. and exempt under section 21
- postscript urged ORHT to review its policy of providing this type of information
- notes that MOU with requesters could not take precedence over the *Act*
- ORHT amended practices and began denying access to requests for p.i. in its files and decisions

Order PO-2265

- tenant duty counsel program requesting “hearing docket” information similar to the information in PO-2109
- case/file no. not p.i. by itself
- street address not p.i. without unit number in this case – unit number is p.i. – makes individuals identifiable
- names of tenants are p.i. – presence on list discloses involvement in ORHT proceedings
- landlord names not p.i. (see also PO-2225) – information in a business context

PO-2265 (cont'd)

- p.i. not collected for public access – 21(1)(c) exception inapplicable – SPPA argument re public hearing rejected – SPPA does not govern disclosure outside “actual hearings process”
- street address (without unit number), hearing date, hearing location and file number ordered disclosed – not p.i.
- disclosure of p.i. (name, unit number) an unjustified invasion of privacy – exempt s. 21(1)
- similar outcome in PO-2266 through PO-2269 – slight variations in what was requested

Order PO-2511

- request for a particular ORHT decision
- disclosed with severances for name, unit number and rent charges paid and owed – p.i./21(1)
- order: financial information not p.i. without unit no. – not about identifiable individual – ordered disclosed
- withheld personal information has no bearing on public scrutiny in this case (21(2)(a)); info. is highly sensitive (21(2)(f)) – name and unit number found exempt under s. 21(1)

PO-2511 (cont'd)

- appellant argues public interest (s. 23) based on:
 - ✓ need for orders *generally* to be available
 - ✓ need for precedents
 - ✓ 184(1) *TPA* – *SPPA* applies
 - ✓ *SPPA* – provision for open hearings – exception for intimate financial or personal matters
 - ✓ does not require decisions to be available
- order: public interest met by disclosure that has already been given
- fact of an open hearing does not mean p.i. should have broad public availability in the decision, outside the context of the hearing

PO-2511 (cont'd)

- appellant argues need to obtain names to assess frivolous/vex arguments
- not an issue in this case so this argument rejected in this order
- constitutional argument re s. 96 courts based on *Reference re Residential Tenancy Commission* – argued under s. 23, no NCQ – decision was superseded by N.S. case [1996] 1 S.C.R. 186 – presumption of constitutionality
- postscript – find ways of issuing without p.i. to make body of decisions available

Order PO-2544

- request for “hearing docket” information similar to PO-2265
- specific argument that *SPPA* ousts the *Act* re tribunal records
- argument rejected based on PO-2265 – *SPPA* applies to the hearing; *Act* applies re disclosure of p.i. in records outside the actual hearings process
- PO-2544 finding: no conflict between *FIPPA* and *SPPA* here – docket not part of hearings process
- p.i. and s. 21 analysis same as in PO-2265

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