



RECENT ORDERS AND DECISIONS

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From the Shadows to the Spotlight
Access and Privacy Workshop
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Ontario (LCBO) v. Information and Privacy Commissioner [2009] O.J. No. 2980 (Div. Ct.)

- Judicial Review of Orders PO-2405 and PO-2538-R
- settlement privilege and section 19 (FIPPA) (solicitor-client privilege).
- orders also dealt with sections 17, 18, 21.
- IPC found that section 19 does not encompass settlement privilege.



Ontario (LCBO) v. Information and Privacy Commissioner continued

- structure of the *Act* - that which is not exempt must be disclosed
- settlement privilege at common law applied
- public interest purpose of settlement privilege
- mediation and the *Rules of Civil Procedure*
- Div. Ct.: records prepared “by or for Crown counsel for use in litigation”



Ontario (LCBO) v. Information and Privacy Commissioner continued

- “branch 2” of section 19 therefore applied to LCBO’s mediation records
- “asymmetry” argument – what about mediation records of private litigants?
- Court: common law settlement privilege applies on a case-by-case basis
- IPC applies for leave to appeal: M37776 (C.A.)



Ontario (Attorney General) v. Ontario I.P.C.
[2009] O.J. No. 952, leave to appeal dismissed
M37397 (C.A)

- JR of PO-2494/PO-2532-R and PO-2498
- does section 19 (FIPPA) (solicitor-client privilege) apply to original Police copies of records copied for the Crown brief?
- section 19(b) not applied by IPC to police records



Ontario (Attorney General) v. Ontario I.P.C. continued

- Considerations in IPC order:
 - purpose of preparation of police records was investigating/deciding whether to lay charges
 - distinct from Crown's purposes of deciding whether to prosecute and using records in the actual prosecution
 - appearance of copies of the records in Crown brief does not alter the original purpose of preparation of police records remaining in the hands of the police
 - applying section 19 here would undermine access purpose of the *Act* by extending section 19 to virtually all investigative records of the police
 - Ct.: Crown brief permanently exempt



Ontario (Attorney General) v. Ontario I.P.C. continued

- IPC position – 19(b) applies to Crown brief itself, not original police investigative records retained by Police
- Court cites impact of other sections designed to protect law enforcement interests – mainly s. 14 – also s. 20, 21
- detailed provisions exist to deal with law enforcement records – IPC appropriately drew distinction between police records and prosecutor’s records




PO-2733; Ministry of the Attorney General— Crown brief

- contents of the prosecutor's file or "Crown brief" *in hands of the prosecutor* are permanently exempt under section 19(b) ("branch 2")
- *Ontario (AG) v. Big Canoe* (2002), 67 O.R. (3d) 167 (C.A.) – intention of branch 2 is to give Crown brief permanent exemption
- *Ontario (AG) v. Big Canoe* (2006), 80 O.R. (3d) 761 (Div. Ct.) reiterates this



PO-2733 continued

- records copied for inclusion in the brief – for counsel’s fact-finding or investigation - exempt if selectively copied, or result from counsel’s research, or exercise of skill and knowledge– see *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Ct.)
- section 19 does *not* reach back and apply privilege to original copies in the hands of others – police records are in effect “prepared” twice
- principles here are briefly restated in PO-2824



Criminal Lawyers Assn v. Ont. (MPSS) [2007]
O.J. No. 2038 (C.A.), 280 D.L.R. (4th) 193 leave to
appeal granted [2007] SCCA No. 332

- JR of PO-1779: Public Interest Override and section 2(b) of the *Charter*
- s. 23 (FIPPA)/ 16 (MFIPPA) -- compelling public interest in disclosure clearly outweighs the purpose of an applicable exemption
- argument – s. 23 under-inclusive for not overriding 14, 19 – interferes with freedom of expression – *Charter* s. 2(b) – *i.e.* is there a constitutionally protected right of access to information to facilitate free expression



***Criminal Lawyers Assn v. Ont.* cont**

- not all exemptions can be overridden – e.g. sections 12, 14, 16, 19
- at issue here – 14, 19
- facts – staying of murder charges in gangland slaying – allegations of Crown/police impropriety – OPP investigation – brief press release announces no charges laid – CLA makes access request
- records: investigation report and correspondence between OPP and Crown – denied under sections 14(2)(a), 19, 21



***Criminal Lawyers Assn v. Ont.* cont**

- PO-1779 – public interest overrides section 21 exemption but open court principle does not support s. 2(b) *Charter* argument
- CA disagrees – reads s. 14/19 into s. 23
- Crown appeals
- at SCC – IPC position – non-disclosure breaches s. 2(b) rights – reading s. 14/19 into s. 23 provides mechanism for proportionality required under *Charter* s. 1



Order PO-2826 – “Excessive Background Checks Conducted on Prospective Jurors”

- Order and Special Investigation Report issued by Commissioner Ann Cavoukian
- police forces doing background checks on jurors – giving information to Crown prosecutors – defence counsel not receiving the information
- *Juries Act* excludes those with criminal record for indictable or other serious offence(s) – these checks went farther



Order PO-2826 continued

- LSUC rules – Crown’s job is not to secure convictions but to see justice done
- jurors have *Charter* right to be secure against unreasonable search/seizure
- provisions of FIPPA/MFIPPA used to arrive at conclusions
- collection/disclosure of information beyond what is required to assess *Juries Act* criteria found not in accordance with Acts.



Order PO-2826 continued

- MAG ordered to cease a “collection practice” under s. 59(b)(i) – i.e. to stop collecting information beyond what is required to assess *Juries Act* eligibility
- 22 recommendations
- centralize process of jury verification through Provincial Jury Centre
- LSUC – make necessary changes to rules



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Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner, 2009 ONCA 20

- Decision by the Court of Appeal requiring the Toronto Police Services Board to create a software program to produce a record from one of their databases in order to meet the requirements of a FOI request made by the Toronto Star.
- Definition of “record” in section 2(1)(b) of MFIPPA (and FIPPA):
“any record that is capable of being produced from a machine-readable record ... by means of computer hardware or software or any other information storage equipment and technical expertise *normally used by the institution.*”



Toronto Police Services Board Continued

- “normally used by the institution” requires an institution to use existing or “in-house” software and expertise to produce a record.
- The Court of Appeal held the Adjudicator’s interpretation of s. 2(1)(b) was reasonable for the following reasons:
 - (a) The Adjudicator was reasonable in finding that the requested information could be extracted from the Police’s databases by developing an algorithm through the use of technical expertise and software that was normally used by the institution;
 - (b) The Adjudicator was correct in taking a contextual and purposive approach to interpreting s.2 (1)(b);
 - (c) “Technological reality” necessitated an interpretation of s. 2(1)(b) that would maximize the public’s right of access to electronically recorded information; and



Toronto Police Services Board Continued

- (d) The outcome reached by the Adjudicator was consistent with the principles expressed in previous decisions that new information technology should enhance instead of undermine information rights under the Act.
- The decision clarifies that institutions are required to use their existing, in-house software and technical expertise when responding to access requests.



MO-2395 – *Niagara Regional Police Services Board*

- In this order, information about nursing home workers investigated by the Police concerning the personal injury of a resident of the nursing home was considered 'personal information.'
- The Niagara police received an access request under MFIPPA for a police investigation report.
- The report was partially disclosed, but some parts of the records were severed.
- Access was denied to these parts pursuant to section 38 (b) (personal privacy) and 14(3)(b) (investigation into a violation of law).
- The withheld information on three of the severed pages related to three nursing home workers.
- The withheld information on the 6 other pages set out evidence obtained by the police during their investigations.



MO-2395 – *Niagara Regional Police Services Board Continued*

- The IPC held that withheld information relating to the injured woman and the nursing home workers was personal information.
- The IPC looked at PO-2225 setting out its approach to the distinction between personal and business or professional information.
- The IPC asked the following:
 - (a) In what context do the names of individuals appear?
 - (b) Is there something about the particular information at issues that, if disclosed, would reveal something of a personal nature about the individual?**
- The information relating to all the individuals in this case were in the professional context.



MO-2395 – *Niagara Regional Police Services Board Continued*

- Information relating to the nursing homes executive director, the director of programs, the businessperson, the union representative and the lawyer, did cross over into “personal information.”
- This did not apply to any comments that they made about other individuals that were summarized in the record.
- Information relating to the four nursing home workers was qualitatively different.
- Although information from the nursing home worker, designated as a witness, to the police was provided in a professional capacity, the summary of her interview contained details about her personal activities outside the workplace.
- Accordingly, if the withheld information relating to this individual were to be disclosed, it would have revealed something of a personal nature about her.



MO-2395 – *Niagara Regional Police Services Board Continued*

- In relation to the withheld information of the two other nursing home workers, the IPC held that the conduct of these two suspects took on a different more personal role.
- In addition the withheld information contained details about their personal activities and the incident that led to the woman's injuries.
- The information relating to the nursing home worker who was not designated as a suspect did not contain information about her personal activities outside work, but constituted an evaluation or investigation into her conduct as an employee.
- This was sufficient, in the circumstances of this case, to cause the information to take on a more personal quality.
- Accordingly, the information was personal information.
- There was a presumed invasion of personal privacy under s. 14(3)(b)
- However, there was a compelling public interest in disclosure.



Tadros v. Peel (Police Services) [2009] O.J. No. 2158

- **Section 32 (b) MFIPPA / s. [(42(1)(b) of FIPPA]**
- **When an individual consents to the disclosure of personal information, how specific does the consent have to be?**
- This was an appeal by the peel regional police from an injunction prohibiting it from making any reference to withdrawn criminal charges of sexual assault and sexual exploitation when responding to any inquiries about the respondent.
- Tadros subsequently signed Toronto Police Service authorization forms requesting a criminal records search in relation to his prospective employment with a group home or as a counsellor.
- He was seeking employment that would bring him into contact with vulnerable people and requested a Vulnerable Persons Search.
- The form requesting the search had a general consent to disclosure of personal information provision.



Tadros v. Peel (Police Services) continued

- Tadros's counsel wrote to the Peel Police Service asking that information about the withdrawn charges not be disclosed and that the records of the charges be destroyed.
- The Peel Police Service indicated that it would not purge the records of the withdrawn.
- Tadros then applied for an order requiring the Peel Police Service to expunge from any and all Police Reference Check Reports any references to the eight withdrawn criminal charges.
- The application judge held that disclosure of the information was not authorized by s. 32 (b) the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA) or the Police Services Act (PSA.)



Tadros v. Peel (Police Services) continued

- He held that both sections 31 and 32, referring to the information sought, required "that information in particular" has been identified by him before it is consented to and released.
- The court of appeal, however, found that pursuant to s. 32(b) of MFIPPA, a chief of police was authorized to disclose personal information with the specific consent of the affected person.
- There was sufficient consent in this case.
- Accordingly, the disclosure was in accordance with s.32 (b) of MFIPPA.

- Application for leave to appeal to SCC filed August 26th 2009.



PO-2730 – Office of the Public Guardian and Trustee

- Expands the scope of continuing access [24(3) FIPPA / 17(3) MFIPPA].
- An access request was made to the PGT under FIPPA for the names, last known addresses, occupation, place of death and date of death of all deceased persons whose names have been reported to the office of the PGT after Jan 1 2002.
- Moreover, the request was for continuing access.
- The IPC had to consider two issues:
- Issue 1: Were the records that were not yet created and that would be created in the future “records” for the purposes of s.10 of FIPPA?
- Issue 2: Did the applicant qualify for continuing access under s.24(3) of the Act?



PO-2730 continued

- To determine if this was a record under the Act, the IPC asked three questions:
 - a. was the record capable of being produced from a machine readable record?
 - b. was the record under the control of the institution?
 - c. could the record be produced by means of computer hardware and software of any other information storage equipment “normally used by the institution” ?
- As the answer to all these questions was “yes”, the IPC asked whether the IPC then considered whether the process of producing the record would unreasonably have interfered with the operations of PGT.
- The IPC concluded that the definition of record was met.



PO-2730 continued

Continuing Access

- Section 24(3) of FIPPA [24(3) FIPPA / 17(3) MFIPPA] – applicant may indicate that it shall, if granted, continue to have effect for a specified period of two years.
- It was not true that *full* access had to be granted or that no consideration may be given as to what level of access to grant in requests that arise later, under the continuing access schedule.
- Moreover, s.24(3) does not refer to any particular type of record that may be subject to continuing access. It does not refer to records produced in a series or records that are of similar character.



PO-2730 continued

- **Implications of the decision:**
- Order has broadened the purview of the right to include many different types of records. While continuing access was considered conditional on access having been granted in the original request Order PO-2730 has broadened that to records that may have to be severed.



MO-2459 – *City of Toronto*

- This order gives direction on how institutions ought to deal with broad access requests.
- The order clarifies that the manner in which records are stored should not dictate the form in which requests for that information are made.
- The City of Toronto received an access request for information relating to signs in the City.
- The City responded by saying that the request was too broad.
- The request was reformulated; the requester asked for records relating to 21 staff members.
- The City again said that the request was too broad.
- The requester asked for the records of one staff member.



MO-2459 – *City of Toronto* continued

- The City again said the request was too broad.
- On appeal to the IPC, the requester provided a 14 page list containing specific sign locations for which she sought the records.
- The City argued that the requester was seeking access to all correspondence relating to signs in 361 separate property addresses and that as such, they were 361 separate access requests.

- The IPC held: it was not a proper interpretation of the *Act* "to impose an ironclad requirement on requesters who ask for the same information about a number of different addresses or locations, that each location or address be considered the subject of a separate request . . . After all, the information requested for each address is the same or similar, and this would suggest a sufficient linkage in subject matter to justify treating this as a single access request."



MO-2418 and MO-2419 – Community Development Corporations

- **What is an 'institution' under MFIPPA**
- MO-2418 and MO-2419 both dealt with community or economic development corporations and the IPC found that both were covered as institutions under section 1(1)4 of Regulation 372/91.
- the IPC also found that the community or economic development corporations were institutions under section 20 of Ontario Regulation 599/06 under the *Municipal Act*
- the purposes of the Act must be considered in reconciling complex and often contradictory provisions.



PO-2775-R - University of Toronto

- **'Institution' under FIPPA**
- Order considers whether Victoria University is subject to FIPPA by virtue of being federated with the University of Toronto (U of T)
- Access request submitted to Victoria University for a report written for United Church of Canada/Victoria University Archives Task Force
- Adjudicator, in order PO-2683, directed the U of T (as the parent University) to release portions of the record
- U of T submitted a request for reconsideration claiming that Victoria University should have been named as the Institution in the order and that it should not be ordered to release a record to which it has no control over and over which it has no rights whatsoever
- Adjudicator stayed order and granted the reconsideration request



PO-2775-R - University of Toronto *continued*

- U of T raised for the first time in submissions that Victoria University is not subject to FIPPA because it is not specifically listed as an institution under regulation 460
- Submissions stated that Victoria University is separately governed and managed, has its own governing legislation, officers, property, collective agreements, policies and students. Agreement entered into between institutions for specified academic purposes only
- Adjudicator found that Victoria University is part of U of T for the purposes of FIPPA because:
 - Legislative intent was to cover all “publicly funded universities”
 - There is strong degree of administrative, financial and academic operations between the universities
- The adjudicator also noted that both universities had been acting as if Victoria University was subject to the requirements of the Act




MO-2408 – City of Ottawa

- **Custody and Control**
- A request made under MFIPPA for records relating to employee's volunteer work and in no way involved city business
- City took position that records not in custody or control of City for the following reasons:
 - The subject matter of the records did not relate to City business
 - City has a policy that allows use of email for incidental personal use
 - Records were kept in a separate file on computer system and were completely segregated from any records related to City business
 - City by-law excludes records from its official business records




MO-2408 – City of Ottawa *continued*

- IPC found the records to be in custody or control of the City because:
 - The records were on the City's email server
 - The City had the right to possess the records. This was supported by the fact that the City stated in its email policy that computers may be monitored for unauthorized use
- Implications:
 - IPC may consider any emails on an institutions server to be in the custody or control of the institution, regardless of the content of the e-mails
 - IPC may view physical records differently than electronic records (See: Order PO-1974-F)



MO-2416/MO-2449 – County of Simcoe

- Access request for “model” developed by engineering firm hired by County to conduct evaluations of potential landfill site as part of requirement under the Environmental Protection Act
- County issued decision stating that it did not have custody or control. As a basis for its decision, the County argued that:
 - The model was not created by the County
 - The County does not have physical possession of the model
 - The country has no explicit contractual right to obtain the model
- IPC found that the County had control of the model for the following reasons:
 - The county had a legal duty to create the report. There was a sufficient connection the legal duty to create the report and the model
 - Engineering firm was not operating at arm’s length
 - Engineering firm received and used public money to create the model and this created an implicit right for the County to obtain the model



MO-2416/MO-2449 – County of Simcoe

continued

- IPC ordered County to issue a written direction to engineering firm to provide the County with records
- County issued direction to engineering firm, but the firm refused to comply with the direction. As a result of non-compliance, IPC continued inquiry
- At the request of the IPC, County provided further submissions that stated:
 - It was not aware of any basis on which it could take legal action to obtain the records;
 - It was beyond their legal rights under the contract to commence legal proceedings against the engineering firm
 - It was not willing to take additional steps to obtain the records
- IPC reiterated that there was an implicit right to obtain the model because it was created with public funds
- IPC ordered County to take immediately take all steps, including legal proceedings, if necessary, to obtain the model