Book: All arguments of parties and intervener in Dr. Denis Rancourt's constitutional challenge of Section 65(6)3 of the *Freedom of Information and Protection of Privacy Act*, at judicial review, in the Divisional Court for Ontario

Court File No.: 17-DC-2279
Scheduled to be heard in Ottawa on November 23, 2018
(Book prepared by Denis Rancourt)
(March 2018)

SUMMARY: The exclusion of employee records from the protection of Ontario's *Freedom of Information and Protection of Privacy Act* is unconstitutional. The exclusion amendment (s. 65(6)3) unreasonably abated the constitutional rights of privacy and freedom of expression to alter the employer-employee landscape. For example, a government employer can capture and use the most intimate childhood, relational and personality information of an employee, without ever obtaining authorization or consent or ever informing the employee. Rancourt's former employer still has and can continue to thus use such information.

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Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

– and –

UNIVERSITY OF OTTAWA

Respondent

– and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Respondent

APPLICANT'S FACTUM

(APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW)

Dated: September 19, 2017

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FACTUM

OVERVIEW: The exclusion of employee records from the protection of Ontario's *Freedom of Information and Protection of Privacy Act* is unconstitutional. The exclusion amendment (s. 65(6)3) unreasonably abated the constitutional rights of privacy and freedom of expression to alter the employer-employee landscape. In the instant case, a government institution produced a psychiatric diagnosis and report about the Applicant who was barred from knowing of its existence, and is barred from accessing it and controlling its disclosure.

Part I: APPLICANT AND IMPUGNED DECISION

1. The Applicant, Dr. Denis Rancourt, formerly a tenured Full Professor at the University of Ottawa (the "University"), makes application for an order to set aside Information and Privacy Commissioner ("IPC") order PO-3686 of Adjudicator John Higgins (the "Adjudicator") dated January 12, 2017 (the "Order") in which the Adjudicator denied the *Charter* claims of the Applicant and upheld the University's decision to deny the Applicant access to his personal information, including:
   i. A psychiatric report (the "psychiatric report") made, held, and used without the knowledge or consent of the Applicant (written in French).
   ii. All records about the psychiatric report.

Part II: FACTS

THE PSYCHIATRIC REPORT

2. The psychiatric report contains intimate details about the Applicant's personal life, including: asserted childhood violence in the home, childhood circumstances, adult personal lifestyle practice, adult family life including intimate family relationships, and psychiatric diagnostic about likelihood of the Applicant committing violent acts. [1]

3. The psychiatric report (in French):

[1] The psychiatric report; **Private Record of Proceedings of the Respondent IPC ("Private Record - IPC"), Tab 1**

(a) was made in 2008 by the University, using information produced, gathered, searched, or seized by the University, [2] [3]

(b) was produced without the applicant's knowledge, consent, or participation, [4]

(c) was produced outside of any claimed prior authorization,

(d) goes to the essential core of the Applicants integrity and identity.

4. The source used by the hired psychiatrist in making the psychiatric report was University executive André Lalonde: [5]

(a) André Lalonde had been an intimate personal friend of the Applicant from approximately 1990 to approximately 2005. [6]

(b) André Lalonde became a University executive in 2006.

(c) André Lalonde died in 2012, the same year (2012) of the University's first disclosure of the psychiatric report to the Applicant.

5. The psychiatric report was never in issue or entered into evidence in the ancillary litigation (labour arbitration) in which it was first disclosed prior to the originating access to information request, under implied undertaking of confidentiality. [7]

ACCESS TO INFORMATION LITIGATION HISTORY

6. The originating access request for the psychiatric report and associated records was made to the University by the Applicant on October 31, 2012.[8]

7. The University first denied access on the grounds that the request was "frivolous or vexatious". The Applicant appealed the denial to the IPC. The IPC ruled on March 25, 2014

[2] Affidavit of Denis Rancourt affirmed 2015-04-13, paras. 26, 27, 35, and 38 (The said affidavit is uncontradicted by evidence, in its entirety.); **Private Record - IPC, Tab 3**
[3] And the psychiatric report itself; **Private Record - IPC, Tab 1**
[4] *Ibid.*, para. 19; **Private Record - IPC, Tab 3**
[5] *Ibid.*, paras. 27(a), 35(b), and 35(d); **Private Record - IPC, Tab 3**
[6] *Ibid.* esp. para. 35(d); **Private Record - IPC, Tab 3**
[7] *Ibid.* paras. 20 to 25; **Private Record - IPC, Tab 3**
[8] Access request dated 2012-10-31, Exhibit "A" of the affidavit of Denis Rancourt affirmed on 2015-04-13; **Private Record - IPC, Tab 3-(A), pp. 97-99**

that the request was duly made and ordered the University to provide a fresh access decision.[9]

8. The University made a fresh denial of access on the grounds that the requested records were excluded from the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "*Act*"), pursuant to s. 65(6)3 of the *Act*. The Applicant appealed the said fresh denial to the IPC.

9. On the fresh appeal to the IPC, the Applicant sought access to the psychiatric report and the other documents at issue on the grounds that the s. 65(6)3 provision that was used by the University to deny access is itself unconstitutional because it violates privacy and freedom of expression *Charter* rights, and sought a declaration of unconstitutionality.

10. In the impugned decision (Order), the IPC decided that none of the Applicant's *Charter* rights were violated, denied the Applicant's constitutional grounds, and upheld the University's denial of access.[10]

11. The Adjudicator correctly determined that:
    (a) The Applicant made a direct challenge to the constitutionality of s. 65(6)3 of the *Act* itself. (Order-paras. 78 and 79)
    (b) The Adjudicator has jurisdiction to decide the constitutional questions. (Order-para. 83, and its footnote)
    (c) The Applicant has standing to make the constitutional arguments. (Order-para. 116)
    (d) The University is a government actor for the purpose of the constitutional claims, and the question of government actor is irrelevant in the constitutional scrutiny of the law itself. (Order-paras. 110 and 114, and see Order-para. 106)

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[9] IPC Order PO-3325, issued 2014-03-25: *University of Ottawa (Re)*, 2014 CanLII 14792 (ON IPC), http://canlii.ca/t/g6ddj ; **Public Record of Proceedings of the Respondent IPC ("Public Record - IPC"), vol. 1, Tab 29-A**

[10] Impugned decision (Order), IPC Order PO-3686, issued 2017-01-12: *University of Ottawa (Re)*, 2017 CanLII 2024 (ON IPC), http://canlii.ca/t/gx2g6 ; **Applicant's Application Record ("AAR"), Tab 2**

(e) The psychiatric report and the other records at issue were prepared by or on behalf of the university. (Order-para. 71)

(f) The s. 65(6)3 exclusion from the *Act* applies to the psychiatric report and the other documents at issue, and is the sole claimed statutory basis for the University's denial of access. (Order-paras. 6 and 75)

(g) An implied undertaking of confidentiality constrains and precludes communication by the Applicant about content of the psychiatric report and about the other records at issue: "[H]aving received a copy" does not constitute access. (Order-paras. 175 to 178)

(h) "While inappropriate behaviour by institutions may attract the application of the 'public interest override' found at section 23 of the *Act*, that override does not apply to exclusions such as section 65(6)." (Order-para. 69)

(i) Possible public disclosure, following access, would not, in any significant way, impinge on the proper functioning of the university. (at Order-para. 154)

(j) Any past failure to take steps to avoid the implied undertaking at labour arbitration is not determinative of the matters in issue. (at Order-paras. 181 and 182)

(k) Allegations of impropriety in the University's relationship with its employees, including the Applicant, may be a matter of public importance. (at Order-para. 184)

12. The Applicant filed the Notice of Application on February 13, 2017. (AAR, Tab 1)

13. Part of the record of proceedings was sealed (following a motion made on consent) by the confidentiality order of Justice L. Sheard, dated July 26, 2017 (Entered at Ottawa, Document # O411, Registry No. 73-13, attached to sealing envelope).

Part III: ISSUES RAISED AND LAW

ISSUES

14. The issues in the application are:

(1) Did the Adjudicator err in deciding that the Applicant's *Charter* privacy rights (ss. 7, 8) were not infringed?

[9]

(2) Did the Adjudicator err in finding that the Applicant's *Charter* freedom-of-expression rights (s. 2(b)) were not infringed?

(3) Is s. 65(6)3 of the *Act* constitutional? Does it survive the *Oakes* test?

(4) Did the Adjudicator err by failing to find that s. 65(6)3 of the *Act* is unconstitutional in its general effect, irrespective of achieving the threshold for *Charter* scrutiny in the particular circumstances of the instant case?

STANDARD OF REVIEW

15. The Applicant made a direct challenge to the constitutionality of s. 65(6)3 of the *Act* itself. He argued that the threshold question was whether his expression or privacy *Charter* rights were violated by s. 65(6)3, and if so that s. 65(6)3 should be declared unconstitutional (Order-paras. 78 and 79). [11]

16. Therefore, the standard of review is correctness:

> There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness. [Emphasis added] [12]

***OAKES* METHODOLOGY**

17. There is an uninterrupted jurisprudence establishing that when a statutory provision is itself constitutionally challenged a formal (or *Oakes*) methodology must be applied, in which: [13]

(a) The right guaranteeing sections of the *Charter* must be kept analytically separate from s. 1. Whether a right has been infringed and whether the limitation is justified are distinct processes with different burdens of proof. [14] [15]

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[11] "ISSUE C: IS SECTION 65(6) OF THE ACT UNCONSTITUTIONAL?" and "ORDER REQUESTED" sections in the representations of the appellant (now the Applicant) dated 2015-04-14, paras. 48 to 131; **Private Record - IPC, Tab 2, pp. 32-67**

[12] *Doré v. Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 (CanLII), http://canlii.ca/t/fqn88 , **("*Doré*")** at para. 43

[13] *R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC), http://canlii.ca/t/1ftv6 , **("*Oakes*")**

[14] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 (SCC), http://canlii.ca/t/1ft8q , at p. 178 (c-g)

(b) In answering the first question of whether or not an infringement of a guaranteed right has occurred, the said right must be interpreted generously, and not in a narrow or legalistic fashion. [16]

(c) In assessing whether the purpose of a legislative provision is constitutional, the court should consider only the purpose of the provision itself and not the broader purpose of the surrounding legislation as a whole. [17]

(d) In the said distinct process of evaluating s. 1 justification (the *Oakes* "test"), the onus — including its factual basis using cogent and persuasive evidence — lies with the government; and the said process must include an inquiry that goes further than the specific case, into the general effects of the impugned provision. [18]

18. The first essential step in the *Oakes* methodology — to separately determine whether the impugned statutory provision infringes the *Charter* right — plays out in different ways:

(a) At one extreme the caused limitation is immediate on its face or is not contested by the government, [19]

(b) while at the other extreme there is either no logical connection between the provision and the claimed infringement [20] or

(c) the admitted limitation of the *Charter* right is already established to be justified in non-distinguished circumstances. [21]

(d) In the case of s. 2(b) expression rights, the methodology of *Irwin Toy* and *Montreal* is established, and the said rights include a derivative right of access to information. [22]

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[15] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, 2002 SCC 68 (CanLII), http://canlii.ca/t/50cw , para. 10

[16] *R. v. Dyment*, [1988] 2 SCR 417, 1988 CanLII 10 (SCC), http://canlii.ca/t/1ftc6 , at p. 426 (at CanLII para. 15)

[17] *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94 (CanLII), http://canlii.ca/t/dlv , at para. 127

[18] *R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC), http://canlii.ca/t/1ftv6 , **("*Oakes*")** CanLII paras. 68 and 71, and see CanLII paras. 14, 49, 60, and 63 to 71

[19] For example: *R. v. Sharpe*, [2001] 1 SCR 45, 2001 SCC 2 (CanLII), http://canlii.ca/t/523f , para. 32. Also, a statute can itself "constitute" an infringement of a guaranteed *Charter* right: see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 1986 CanLII 5 (SCC), http://canlii.ca/t/1ftpc , at para. 34.

[20] For example: *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157, 2013 SCC 47 (CanLII), http://canlii.ca/t/g0mbh , para. 48.

[21] "not all limitations will attract *Charter* scrutiny" in: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 1995 CanLII 115 (SCC), http://canlii.ca/t/1frmh , at p. 368-369.

STATUTORY CONTEXT

19. The instant case is the first constitutional challenge to the s. 65(6)3 exclusion provision in Ontario's information access and privacy protection statute. The constitutional issues raised by the Applicant are serious, important and novel in the context of access to information litigation.

20. The purposes of the *Act* are given in its section 1:

> *The purposes of this Act are,*
> *(a) to provide a right of access to information under the control of institutions in accordance with the principles that,*
> *(i) information should be available to the public,*
> *(ii) necessary exemptions from the right of access should be limited and specific, and*
> *(iii) decisions on the disclosure of government information should be reviewed independently of government; and*
> *(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information*.

21. Ontario is the only Canadian province or territory to have an employment-related or labour relations exclusion in its privacy and access statute, codified in s. 65(6)3 of the *Act*:

> *Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following: ...*
> *3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. ...*

22. In the context of the *Act* and of the instant application: ●"access" means obtaining copy and control for use of the sought records or documents. (Denial of access to a record held by an institution *prima facie* infringes or denies expression about the form and content of the denied record, unless the said denied record is otherwise already available for use.)

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[22] See section "4. Is the Legislation Constitutional?" in: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII), http://canlii.ca/t/2b5ss , **("*CLA*")**, esp. paras. 31 to 33

●"Privacy protection" means those provisions of the *Act* that protect personal information against misuse by the institutions (including search, collection, storage, disclosure, and use). ●"Excluded" records are records to which "*this Act does not apply*", per an exclusion such as s. 65(6)3.

23. "Excluded" records are not subject to the right-of-access and privacy-protection provisions of the *Act*, whether the said excluded records contain personal information or not.[23] [24]

ISSUE #1: Did the Adjudicator err in finding that the Applicant's *Charter* privacy rights (ss. 7, 8) were not infringed?

24. The Applicant vigorously argued that his *Charter* privacy and privacy protection rights were violated, and that the violations resulted from the s. 65(6)3 exclusion. [25] [26]

25. The Applicant's evidence about his *Charter* privacy rights being infringed is uncontested. In Sur-Reply, the Applicant stressed this point as: [27]

> The Appellant notes that none of his affidavit evidence is objected-to or contradicted or opposed by the institution (Supporting affidavit in Response, affirmed by Denis Rancourt on April 13, 2015, with 34 exhibits — "A" to "H" and "1" to "26").

Nor did the Adjudicator make any finding that the Applicant's evidence was in doubt.

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[23] For example: IPC Order PO-2951, issued 2011-02-09, *University of Ottawa (Re)*, 2011 CanLII 7189 (ON IPC), http://canlii.ca/t/2frlq ; where s. 65(6)3 was used to deny the Applicant access to the records that are exhibits 16 to 25 in the affidavit of Denis Rancourt affirmed on 2015-04-13; **Private Record - IPC, Tab-3-(16) to Tab 3-(25), pp. 176-200**

[24] And see: IPC Analyst Ruth Koziebrocki's letter to the Applicant, dated 2014-09-05, last two paras. on p. 4; **Public Record - IPC, Tab-35, pp. 237-241**

[25] Representations of the appellant (now the Applicant) dated 2015-04-14, paras. 48, 50, 54, 60 to 64, 66 (in subsection entitled "There is a *Charter*-protected right to protection of privacy"), 72, 87, 109 to 115 (in subsection entitled "Privacy of the Report is constitutionally protected, as a fundamental value"), 116 to 118, and 127 to 130; **Private Record - IPC, Tab-2, pp. 11-71**

[26] Sur-Reply of the appellant (now the Applicant) dated 2016-01-03, esp. paras. 21 and 48 to 52; **Public Record - IPC, Tab-59-A, pp. 859-879**

[27] *Ibid.*, para. 26; **Public Record - IPC, Tab-59-A, pp. 859-879**

26. The Adjudicator decided not to uphold the Applicant's claim of unconstitutionality of s. 65(6)3 of the *Act* regarding *Charter* privacy rights, in the section of the Order entitled "*The appellant's arguments that section 65(6)3 is unconstitutional because it limits privacy protection*" (Order-paras. 117 to 125).

27. The Adjudicator was silent on the *Charter* jurisprudence of informational privacy, and on the *Charter* jurisprudence of the meaning of "reasonable search or seizure", and erred in not finding that the Applicant's *Charter* privacy rights are engaged (Order-paras. 117 to 125).

28. Informational privacy and privacy protection rights are enshrined in ss. 7 and 8 of the *Charter*. [28] Basic elements of the established jurisprudence (see below) are:
    (a) Ss. 7, 8 protect informational privacy regarding a biographical core of personal information.
    (b) Unreasonable invasion of privacy is defined with respect to a reasonable expectation of privacy (ss. 7,8).
    (c) State denial of privacy protection must be in accordance with the principles of fundamental justice (s. 7).
    (d) There is a positive right of preventive protection against invasion of privacy (ss. 7, 8).

29. The Applicant disjunctively relies on both sections of the *Charter*, as follows.

Section 7 (*7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*)

30. The privacy rights enshrined in s. 7 of the *Charter* have these salient features:

A. *Interpreting s. 7*

[28] "[The Supreme Court] articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the *Charter*, and privacy rights are to be compromised only where there is a compelling state interest for doing so." — at para. 29: *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502 (CanLII), http://canlii.ca/t/1rxpx

[14]

The goal of *Charter* interpretation is to secure for all people "the full benefit of the *Charter*'s protection" […]

In […], Justice Wilson emphasized that there are three distinct elements to the s. 7 right, that "life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the Court. […] It is therefore possible to treat only one aspect of the first part of s. 7 before determining whether any infringement of that interest accords with the principles of fundamental justice.

[…]

Lamer J. went on to hold that the principles of fundamental justice referred to in s. 7 can relate both to procedure and to substance, depending upon the circumstances presented before the Court.

I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual's right to "life, liberty and security of the person". […]

[references omitted] [Emphasis added] [29]

113 […] Respect for individual privacy is an essential component of what it means to be "free". As a corollary, the infringement of this right undeniably impinges upon an individual's "liberty" in our free and democratic society.

117 It is apparent, however, that privacy can never be absolute. It must be balanced against legitimate societal needs. This Court has recognized that the essence of such a balancing process lies in assessing reasonable expectation of privacy, and balancing that expectation against the necessity of interference from the state: […]. […]

118 In R. v. Plant, […], albeit in the context of a discussion of s. 8 of the *Charter*, a majority of this Court identified one context in which the right to privacy would generally arise in respect of documents and records (at p. 293):

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [original emphasis omitted.]

Although I prefer not to decide today whether this definition is exhaustive of the right to privacy in respect of all manners of documents and records, I am satisfied that the nature of the private records which are the subject matter of this appeal properly brings them within that rubric. Such items may consequently be viewed

[29] *R. v. Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90 (SCC), http://canlii.ca/t/1ftjt , at pp. 51-53

> as disclosing a reasonable expectation of privacy which is worthy of protection under s. 7 of the *Charter*.
>
> 119 The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure. As La Forest J. observed in Dyment, supra, at p. 430:
>
> > ...if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. [Emphasis in last sentence in the original.] […]
> >
> > [references omitted] [Emphasis added] [30]

31. Thus: [31] [32]

(a) There is a *Charter* s. 7 right of informational privacy for a "biographical core of personal information";

(b) There is a *Charter* s. 7 positive right of protection of informational privacy for a "biographical core of personal information"; and

(c) Where the said informational privacy right is engaged in a judicial proceeding, it cannot be infringed except in accordance with the principles of fundamental justice (which is separate and distinct from *Charter* s. 1 justification). [33]

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[30] *R. v. O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51 (SCC), http://canlii.ca/t/1frdh , at paras. 113 and 117, para. 118, and at para. 119

[31] Above, and see the leading authority defining the said biographical core of personal information: — at p. 293(e-h): *R. v. Plant*, [1993] 3 SCR 281, 1993 CanLII 70 (SCC), http://canlii.ca/t/1fs0w

[32] Above, and this clarification on the *R. v. Plant* definition of the said biographical core of personal information: "I emphasize the word "include" because Sopinka J. was clear that his illustration ("intimate details of the lifestyle and personal choices") was not meant to be exhaustive, and should not be treated as such." — at para. 26: *R. v. Tessling*, [2004] 3 SCR 432, 2004 SCC 67 (CanLII), http://canlii.ca/t/1j0wb

[33] On the "fundamental justice" requirement of *Charter* s. 7, see also *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, 2007 SCC 9 (CanLII), http://canlii.ca/t/1qljj , at paras. 21 to 23:

> 21 Unlike s. 1, s. 7 is not concerned with whether a limit on life, liberty or security of the person is justified, but with whether the limit has been imposed in a way that respects the principles of fundamental justice. Hence, it has been held that s. 7 does not permit "a free-standing inquiry ... into whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general" (Malmo-Levine, at para. 96). Nor is "achieving the right balance ... itself an overarching principle of fundamental justice" (ibid.). […]
> 22 […] The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty or security of the person simply does not conform to the requirements of s. 7. […] *cont. next footer*

32. There is also a concomitant right of access to personal information in the hands of government (independent of access for the purpose of expression): [34]
    (a) in order that an individual may know what information the government possesses,
    (b) to ensure that government action in the collection of personal information can be scrutinized,
    (c) to allow inaccuracies in the information collected to be corrected, and
    (d) to ensure that the information has been properly collected and used.

33. The Applicant submits that there can be little doubt that his s. 7 privacy right is engaged: the government institution (University) made and used the psychiatric report, without the Applicant's knowledge or consent, and has for years vigorously refused to give the Applicant knowledge of or access to this his own intimate personal information, using the s. 65(6)3 exclusion provision of the *Act*.

34. Section 65(6)3 infringes the Applicant's *Charter* s. 7 privacy rights in several ways that include:
    (a) S. 65(6)3 deprives the Applicant of all the privacy protection provisions of the *Act* (ss. 37 to 49) (for all excluded records or documents).
    (b) In particular, s. 65(6)3 deprives the Applicant of all the protections of the *Act* against unlawful, improper, or unethical government collection and use of personal information, including ss. 38(2), 39(1), 39(2), 40(2), and 41(1).

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23 […] If the context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found. But the principles must be respected to pass the hurdle of s. 7. That is the bottom line.

[34] "In a case such as this where an individual may not be fully aware of the information collected and retained by the government, the ability to control the dissemination of personal information is dependent on a corollary right of access, if only to verify the information's accuracy. In short, a reasonable expectation of access is a corollary to a reasonable expectation of privacy." — para. 169 of *Ruby v. Canada (Solicitor General)*, [2000] 3 FCR 589, 2000 CanLII 17145 (FCA), http://canlii.ca/t/4l09 , neutrally cited and discussed in: *Ruby v. Canada (Solicitor General)*, [2002] 4 SCR 3, 2002 SCC 75 (CanLII), http://canlii.ca/t/1k7 , at para. 32

(c) In particular, s. 65(6)3 deprives the Applicant of the s. 47 balanced statutory right to access his own personal information, here of an intimate nature going to personal dignity, integrity, and autonomy. [35]

(d) S. 65(6)3 deprives the Applicant of all the appeal provisions of the *Act* (ss. 50 to 56) against a government institution's claim that records or documents are excluded pursuant to s. 65(6); except if a novel and direct *Charter* challenge to the *Act* itself is made, as in the instant case, and then solely on the carved-out constitutional issues.

35. In its general effect, even within the confine of a constitutional challenge of the *Act* itself, s. 65(6) deprives the appellant of seeing or knowing the documents in issue, which on its face is incompatible with principles of fundamental justice.

36. Thus, the statutory scheme of the *Act* including s. 65(6)3 deprives the Applicant of his *Charter* s. 7 rights ("life, liberty and security of the person"), and the said deprivation is not "in accordance with the principles of fundamental justice" (*Charter*, s. 7):

- It is a non-transparent litigation framework with "exclusion".
- It deprives citizens of *Charter*-guaranteed privacy protection on "excluded" records.
- It does not allow a right of appeal (application of the ss. 50 to 56 appeal provisions of the *Act* is excluded) on just terms of equal disclosure (an appellant does not have a right to disclosure of the sought records, on a constitutional appeal).
- It does not admit any statutory provision for oversight against a government institution's claim of exclusion.

Section 8 (*8. Everyone has the right to be secure against unreasonable search or seizure.*)

37. The Adjudicator denied any s. 8 violation by deciding that neither a "search" nor a "seizure" has occurred (Order-para. 123). Therefore, it is relevant to review the *Charter* jurisprudence of the definitions of the words "search" and "seizure".

[35] And see *R. v. O'Connor*, 1995, para. 111, on "psychological integrity of the individual"

38. On examining the current jurisprudence, LeBel J. concluded: [36]

> a s. 8 search "may be defined as the state invasion of a reasonable expectation of privacy"

39. Likewise, "seizure", in relation to "search", is defined by the following determinations: [37]

> 25. It should be observed, however, that s. 8 of the *Charter* does not protect only against searches, or against seizures made in connection with searches. It protects against searches or seizures. […]: "The words are used disjunctively […]."
>
> 26. As I see it, the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent. […]
>
> 30. […] If I were to draw the line between a seizure and a mere finding of evidence, I would draw it logically and purposefully at the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject-matter allegedly seized. [Emphasis in original]

40. The privacy rights themselves enshrined in s. 8 of the *Charter* have these salient features:

> 15. From the earliest stage of *Charter* interpretation, this Court has made it clear that the rights it guarantees must be interpreted generously, and not in a narrow or legalistic fashion; […] It underlined that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of the privacy of the individual; […]
>
> 16. […] the purpose of s. 8 "is ... to protect individuals from unjustified state intrusions upon their privacy" […] it should be interpreted broadly to achieve that end, uninhibited by the historical accoutrements that gave it birth. […] It should also be noted that s. 8 does not merely prohibit unreasonable searches and seizures. […] it goes further and guarantees the right to be secure against unreasonable search and seizure.
>
> 17. […] Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

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[36] *R. v. MacDonald*, [2014] 1 SCR 37, 2014 SCC 3 (CanLII), http://canlii.ca/t/g2ng9 , at para. 25

[37] *R. v. Dyment*, [1988] 2 SCR 417, 1988 CanLII 10 (SCC), http://canlii.ca/t/1ftc6 , at CanLII paras. 25, 26, and 30

[19]

18. Claims to privacy must, of course, be balanced against other societal needs, and in particular law enforcement […]

21. […quoting and agreeing with the Task Force on Privacy and Computers:] ... this sense of privacy transcends the physical and is aimed essentially at protecting the dignity of the human person. Our persons are protected not so much against the physical search (the law gives physical protection in other ways) as against the indignity of the search, its invasion of the person in a moral sense.

22. Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act, S.C. 1980-81-82-83, c. 111.

[Emphasis added] [38]

The purpose of s. 8 is to protect against intrusion of the state on an individual's privacy. The limits on such state action are determined by balancing the right of citizens to have respected a reasonable expectation of privacy as against the state interest in law enforcement.

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.

[Emphasis added] [39]

17 […] We agree with L'Heureux-Dubé J. that a constitutional right to privacy extends to information contained in many forms of third party records.

[dissenters agreeing] [Emphasis added] [40]

[38] *R. v. Dyment*, [1988] 2 SCR 417, 1988 CanLII 10 (SCC), http://canlii.ca/t/1ftc6 , starting at p. 426, at CanLII paras. 15 to 18 and 21 to 22

[39] *R. v. Plant*, [1993] 3 SCR 281, 1993 CanLII 70 (SCC), http://canlii.ca/t/1fs0w , at pp. 291(h) and 293(f)

[20]

[33] Section 8, like the rest of the *Charter*, must be interpreted purposively, that is to say, to further the interests it was intended to protect. While these interests may go beyond privacy, they go "at least that far" (*Hunter v. Southam*, at p. 159). A privacy interest worthy of protection is one the citizen subjectively believes ought to be respected by the government and "that society is prepared to recognize as 'reasonable'" (Katz, at p. 361). In each case, "an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" (*Hunter v. Southam*, at pp. 159-60).

[Emphasis added] [41]

[19] […] Section 278.1 defines "records" as follows:

[…] "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, […]

[27] […] The circumstances (or nature of the relationship) in which information is shared are not determinative: the reasonable expectation of privacy is not limited to trust-like, confidential, or therapeutic relationships.

[37] It bears repeating that privacy is not an all or nothing concept; rather, "[p]rivacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged" (Mills, at para. 108). Consequently, the fact that information about a person has been disclosed to a third party does not destroy that person's privacy interests. Because the contents of occurrence reports will be disclosed under certain circumstances does not mean that there is not a reasonable expectation of privacy in those records.

[Emphasis added] [42]

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[40] *R. v. O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51 (SCC), http://canlii.ca/t/1frdh , at para. 17
[41] *R. v. A.M.*, [2008] 1 SCR 569, 2008 SCC 19 (CanLII), http://canlii.ca/t/1wnbf , para. 33
[42] *R. v. Quesnelle*, [2014] 2 SCR 390, 2014 SCC 46 (CanLII), http://canlii.ca/t/g7xds , at paras. 19, 27, and 37

41. The *Charter* jurisprudence additionally establishes a positive right of preventative protection against violations of s. 8 privacy:

> Such a post facto analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.
> …
> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.
> …
> Nevertheless, I would in the present instance respectfully adopt Stewart J.'s formulation as equally applicable to the concept of "unreasonableness" under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness.
>
> [Emphasis added] [43]

> 23. One further general point must be made, and that is that if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated.
>
> [Emphasis added] [44]

42. The Applicant submits that, in light of the above and given the facts, there can be little doubt that the government institution (University) violated the Applicant's s. 8 rights by its capture and use of his intimate personal information in the psychiatric report, without consent or any prior authorization; and thereby attacked his dignity, invaded his person in a moral sense, and violated his right of security from unreasonable intrusion.

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[43] *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145, 1984 CanLII 33 (SCC), http://canlii.ca/t/1mgc1 , at pp. 160 and 161

[44] *R. v. Dyment*, [1988] 2 SCR 417, 1988 CanLII 10 (SCC), http://canlii.ca/t/1ftc6 , at CanLII para. 23

43. Section 65(6)3 of the *Act* infringes the Applicant's s. 8 privacy rights in several ways regarding his personal information in a *Charter*-protected biographical core:
    (a) S. 65(6)3 deprives the Applicant of all the protections of the *Act* against unreasonable search or seizure of his personal information (ss. 37 to 49), for all excluded records or documents.
    (b) In particular, s. 65(6)3 deprives the Applicant of the protection against collection of his personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity (s. 38(2)).
    (c) In particular, s. 65(6)3 deprives the Applicant of all the protections of prior and purpose-specific authorizations for collecting his personal information (s. 39).
    (d) In particular, s. 65(6)3 deprives the Applicant of all the protections against using indirect sources of his personal information (s. 39).
    (e) In particular, s. 65(6)3 deprives the Applicant of the preventative protection of being informed that his personal information is being collected, by what authority it is being collected, and the purpose for which it is being collected (s. 39(2)).
    (f) In particular, s. 65(6)3 deprives the Applicant of all the protections of standard of accuracy, retention, and disposal of his personal information, and prevention of use of inaccurate personal information (s. 40).
    (g) In particular, s. 65(6)3 deprives the Applicant of all the protections against use of his personal information without purpose-specific prior consent and notice to the Applicant, or express statutory authority (s. 41).
    (h) All of the above-particularized (s. 65(6)3-excluded) protections were violated by the University in the making and use of the psychiatric report.

ISSUE #2: Did the Adjudicator err in finding that the Applicant's *Charter* freedom-of-expression rights (s. 2(b)) were not infringed?

44. Three principles underlying the *Charter* right of freedom of expression are established,

[23]

i. seeking and attaining truth

ii. participation in social and political decision-making

iii. individual self-fulfillment and human flourishing

as is their use in a constitutional challenge of a law that infringes expression by its effect:

> We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in *Ford* (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. […] the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. [Emphasis added] [45]
>
> All activities which convey or attempt to convey meaning *prima facie* fall within the scope of the guarantee: *Irwin Toy*, per Dickson C.J., Lamer and Wilson JJ. Within the framework of this general principle, however, some of the classic rationales for protecting freedom of expression have been given a limited role in interpreting s. 2(b). Where a government measure limits expressive activity not by design but in its effects, to make out a violation of s. 2(b) the claimant must show that the expressive activity relates to those values identified in *Irwin Toy* as underlying the guarantee of freedom of expression in s. 2(b) of the *Charter*: the value of seeking and attaining truth; the value of participation in social and political decision-making; and individual self-fulfillment and human flourishing.
>
> To make out a violation of s. 2(b) where the government infringement of expression is incidental to its pursuit of another goal, a complainant must show that one of the suggested values underlying the guarantee is infringed, these being three. […] *Irwin Toy*, at p. 976.] Thus a government action not aimed at suppressing free expression will constitute a violation only if the complainant can show that one of these values is implicated in protecting his or her expression.
>
> [Emphasis added] [46] [47]

[45] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, 1989 CanLII 87 (SCC), http://canlii.ca/t/1ft6g , at pp. 976-977

[46] *R. v. Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (SCC), http://canlii.ca/t/1fsr1 , at pp. 810-811 and at pp. 827-828

45. In the instant case (see Facts):

(a) The impugned provision of the *Act* (s. 65(6)3) excluded the Applicant from "knowledge about" and excludes him from "access" to the psychiatric report and to the other documents in issue.

(b) Without knowledge about or access, the Applicant is barred from communicating about the form, content, and existence of the said documents, until knowledge about or access is otherwise secured by a different process, if ever.

(c) The barring of expression was first from absence of knowledge, until the documents were disclosed to the Applicant under implied undertaking of confidentiality in a separate and distinct litigation.

(d) The said barring of expression from lack of knowledge was caused by s. 65(6)3 of the *Act* relieving the government institution (University) from its obligations otherwise pursuant to the *Act* to seek consent and to inform the person whose personal information is being collected and used (excluded ss. 37 to 49 of the *Act*).

(e) The implied undertaking of confidentiality is a bar against the Applicant's expression about the content, form, and existence of the psychiatric report and of the other documents in issue. [48]

(f) The existence of the psychiatric report was released from the implied undertaking when the external psychiatrist, Dr. Louis Morissette, informed the Applicant that he had made the psychiatric report, [49] whereas all other information continues to be sealed to the Applicant, except four (4) records that were released by order of the Court in the instant judicial review (interim motion on consent) (Sealing order, Justice L. Sheard, dated July 26, 2017; entered at Ottawa, Document # O411, Registry No. 73-13, attached to sealing envelope).

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[47] These principles established in *Irwin Toy* have been continuously reaffirmed by the Supreme Court of Canada, and as recently as 2017: *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 (CanLII), http://canlii.ca/t/gwvg7, para. 156

[48] Leading authority on implied undertaking of confidentiality: *Juman v. Doucette*, [2008] 1 SCR 157, 2008 SCC 8 (CanLII), http://canlii.ca/t/1vxj7 . Also: *University of Ottawa v Association of Professors of the University of Ottawa*, 2011 CanLII 98078 (QC SAT), http://canlii.ca/t/fw9x8 , para. 32

[49] Affidavit of Denis Rancourt affirmed 2015-04-13, paras. 33 to 34, and affidavit Exhibits 9 and 10; **AR, Tab 1???**.

46. The information about the form, content, and existence of the documents in issue was not and is not available by any other means to the Applicant than the instant access litigation,[50] except the existence itself of the psychiatric report, as noted above.

47. The activity of the Applicant, which is barred by application of s. 65(6)3 of the *Act*, of seeking access to his own intimate personal and associated information promotes all three said principles underlying the vigilant protection of free expression in a society such as ours:

    (a) Communicating what occurred and how it occurred in the making and using of the psychiatric report can cause or encourage individuals to disclose more about the events, which constitutes seeking and attaining the truth. (For example, Dr. Morissette revealed unknown information about the making of his psychiatric report when the Applicant communicated to him about the report.)

    (b) The highest University official who directed the making of the psychiatric report is now an elected politician (his/her role is disclosed in the documents in issue) and has often made public policy statements about civil rights. Therefore, the Applicant's intended public communication of these circumstances constitutes participation in social and political decision-making.

    (c) The Applicant's intended public communication about the specific methods used in the making of and about the nature of the psychiatric report, combined with how the *Act* blocks transparency, accountability and access in this specific case, is relevant to labour law, employer practice, and public policy in Ontario and constitutes participation in social and political decision-making.

    (d) The access and privacy protections barred by s. 65(6)3 would have given the Applicant control over his own intimate personal information that is in a fundamental way his own, for him to communicate or retain for himself as he sees fit, thus cultivating diversity in forms of individual self-fulfillment and human flourishing. For example,

[50] Adjudicator's Order, paras. 2, 3, 153, 157, and 175 to 178; and see factum-footnote-47 regarding the law of implied undertaking of confidentiality.

select information could be communicated by the Applicant to a confidant or to a private group for personal or professional development.

48. The Adjudicator erred in finding that the Applicant's s. 2(b) *Charter* freedom-of-expression rights were not impinged:
    (a) The Adjudicator was silent on and did not consider two of the three principles underlying the *Charter* right of freedom of expression: "seeking and attaining truth" and "individual self-fulfillment and human flourishing".
    (b) The Adjudicator admitted only a limited version of "participation in social and political decision-making" and expressly confined his consideration to "where access is necessary to permit meaningful discussion on a matter of public importance" (Order-para. 102).
    (c) The Adjudicator failed to apply the *Oakes* methodology and incorrectly subsumed the threshold analysis for an impugned statutory provision under the distinguished *Doré* methodology for discretionary administrative tribunal decisions (Order-paras. 217 to 219). [51]

49. With all due respect, the Adjudicator misinterpreted the approach used in *Ontario v. Criminal Lawyers' Association* ("*CLA*") [52] and failed to recognize that the *Doré* administrative law approach is distinguished:
    (a) Otherwise, *CLA* would represent a legal-landscape-changing repudiation of the *Oakes* methodology when a law itself is constitutionally challenged, which it does not.
    (b) *CLA* is a case where the *Oakes* threshold for unconstitutionality of an impugned statutory provision separately failed (in *CLA* section 4), prior to the application of an administrative law approach (in *CLA* section 5). [53]

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[51] *Doré v. Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 (CanLII), http://canlii.ca/t/fqn88 , **("*Doré*")**
[52] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII), http://canlii.ca/t/2b5ss , **("*CLA*")**
[53] *CLA*, para. 62 "Having decided that s. 23 of the Act itself is constitutional, our focus shifts now to determining whether the decisions of the Minister (the head) and the Commission complied with the statutory framework established by the Act." [Emphasis added]

(c) The Adjudicator's subsuming of the separate threshold analysis (as used in *CLA*) under *Doré* leads to the absurdity that one asks whether a statutory provision is constitutional within the confine of presuming that the said provision is constitutional. For example, the Adjudicator thereby absurdly concludes that an implied confidentiality undertaking that would not be a barrier to access in the absence of the s. 65(6)3 exclusion is a sufficient threshold to bar a constitutional examination of s. 65(6)3 (Order-paras. 213 to 216). [54]

(d) *Doré* specifically cites the section entitled "5. Exercise of the Discretion Under the Act" of *CLA* (*CLA* paras. 62 to 75), not the *CLA* section entitled "4. Is the Legislation Constitutional?". [55]

(e) The said *Doré* administrative law approach expressly applied by the Adjudicator (Order-paras. 217 to 219) is distinguished from the *Oakes* methodology: [56] [57] [58] [59]

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[54] S. 65(6)3 excludes application of *inter alia* s. 64(1) of the *Act*: "This Act does not impose any limitation on the information otherwise available by law to a party to litigation." And, there is uninterrupted IPC jurisprudence that "The civil discovery process and the access scheme under the *Act* are separate and distinct from one another. Information that may be exempt under the *Act* may be available pursuant to civil discovery proceedings, and vice versa (see section 64 of the *Act* and Order PO-1688)." *Ontario (Public Safety and Security) (Re)*, 2003 CanLII 53958 (ON IPC), http://canlii.ca/t/1r183 , IPC Order PO-2208; and see the section entitled "THE ACT AND THE CIVIL LITIGATION PROCESS" in *Ontario (Environment) (Re)*, 1999 CanLII 14367 (ON IPC), http://canlii.ca/t/1rcxk , IPC Order PO-1688.

[55] *Doré*, para. 24: "It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values (see […] and [*CLA*], at paras. 62-75). The question then is what framework should be used to scrutinize how those values were applied?" [references omitted] [Emphasis added]; and see para. 32.

[56] *Doré*, paras. 4, 43, and 55 to 58.

[57] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283, 2012 SCC 35 (CanLII), http://canlii.ca/t/fs0v9 , see paras. 16 and 18

[58] *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157, 2013 SCC 47 (CanLII), http://canlii.ca/t/g0mbh , see paras. 48 and 49

[59] *Loyola High School v. Quebec (Attorney General)*, [2015] 1 SCR 613, 2015 SCC 12 (CanLII), http://canlii.ca/t/ggrhf, see paras. 3, 4, and 30:

At para. 3. "This Court's decision in *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections."

Para. 4. "Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue."

At para. 30. "Applying this Court's decision in *Doré*, the Court of Appeal held that a reasonableness standard should be applied in assessing how the Minister balanced the *Charter* rights at stake."

i. It can be used only if the home statute is not itself challenged or after the constitutional challenge of an impugned provision is separately determined to fail.

ii. It assumes the reasonableness standard of review, not the correctness standard.

iii. It operates within the confine that the purpose of the home statute is upheld, rather than constitutionally questioned in any provision.

iv. It does not make an analytic distinction or separation between a threshold step for infringement of a *Charter* right or value and a s. 1 justification step.

ISSUE #3: Is s. 65(6)3 of the *Act* constitutional? Does it survive the *Oakes* test?

50. S. 65(6)3 of the *Act* is unconstitutional:

(a) Privacy protection statutes in Canada are quasi-constitutional statutes.[60] [61] [62] [63] As such, the purpose of a privacy protection law is to be synergistically aligned with the privacy protections in the *Charter*, whereas s. 65(6)3 encodes a subversion of the said purpose.

(b) The objectives that the *Act* is designed to serve are irreconcilable with s. 65(6)3, which creates a complete (non-discretionary), unreviewable (no statutory right of appeal), and permanent (no time limitation) gap of privacy protection — including blocked access to one's own personal information — for records about labour relations or employment-related matters.

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[60] *Douez v. Facebook, Inc., 2017 SCC 33 (CanLII)*, http://canlii.ca/t/h4g1b : "Privacy legislation has been accorded quasi-constitutional status […]" — at para. 59; "[…]we are dealing with a fundamental right like privacy. In […], this Court acknowledged the quasi-constitutional status of legislation relating to privacy protection […]" — at para. 105

[61] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, 2013 SCC 62 (CanLII), http://canlii.ca/t/g1vf6 : "As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society […]" — at para. 19; "Insofar as *PIPA* seeks to safeguard informational privacy, it is "quasi-constitutional" in nature […]" — at para. 22

[62] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25 (CanLII), http://canlii.ca/t/fld60 : "[...] the *Access to Information Act* may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation. [...]" — at para. 40

[63] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773, 2002 SCC 53 (CanLII), http://canlii.ca/t/51qz : "[...] this Court's use of the expression "quasi-constitutional" to describe these two Acts is to recognize their special purpose." — at para. 25

(c) S. 65(6)3 encodes an elimination of the constitutional status of privacy, privacy protection, and freedom of expression in the *Act*, in favour of a Parliamentary adjustment in the union-employer or employee-employer adversarial landscape.

51. The Adjudicator was incorrect in concluding that the Applicant's *Charter* rights were not infringed by the effect of s. 65(6)3 of the *Act*. Therefore, a s. 1 analysis following *Oakes* must be applied. [64]

52. The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. [65]

53. In the instant case:

(a) No national security or law enforcement considerations are relevant whatsoever, nor are any claimed. This was a government institution (University) employer acting alone. There is no compelling state interest for the violation of the Applicant's privacy and privacy protection *Charter* rights.

(b) The Adjudicator correctly determined that possible public disclosure, following access, would not, in any significant way, impinge on the proper functioning of the government institution (University) (Order-para. 154).

(c) S. 65(6)3 applies at the time the excluded record is collected, prepared, maintained or used, and it never ceases to apply at a later date. [66] It is devoid of balance regarding time limitation.

(d) No such exclusion provision as s. 65(6)3 exists in the privacy protection and access to information statutes of other provinces or territories, nor in the federal privacy and access statutes. [67]

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[64] *R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC), http://canlii.ca/t/1ftv6 , CanLII paras. 60, and 63 to 71, CanLII paras. 69-71 (*Oakes* "test")
[65] *Oakes*, at para. 66
[66] *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA), http://canlii.ca/t/1ffwz , para. 38

54. The infringements of ss. 2(b), 7, and 8 of the *Charter* caused by the s. 65(6)3 exclusion provision cannot be justified under s. 1 of the *Charter* because:

(a) The exclusion is not a limit "prescribed by law", in that limits must flow from a sufficiently clear legal standard that can inform legal debate.

(b) The exclusion has no pressing and substantial objective.

(c) There is no rational connection between the exclusion and a pressing and substantial objective.

(d) The exclusion is not minimally impairing of privacy and freedom of expression.

(e) Its ills outweigh its benefits, and it is more absolute in nature rather than balancing.

ISSUE #4: Did the Adjudicator err by failing to find that s. 65(6)3 of the *Act* is unconstitutional in its general effect, irrespective of achieving the threshold for *Charter* scrutiny in the particular circumstances of the instant case?

55. *Evidence for unconstitutionality from general effect*. Beyond the facts directly about the psychiatric report (Facts), there is additional evidence for constitutional infringement from s. 65(6)3 in its general effect, including the following:

(a) Requests for access to the Applicant's own personal information have been the subject of at least eight (8) IPC orders, in which the s. 65(6)3 exclusion for labour relations was applied to exclude responsive records from the rights and protections otherwise provided by the *Act*. [68]

(b) The thus excluded records include records which were collected by University agent Maureen Robinson (reporting directly to University executive André Lalonde) who used false representations and false cyber identities in her information-gathering work.[69]

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[67] Such an exclusion provision also does not exist in the privacy and access federal statutes of the UK, USA, and Australia. The Applicant has not been able to find a statute of a Western jurisdiction that contains such an exclusion.

[68] Affidavit of Denis Rancourt affirmed 2015-04-13, para. 10; **Private Record - IPC, Tab 3, pp. 72-202**

[69] Affidavit of Denis Rancourt affirmed 2015-04-13, paras. 35(b), and 38 to 54, and cited affidavit exhibits 16 to 25 that prove methods used by Maureen Robinson; **Private Record - IPC, Tab 3, pp. 72-202**; and see IPC Order PO-2951, issued 2011-02-09, *University of Ottawa (Re)*, 2011 CanLII 7189 (ON IPC), http://canlii.ca/t/2frlq ; where s. 65(6)3 was used to deny the Applicant access to records that include the said affidavit exhibits 16 to 25.

(c) The said information-gathering work of Maureen Robinson for André Lalonde was extensive. [70] In a separate litigation involving the Applicant and the University, Divisional Court motions judge Justice Scott found: [71]

> MAUREEN ROBINSON
> [15] The circumstances of Maureen Robinson's involvement in this entire matter is troubling at best. Throughout the relevant portion of the Award by Arbitrator Foisy, Ms. Robinson's written notes were referred to "the report on Professor Rancourt's address prepared by a University of Ottawa student".
>
> [17] Either in consultation with her employer, the University, or on her own, she monitored the activities of Professor Rancourt both on and off campus and reported her finding back to the University. In an email to Dean Lalonde, she admitted to having a "personal grudge" against Professor Rancourt and went so far as to liken her monitoring of Professor Rancourt as "posing as a young girl to catch a pedophile". Ms. Robinson was not called as a witness at the hearing […]. [Underline in original]

56. The Applicant sought public interest standing in order to challenge all subsections of s. 65(6) of the *Act*, for unconstitutionality in general effect (Order-paras. 115 to 116). [72]

57. *Law of unconstitutionality from general effect.* In a case in which the litigant did not have access to the records in issue in making a constitutional challenge, the Supreme Court of Canada determined: [73]

> 36 […] The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. Establishing that the legislation is unconstitutional in its general effects would suffice, as s. 52 of the *Constitution Act, 1982*, declares a law to be of no force or effect to the extent that it is inconsistent with the Constitution. [Emphasis in original]

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[70] Affidavit of Denis Rancourt affirmed 2015-04-13, esp. para. 38; **Private Record - IPC, Tab 3, pp. 72-202**
[71] *Association of Professors of the University of Ottawa (APUO) and University of Ottawa*, Superior Court of Justice for Ontario (Divisional Court), dated 2015-10-26, Court File No. 14-2022, Justice Robert Scott, paras. 15 and 17; **Public Record - IPC, vol. 3, Tab 59-B-(A), pp. 882-895**
[72] Representations of the appellant (now the Applicant) dated 2015-04-14, paras. 74 to 78; **Private Record - IPC, Tab 2, pp. 11-71**
[73] *R. v. Mills*, [1999] 3 SCR 668, 1999 CanLII 637 (SCC), http://canlii.ca/t/1fqkl , at paras. 36 and 41, and see paras. 35 to 42

[32]

> 41 Second, the record contains sufficient facts to resolve the issues posed by the present appeal. Indeed, no argument was made that the adjudicative facts, sparse as they may be, are insufficient. Moreover, a determination that the legislation at issue in this appeal is unconstitutional in its general effect involves an assessment of the effects of the legislation under reasonable hypothetical circumstances. […] Likewise, given the nature of the statutory framework, where the accused and the Court remain unaware of the contents of the records sought, many of the arguments by necessity focus upon such "imaginable circumstances". [Emphasis added]

58. The nature of the statutory framework of the *Act*, in which the requester/appellant/ applicant generally remains unaware of the contents of the records sought, is such that the arguments regarding expression and privacy constitutionality by necessity will focus upon reasonable imaginable circumstances, except in exceptional cases such as the instant case. Indeed, if the Applicant had not obtained the documents in issue by the ancillary implied undertaking process, then he would have had no information except that documents are responsive to a non-specific and tentative access request. Nor would the documents be revealed to him even on appealing to the IPC on *Charter* grounds.

59. The Applicant submits that even if the Adjudicator did not err (which is denied) by failing to find that the Applicant's *Charter* rights are infringed, s. 65(6)3 of the *Act* is unconstitutional in its general effect, and the factual record is sufficient to resolve the issue:
    (a) S. 65(6)3 of the *Act* constitutes a complete (without IPC discretion) and unchallengeable (no right of appeal or review pursuant to the *Act*) loss of the concerned individual's right to know and access his own personal information in excluded records, which can be of the most intimate nature. This is diametrically contrary to the s. 1(b) purpose of the Act, and is intolerable in a free and democratic society. No such provision exists in the other provinces or in the federal privacy and access statutes.
    (b) S. 65(6)3 is an exclusion from applicability of the *Act*. As such, s. 65(6)3 is diametrically opposite to the established *Charter* s. 8 jurisprudence of a positive right to be preventatively protected by law against unreasonable state invasion of a reasonable

expectation of privacy, where the *Act* concerns all provincial layers of government and government institutions.

(c) There are reasonably imagined circumstances (elucidated by the instant factual framework) in which the complete loss of privacy safeguards and protections and loss of access to one's own personal information (including during appeal on constitutional grounds) pursuant to s. 65(6)3 leads to violations of an individual's privacy rights guaranteed by the *Charter* (ss. 7, 8).

(d) There are reasonably imagined circumstances (elucidated by the instant factual framework) in which blanket and unchallengeable denial of access of employment-related documents pursuant to s. 65(6)3 leads to violations of an individual's *Charter* (s. 2(b)) right of freedom of expression on matters of public importance, or on matters of expressive value to the individual for democratic participation, self-fulfilment and/or truth-seeking.

60. The Adjudicator erred by failing to find that s. 65(6)3 of the *Act* is unconstitutional in its general effect, irrespective of his other findings.

Part IV: ORDER REQUESTED

61. The Applicant requests that this Honourable Court:

(a) quash the Order;

(b) declare s. 65(6)3 of the *Act* to be unconstitutional;

(c) provide the remedy that follows from unconstitutionality of s. 65(6)3 of the *Act* or remit the matter to a different IPC Adjudicator for a determination in accordance with the reasons of this Honourable Court;

(d) award the Applicant the costs of this application; and

(e) make such further order as is appropriate in the circumstances.

[34]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2017.

Dr. Denis Rancourt
Applicant

Schedule A: List of Authorities Referred To

Authority	**Paras. or pp. cited**
Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, [2013] 3 SCR 733, 2013 SCC 62 (CanLII), http://canlii.ca/t/g1vf6	19, 22
Andrews v. Law Society of British Columbia, [1989] 1 SCR 143, 1989 CanLII 2 (SCC), http://canlii.ca/t/1ft8q	p. 178 (c-g)
Association of Professors of the University of Ottawa (APUO) and University of Ottawa, Superior Court of Justice for Ontario (Divisional Court), dated 2015-10-26, Court File No. 14-2022, Justice Robert Scott, **(Public Record - IPC, vol. 3, Tab 59-B-(A))**	15, 17
B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315, 1995 CanLII 115 (SCC), http://canlii.ca/t/1frmh	p. 368-369
Canada (Information Commissioner) v. Canada (Minister of National Defence), [2011] 2 SCR 306, 2011 SCC 25 (CanLII), http://canlii.ca/t/fld60	40
Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502 (CanLII), http://canlii.ca/t/1rxpx	29
Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 SCR 350, 2007 SCC 9 (CanLII), http://canlii.ca/t/1qljj	21-23
Divito v. Canada (Public Safety and Emergency Preparedness), [2013] 3 SCR 157, 2013 SCC 47 (CanLII), http://canlii.ca/t/g0mbh	48-49
Doré v. Barreau du Québec, [2012] 1 SCR 395, 2012 SCC 12 (CanLII), http://canlii.ca/t/fqn88 , **("*Doré*")**	4, 24, 32, 43, 55-58
Douez v. Facebook, Inc., 2017 SCC 33 (CanLII), http://canlii.ca/t/h4g1b	105
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Hunter et al. v. Southam Inc., [1984] 2 SCR 145, 1984 CanLII 33 (SCC), http://canlii.ca/t/1mgc1	pp. 160, 161
IPC Order PO-1688, issued 1999-06-16: *Ontario (Environment) (Re)*, 1999 CanLII 14367 (ON IPC), http://canlii.ca/t/1rcxk	section
IPC Order PO-2208, issued 2003-11-27: *Ontario (Public Safety and Security) (Re)*, 2003 CanLII 53958 (ON IPC), http://canlii.ca/t/1r183	quote
IPC Order PO-2951, issued 2011-02-09: *University of Ottawa (Re)*, 2011 CanLII 7189 (ON IPC), http://canlii.ca/t/2frlq	all
IPC Order PO-3325, issued 2014-03-25: *University of Ottawa (Re)*, 2014 CanLII 14792 (ON IPC), http://canlii.ca/t/g6ddj , **(Public Record - IPC, vol. 1, Tab 29-A)**	all
IPC Order PO-3686, issued 2017-01-12: *University of Ottawa (Re)*, 2017 CanLII 2024 (ON IPC), http://canlii.ca/t/gx2g6 , **("Order")**	all
Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927, 1989 CanLII 87 (SCC), http://canlii.ca/t/1ft6g	pp. 976-977
Juman v. Doucette, [2008] 1 SCR 157, 2008 SCC 8 (CanLII), http://canlii.ca/t/1vxj7	all
Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 SCR 773, 2002 SCC 53 (CanLII), http://canlii.ca/t/51qz	25
Loyola High School v. Quebec (Attorney General), [2015] 1 SCR 613, 2015 SCC 12 (CanLII), http://canlii.ca/t/ggrhf	3, 4, 30
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Ontario (Solicitor General) v. Mitchinson, 2001 CanLII 8582 (ON CA), http://canlii.ca/t/1ffwz	38
R. v. A.M., [2008] 1 SCR 569, 2008 SCC 19 (CanLII), http://canlii.ca/t/1wnbf	33

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R. v. Dyment, [1988] 2 SCR 417, 1988 CanLII 10 (SCC), http://canlii.ca/t/1ftc6	p. 426-, CanLII 15-18, 21-23, 25, 26, 30
R. v. Keegstra, [1990] 3 SCR 697, 1990 CanLII 24 (SCC), http://canlii.ca/t/1fsr1	pp. 810-811, 827-828
R. v. MacDonald, [2014] 1 SCR 37, 2014 SCC 3 (CanLII), http://canlii.ca/t/g2ng9	25
R. v. Mills, [1999] 3 SCR 668, 1999 CanLII 637 (SCC), http://canlii.ca/t/1fqkl	36, 35-42
R. v. Morgentaler, [1988] 1 SCR 30, 1988 CanLII 90 (SCC), http://canlii.ca/t/1ftjt	pp. 51-53
R. v. Oakes, [1986] 1 SCR 103, 1986 CanLII 46 (SCC), http://canlii.ca/t/1ftv6 , **("*Oakes*")**	CanLII 14, 49, 60, 63-71
R. v. O'Connor, [1995] 4 SCR 411, 1995 CanLII 51 (SCC), http://canlii.ca/t/1frdh	17, 111, 113, 117-119
R. v. Plant, [1993] 3 SCR 281, 1993 CanLII 70 (SCC), http://canlii.ca/t/1fs0w	pp. 291(h), 293(e-h)
R. v. Quesnelle, [2014] 2 SCR 390, 2014 SCC 46 (CanLII), http://canlii.ca/t/g7xds	19, 27, 37
R. v. Sharpe, [2001] 1 SCR 45, 2001 SCC 2 (CanLII), http://canlii.ca/t/523f	32
R. v. Tessling, [2004] 3 SCR 432, 2004 SCC 67 (CanLII), http://canlii.ca/t/1j0wb	26
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Ruby v. Canada (Solicitor General), [2000] 3 FCR 589, 2000 CanLII 17145 (FCA), http://canlii.ca/t/4l09	169
Ruby v. Canada (Solicitor General), [2002] 4 SCR 3, 2002 SCC 75 (CanLII), http://canlii.ca/t/1k7	32

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RWDSU v. Dolphin Delivery Ltd., [1986] 2 SCR 573, 1986 CanLII 5 (SCC), http://canlii.ca/t/1ftpc	34
Sauvé v. Canada (Chief Electoral Officer), [2002] 3 SCR 519, 2002 SCC 68 (CanLII), http://canlii.ca/t/50cw	10
University of Ottawa v Association of Professors of the University of Ottawa, 2011 CanLII 98078 (QC SAT), http://canlii.ca/t/fw9x8	32

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Schedule B: Text of Relevant Provisions of Statutes

INDEX	
Statute	**Sections cited**
Canadian Charter of Rights and Freedoms http://laws-lois.justice.gc.ca/eng/Const/page-15.html	1, 2, 7, 8
Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 https://www.ontario.ca/laws/statute/90f31	1, 37-56, 65(6), 65(7)

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[40]

(c) freedom of peaceful assembly; and

(d) freedom of association.

[…]

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

[…]

Freedom of Information and Protection of Privacy Act

R.S.O. 1990, CHAPTER F.31

Purposes

1 The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. F.31, s. 1.

[…]

PART III
PROTECTION OF INDIVIDUAL PRIVACY
Collection and Retention of Personal Information

Application of Part
37 This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public. R.S.O. 1990, c. F.31, s. 37.

Personal information
38 (1) In this section and in section 39,

"personal information" includes information that is not recorded and that is otherwise defined as "personal information" under this Act. R.S.O. 1990, c. F.31, s. 38 (1).

Collection of personal information
(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. R.S.O. 1990, c. F.31, s. 38 (2).

Manner of collection
39 (1) Personal information shall only be collected by an institution directly from the individual to whom the information relates unless,

(a) the individual authorizes another manner of collection;

(b) the personal information may be disclosed to the institution concerned under section 42 or under section 32 of the Municipal Freedom of Information and Protection of Privacy Act;

(c) the Commissioner has authorized the manner of collection under clause 59 (c);

(d) the information is in a report from a reporting agency in accordance with the Consumer Reporting Act;

(e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or tribunal;

(g) the information is collected for the purpose of law enforcement; or

(h) another manner of collection is authorized by or under a statute. R.S.O. 1990, c. F.31, s. 39 (1).

Notice to individual
(2) Where personal information is collected on behalf of an institution, the head shall, unless notice is waived by the responsible minister, inform the individual to whom the information relates of,

(a) the legal authority for the collection;

(b) the principal purpose or purposes for which the personal information is intended to be used; and

(c) the title, business address and business telephone number of a public official who can answer the individual's questions about the collection. R.S.O. 1990, c. F.31, s. 39 (2).

Exception
(3) Subsection (2) does not apply where the head may refuse to disclose the personal information under subsection 14 (1) or (2) (law enforcement), section 14.1 (Civil Remedies Act, 2001) or section 14.2 (Prohibiting Profiting from Recounting Crimes Act, 2002). 2002, c. 2, s. 19 (6); 2007, c. 13, s. 43 (3).

Retention of personal information
40 (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information. R.S.O. 1990, c. F.31, s. 40 (1).

Standard of accuracy
(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date. R.S.O. 1990, c. F.31, s. 40 (2).

Exception
(3) Subsection (2) does not apply to personal information collected for law enforcement purposes. R.S.O. 1990, c. F.31, s. 40 (3).

Disposal of personal information

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations. R.S.O. 1990, c. F.31, s. 40 (4).

Use and Disclosure of Personal Information

Use of personal information
41 (1) An institution shall not use personal information in its custody or under its control except,

(a) where the person to whom the information relates has identified that information in particular and consented to its use;

(b) for the purpose for which it was obtained or compiled or for a consistent purpose;

(c) for a purpose for which the information may be disclosed to the institution under section 42 or under section 32 of the Municipal Freedom of Information and Protection of Privacy Act; or

(d) subject to subsection (2), an educational institution may use personal information in its alumni records and a hospital may use personal information in its records for the purpose of its own fundraising activities, if the personal information is reasonably necessary for the fundraising activities. R.S.O. 1990, c. F.31, s. 41; 2005, c. 28, Sched. F, s. 5 (1); 2010, c. 25, s. 24 (9).

Notice on using personal information for fundraising
(2) In order for an educational institution to use personal information in its alumni records or for a hospital to use personal information in its records, either for its own fundraising activities or for the fundraising activities of an associated foundation, the educational institution or hospital shall,

(a) give notice to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be used for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, give notice to the individual to whom the personal information relates of his or her right to request that the information cease to be used for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, publish a notice of the individual's right to request that the individual's personal information cease to be used for fundraising purposes. 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (10).

Discontinuing use of personal information

(3) An educational institution or a hospital shall, when requested to do so by an individual, cease to use the individual's personal information under clause (1) (d). 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (11).

Where disclosure permitted
42 (1) An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part II;

(b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;

(c) for the purpose for which it was obtained or compiled or for a consistent purpose;

(d) where disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and where disclosure is necessary and proper in the discharge of the institution's functions;

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;

(f) where disclosure is by a law enforcement institution,

(i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or

(ii) to another law enforcement agency in Canada;

(g) where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(i) in compassionate circumstances, to facilitate contact with the spouse, a close relative or a friend of an individual who is injured, ill or deceased;

(j) to a member of the Legislative Assembly who has been authorized by a constituent to whom the information relates to make an inquiry on the constituent's behalf or, where the constituent is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the constituent;

(k) to a member of the bargaining agent who has been authorized by an employee to whom the information relates to make an inquiry on the employee's behalf or, where the employee is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the employee;

(l) to the responsible minister;

(m) to the Information and Privacy Commissioner;

(n) to the Government of Canada in order to facilitate the auditing of shared cost programs; or

(o) subject to subsection (2), an educational institution may disclose personal information in its alumni records, and a hospital may disclose personal information in its records, for the purpose of its own fundraising activities or the fundraising activities of an associated foundation if,

(i) the educational institution and the person to whom the information is disclosed, or the hospital and the person to whom the information is disclosed, have entered into a written agreement that satisfies the requirements of subsection (3), and

(ii) the personal information is reasonably necessary for the fundraising activities. R.S.O. 1990, c. F.31, s. 42; 2005, c. 28, Sched. F, s. 6 (1); 2006, c. 19, Sched. N, s. 1 (5-7); 2006, c. 34, Sched. C, s. 5; 2010, c. 25, s. 24 (12).

Notice on disclosing personal information for fundraising

(2) In order for an educational institution to disclose personal information in its alumni records or for a hospital to disclose personal information in its records, either for the purpose of its own fundraising activities or the fundraising activities of an associated foundation, the educational institution or hospital shall ensure that,

(a) notice is given to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be disclosed for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, notice is given to the individual to whom the personal information relates of his or her right to request that the information cease to be disclosed for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, notice is published in respect of the individual's right to

request that the individual's personal information cease to be disclosed for fundraising purposes. 2005, c. 28, Sched. F, s. 6 (2); 2010, c. 25, s. 24 (13).

Fundraising agreement
(3) An agreement between an educational institution and another person for the disclosure of personal information in the educational institution's alumni records for fundraising activities, or an agreement between a hospital and another person for the disclosure of personal information in the hospital's records for fundraising activities, must,

(a) require that the notice requirements in subsection (2) are met;

(b) require that the personal information disclosed under clause (1) (o) be disclosed to the individual to whom the information relates upon his or her request; and

(c) require that the person to whom the information is disclosed shall cease to use the personal information of any individual who requests that the information not be used. 2005, c. 28, Sched. F, s. 6 (2); 2010, c. 25, s. 24 (14).

Consistent purpose
43 Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information is a consistent purpose under clauses 41 (1) (b) and 42 (1) (c) only if the individual might reasonably have expected such a use or disclosure. R.S.O. 1990, c. F.31, s. 43; 2006, c. 34, Sched. C, s. 6.

Personal Information Banks

Personal information banks
44 A head shall cause to be included in a personal information bank all personal information under the control of the institution that is organized or intended to be retrieved by the individual's name or by an identifying number, symbol or other particular assigned to the individual. R.S.O. 1990, c. F.31, s. 44.

Personal information bank index
45 The responsible minister shall publish at least once each year an index of all personal information banks setting forth, in respect of each personal information bank,

(a) its name and location;

(b) the legal authority for its establishment;

(c) the types of personal information maintained in it;

(d) how the personal information is used on a regular basis;

(e) to whom the personal information is disclosed on a regular basis;

(f) the categories of individuals about whom personal information is maintained; and

(g) the policies and practices applicable to the retention and disposal of the personal information. R.S.O. 1990, c. F.31, s. 45.

Inconsistent use or disclosure
46 (1) A head shall attach or link to personal information in a personal information bank,

(a) a record of any use of that personal information for a purpose other than a purpose described in clause 45 (d); and

(b) a record of any disclosure of that personal information to a person other than a person described in clause 45 (e). R.S.O. 1990, c. F.31, s. 46 (1).

Record of use part of personal information
(2) A record retained under subsection (1) forms part of the personal information to which it is attached or linked. R.S.O. 1990, c. F.31, s. 46 (2).

Notice and publication
(3) Where the personal information in a personal information bank under the control of an institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not one of the uses included under clauses 45 (d) and (e), the head shall,

(a) forthwith notify the responsible minister of the use or disclosure; and

(b) ensure that the use is included in the index. R.S.O. 1990, c. F.31, s. 46 (3).

Right of Individual to Whom Personal Information Relates to Access and Correction

Rights of access and correction
Right of access to personal information
47 (1) Every individual has a right of access to,

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution. R.S.O. 1990, c. F.31, s. 47 (1).

Right of correction
(2) Every individual who is given access under subsection (1) to personal information is entitled to,

(a) request correction of the personal information where the individual believes there is an error or omission therein;

(b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and

(c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement. R.S.O. 1990, c. F.31, s. 47 (2).

Requests and manner of access
Request
48 (1) An individual seeking access to personal information about the individual shall,

(a) make a request in writing to the institution that the individual believes has custody or control of the personal information, and specify that the request is being made under this Act;

(b) identify the personal information bank or otherwise identify the location of the personal information; and

(c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 7; 2017, c. 2, Sched. 12, s. 4 (2).

Access procedures
(2) Subsections 10 (2), 24 (1.1) and (2) and sections 25, 26, 27, 27.1, 28 and 29 apply with necessary modifications to a request made under subsection (1). 1996, c. 1, Sched. K, s. 7.

Manner of access
(3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

(a) permit the individual to examine the personal information; or

(b) provide the individual with a copy thereof. R.S.O. 1990, c. F.31, s. 48 (3).

Comprehensible form
(4) Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which

indicates the general terms and conditions under which the personal information is stored and used. R.S.O. 1990, c. F.31, s. 48 (4).

Exemptions
49 A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 49 (a) of the Act is amended by adding "15.1" after "15". (See: 2017, c. 8, Sched. 13, s. 4)

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

(c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

(c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,

(i) assessing the teaching materials or research of an employee of an educational institution or a hospital or of a person associated with an educational institution or a hospital,

(ii) determining suitability, eligibility or qualifications for admission to an academic program of an educational institution or a hospital, or

(iii) determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;

(e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or

(f) that is a research or statistical record. R.S.O. 1990, c. F.31, s. 49; 2001, c. 28, s. 22 (4); 2002, c. 2, ss. 15 (4), 19 (7); 2002, c. 18, Sched. K, s. 10; 2005, c. 28, Sched. F, s. 7; 2010, c. 25, s. 24 (15).

PART IV
APPEAL

Right to appeal
50 (1) A person who has made a request for,

(a) access to a record under subsection 24 (1);

(b) access to personal information under subsection 48 (1); or

(c) correction of personal information under subsection 47 (2),

or a person who is given notice of a request under subsection 28 (1) may appeal any decision of a head under this Act to the Commissioner. R.S.O. 1990, c. F.31, s. 50 (1).

Fee
(1.1) A person who appeals under subsection (1) shall pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 8.

Time for application
(2) Subject to subsection (2.0.1), an appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal. R.S.O. 1990, c. F.31, s. 50 (2); 2016, c. 5, Sched. 10, s. 3 (1).

Extension of time
(2.0.1) If the time limit specified in subsection (2) presents a barrier, as defined in the Accessibility for Ontarians with Disabilities Act, 2005, to the person, the Commissioner may extend the time limit for a period of time that is reasonably required in the circumstances to accommodate the person for the purpose of making the appeal. 2016, c. 5, Sched. 10, s. 3 (2).

Immediate dismissal
(2.1) The Commissioner may dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the record or the personal information to which the notice relates exists. 1996, c. 1, Sched. K, s. 8.

Non-application
(2.2) If the Commissioner dismisses an appeal under subsection (2.1), subsection (3) and sections 51 and 52 do not apply to the Commissioner. 1996, c. 1, Sched. K, s. 8.

Notice of application for appeal
(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an

interest in the appeal, including an institution within the meaning of the Municipal Freedom of Information and Protection of Privacy Act, of the notice of appeal. 2006, c. 34, Sched. C, s. 7.

Ombudsman Act not to apply
(4) The Ombudsman Act does not apply in respect of a complaint for which an appeal is provided under this Act or the Municipal Freedom of Information and Protection of Privacy Act or to the Commissioner or the Commissioner's delegate acting under this Act or the Municipal Freedom of Information and Protection of Privacy Act. R.S.O. 1990, c. F.31, s. 50 (4).

Mediator to try to effect settlement
51 The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal. R.S.O. 1990, c. F.31, s. 51.

Inquiry
52 (1) The Commissioner may conduct an inquiry to review the head's decision if,

(a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or

(b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected. 1996, c. 1, Sched. K, s. 9.

Procedure
(2) The Statutory Powers Procedure Act does not apply to an inquiry under subsection (1). R.S.O. 1990, c. F.31, s. 52 (2).

Inquiry in private
(3) The inquiry may be conducted in private. R.S.O. 1990, c. F.31, s. 52 (3).

Powers of Commissioner
(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation. R.S.O. 1990, c. F.31, s. 52 (4).

Record not retained by Commissioner
(5) The Commissioner shall not retain any information obtained from a record under subsection (4). R.S.O. 1990, c. F.31, s. 52 (5).

Examination on site
(6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site. R.S.O. 1990, c. F.31, s. 52 (6).

Notice of entry

(7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose. R.S.O. 1990, c. F.31, s. 52 (7).

Examination under oath
(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath. R.S.O. 1990, c. F.31, s. 52 (8).

Evidence privileged
(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court. R.S.O. 1990, c. F.31, s. 52 (9).

Protection
(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person. R.S.O. 1990, c. F.31, s. 52 (10).

Protection under Federal Act
(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the Canada Evidence Act. R.S.O. 1990, c. F.31, s. 52 (11).

Prosecution
(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section. R.S.O. 1990, c. F.31, s. 52 (12).

Representations
(13) The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50 (3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made. 2006, c. 34, Sched. C, s. 8 (1).

Right to representation
(14) Each of the following may be represented by a person authorized under the Law Society Act to represent them:

1. The person who requested access to the record.

2. The head of the institution concerned.

3. Any other institution or person informed of the notice of appeal under subsection 50 (3). 2006, c. 34, Sched. C, s. 8 (5).

Burden of proof
53 Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head. R.S.O. 1990, c. F.31, s. 53.

Order
54 (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal. R.S.O. 1990, c. F.31, s. 54 (1).

Idem
(2) Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part. R.S.O. 1990, c. F.31, s. 54 (2).

Terms and conditions
(3) Subject to this Act, the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate. R.S.O. 1990, c. F.31, s. 54 (3); 1996, c. 1, Sched. K, s. 10.

Notice of order
(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 50 (3) written notice of the order. R.S.O. 1990, c. F.31, s. 54 (4).

Confidentiality
55 (1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (1).

Not compellable witness
(2) The Commissioner or any person acting on behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (2).

Proceedings privileged
(3) No proceeding lies against the Commissioner or against any person acting on behalf or under the direction of the Commissioner for anything done, reported or said in good faith in the course of the exercise or performance or intended exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (3).

Delegation by Commissioner
56 (1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation. R.S.O. 1990, c. F.31, s. 56 (1).

Exception re records under s. 12 or 14
(2) The Commissioner shall not delegate to a person other than an Assistant Commissioner his or her power to require a record referred to in section 12 or 14 to be produced and examined. R.S.O. 1990, c. F.31, s. 56 (2).

[…]

65 (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

4. Meetings, consultations, discussions or communications about the appointment or placement of any individual by a church or religious organization within an institution, or within the church or religious organization.

5. Meetings, consultations, discussions or communications about applications for hospital appointments, the appointments or privileges of persons who have hospital privileges, and anything that forms part of the personnel file of those persons. 1995, c. 1, s. 82; 2010, c. 25, s. 24 (18).

Exception
(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.

[55]

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment. 1995, c. 1, s. 82.

[…]

DENIS RANCOURT
Applicant

- and -

UNIVERSITY OF OTTAWA
Respondent

[95]

Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at OTTAWA

APPLICANT'S FACTUM

(APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW)

Dr. Denis Rancourt
[redacted]
Ottawa, ON [redacted]
Tel.: [redacted]
Email: [redacted]

Applicant

Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

– and –

UNIVERSITY OF OTTAWA

Respondent

– and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Respondent

APPLICANT'S APPLICATION RECORD

(JUDICIAL REVIEW OF IPC TRIBUNAL DECISION)

Dated: September 19, 2017

Dr. Denis Rancourt
Applicant
[redacted]
Ottawa, ON [redacted]
Tel.: [redacted]
Email: [redacted]

[58]

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Applicant's Application Record

Note. The Applicant relies on:

- "Public Record of Proceedings of the Respondent Information and Privacy Commissioner of Ontario" (3 volumes)
- "Private Record of Proceedings of the Respondent Information and Privacy Commissioner of Ontario" (1 volume)

Court File No. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

and

UNIVERSITY OF OTTAWA

Respondent

APPLICATION UNDER the *Judicial Review Procedure Act*, R.S.O. 1990 c.J.1

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.
THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in additional to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: February 13, 2017

Issued by .....
Registrar

Address of Court Office:
161 Elgin Street
Ottawa, Ontario
K2P 2KI

TO: UNIVERSITY OF OTTAWA
75 Laurier Ave. East
Ottawa, ON KIN 6N5

TO: ADJUDICATOR JOHN HIGGINS
Information and Privacy Commissioner of Ontario
2 Bloor Street East, Suite 1400
Toronto, ON M4W 1A8

TO: ATTORNEY GENERAL OF ONTARIO
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

APPLICATION

REQUEST TO THIS HONOURABLE COURT

1. The Applicant makes application for an order to set aside Information and Privacy Commissioner ("IPC") order PO-3686 of Adjudicator John Higgins (the "Adjudicator") dated January 12, 2017 (the "Order") in which the Adjudicator denied the *Charter* claims of the Applicant and upheld the University of Ottawa (the "University") decision to deny the Applicant access to his personal information, including:
   i. A psychiatric report (the "psychiatric report") made, held, and used without the knowledge or consent of the Applicant (written in French).
   ii. All records about the psychiatric report.

2. The psychiatric report contains intimate details about the Applicant's personal life, including: childhood violence in the home, childhood circumstances, adult personal lifestyle practice, adult family life including intimate family relationships, and psychiatric opinion about likelihood of the Applicant committing violent acts. None of the said personal information was ever volunteered or disclosed to the university by the Applicant.

3. The existence of the psychiatric report and its use were first disclosed to the Applicant approximately 3 years after the psychiatric report was written, as part of disclosures under deemed undertaking (implied undertaking confidentiality rule) during a labour arbitration process about the Applicant's termination of employment with the University.

4. The IPC administers Ontario's *Freedom of Information and Protection of Privacy Act* (the "*Act*"). The purposes of the *Act* are given in its section 1:

> *The purposes of this Act are,*
> *(a) to provide a right of access to information under the control of institutions in accordance with the principles that,*
> *(i) information should be available to the public,*

> *(ii) necessary exemptions from the right of access should be limited and specific, and*
> *(iii) decisions on the disclosure of government information should be reviewed independently of government; and*
> *(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information*. [Emphasis added]

5. Ontario is the only Canadian province or territory to have an employment-related or labour relations exclusion in its privacy and access statute, codified in s. 65(6)3 of the *Act*:

> *Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following: ...*
> *3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. ...* [Emphasis added]

6. In the context of the *Act* and of the instant application, "access" means obtaining copy and control for use of the sought records (or documents). Denial of access to a record held by an institution *prima facie* infringes or denies expression about the form and content of the denied record, unless the said denied record is otherwise already available for use. "Privacy protection" means those provisions of the *Act* that protect personal information against misuse by the institutions subject to the purview of the *Act* (including search, collection, storage, disclosure, and use). "Excluded" records are records to which "*this Act does not apply*", per an exclusion such as s. 65(6)3. Literally, excluded records are not subject to the right-of-access and privacy-protection provisions of the *Act*, whether the said excluded records contain personal information or not.

7. On appeal pursuant to s. 50 of the *Act*, the Applicant sought access to the psychiatric report and the other documents at issue on the grounds that the provision that was used

by the University to deny access (s. 65(6)3) is itself unconstitutional, and sought a declaration of unconstitutionality.

8. The Applicant's argument that s. 65(6)3 of the *Act* is unconstitutional was twofold:
   i. S. 65(6)3 breaches the Applicant's *Charter* right of freedom of expression (s. 2(b)).
   ii. S. 65(6)3 breaches the Applicant's *Charter* right to privacy (ss. 7, 8).

9. In addition to a declaration of unconstitutionality of s. 65(6)3 of the *Act*, the Applicant also sought overlapping remedies for infringement or denial of his *Charter* rights:
   i. "Access" is the remedy for breach of the Applicant's *Charter* right of freedom of expression (s. 2(b)) because access allows the expression that is infringed or denied by denial of access;
   ii. "Access" is also one part of the remedy for breach of the Applicant's *Charter* right to privacy (ss. 7, 8) because (together with "protection") it provides the individual "the ability to control the purpose and manner of its disclosure", as prescribed in the privacy jurisprudence for personal information.
   iii. Protection of privacy is the other part of the sought remedy for privacy violation; in that declared unconstitutionality of s. 65(6)3 would bring the excluded records under the privacy protection provisions of the *Act*.

10. The Adjudicator concluded that there had been no breaches of the Applicant's *Charter* rights of freedom of expression or privacy sufficient to engage the *Charter* claims. He did not perform a *Charter* s. 1 analysis of the impugned s. 65(6)3. He upheld the University's denial of access pursuant to the s. 65(6)3 exclusion.

11. The instant case is the first constitutional challenge to the s. 65(6)3 exclusion provision in Ontario's information access and privacy protection statute. The constitutional issues raised by the Applicant are serious, important and novel in the context of access to information litigation.

12. The Applicant requests that this Honourable Court:
    (a) quash the Order;
    (b) declare s. 65(6)3 of the *Act* to be unconstitutional;
    (c) remit the matter to a different IPC Adjudicator for a determination in accordance with the reasons of this Honourable Court;
    (d) award the Applicant the costs of this application; and
    (e) make such further order as is appropriate in the circumstances.

GROUNDS FOR THE APPLICATION

13. The grounds for the application are the following:
    a. The Adjudicator correctly determined that:
        i. The Adjudicator has jurisdiction to hear the constitutional claims.
        ii. The Applicant has standing to make the constitutional arguments.
        iii. The University is a government actor for the purpose of the constitutional claims, and the question of government actor is irrelevant in the constitutional scrutiny of the law itself.
        iv. The psychiatric report and the other records at issue were prepared by or on behalf of the university.
        v. The s. 65(6)3 exclusion from the *Act* applies to the psychiatric report and the other documents at issue, and is the sole claimed statutory basis for the University's denial of access.
        vi. An implied (or deemed) undertaking constrains and precludes communication by the Applicant about content of the psychiatric report and about the other records at issue: "[H]aving received a copy" does not constitute access.

vii. "While inappropriate behaviour by institutions may attract the application of the 'public interest override' found at section 23 of the *Act*, that override does not apply to exclusions such as section 65(6)."

viii. Possible public disclosure, following access, would not, in any significant way, impinge on the proper functioning of the university.

ix. Any past failure to take steps to avoid the implied undertaking at labour arbitration is not determinative of the matters in issue.

b. The Adjudicator erred in law by not applying the *Oakes* methodology, with its standard of correctness, in his analysis of whether s. 65(6)3 is itself constitutional:

i. The approach used when determining the constitutionality of a law is distinguished from the approach used for determining whether an administrative decision violates the *Charter* rights of a particular individual.

ii. The administrative law approach of *Doré* was expressly used by the Adjudicator, as his decisional frame.

iii. The administrative law approach of *Doré*, with its review standard of reasonableness, applies solely in determining whether an administrative tribunal's use of a statutory discretion violates the *Charter* rights of an individual, in the absence of a constitutional challenge to the relevant statutory provision itself.

iv. The administrative law approach of *Doré* presumes constitutionality of the home statute of the administrative tribunal.

v. There is no substitute for the *Oakes* methodology — with its onus on the government to justify the violations caused by the impugned statute — in determining constitutionality of a law.

vi. It is impossible to know what the Adjudicator would have determined if his frame was not that of *Doré*, and if he had applied *Oakes* to the question of constitutionality of s. 65(6)3 itself.

c. Even if the Adjudicator's

i. adoption of the administrative law approach of *Doré*,

ii. failure to apply the *Oakes* methodology in the constitutional challenge of the *Act* itself, and

iii. consequent failure to use a proscriptive first step, separate from the salient *Charter* s. 1 considerations, in determining whether a *Charter* violation has occurred

are not fatal (which the Applicant denies), then the following additional errors of law nonetheless were made.

d. The Adjudicator erred in law by rejecting "*The appellant's arguments that section 65(6)3 is unconstitutional because it limits privacy protection*", and by concluding that the Applicant's *Charter* right of privacy was not breached sufficiently to engage a constitutional examination of s. 65(6)3 of the *Act*, because:

i. The *Charter* right to privacy includes protection against invasion of informational privacy that goes to personal dignity and integrity.

ii. The *Charter* right to privacy includes a positive and preventative right of protection of personal privacy.

iii. The *Charter* right to privacy includes a concomitant right of access to personal information in the hands of government institutions in order that an individual may know what information the institutions possess, which, in turn, ensures that institutional action in the collection and use of personal information can be scrutinized.

iv. S. 65(6)3 abrogates both the statutory right of access to one's own personal information and the statutory protections of privacy, for excluded records.

v. The impugned section is *prima facie* inconsistent with the purpose of the *Act* regarding personal information (s. 1(b)).

vi. In the instant case, privacy is inseparable from the question of constitutionality of s. 65(6)3, and from the question of access.

e. The Adjudicator erred in law when he failed to consider and/or find any breach of the Applicant's implied, derivative or express *Charter* right of privacy (ss. 7, 8); and when he failed to provide the sought remedies (protection of and access to the Applicant's

personal information) for infringement or denial of the said *Charter* right of privacy, because:

i. The content of the psychiatric report itself and of the other documents at issue shows that the University sought, obtained and used intimate personal information, of a nature tied to the Applicant's dignity, integrity, and autonomy.

ii. The University's actions were done without prior legal authorization, as part of a purposeful investigation.

iii. The Applicant's right to fully know his intimate personal information held by the University was infringed or denied.

f. The Adjudicator erred in law by failing to find that s. 65(6)3 is unconstitutional because it causes a violation of principles of fundamental justice in the litigation to gain access to intimate personal information:

i. The exclusion precludes an appellate challenge of an institution's denial of access, since the "*Act does not apply to"* excluded records, including the provision of the *Act* that gives a statutory right of appeal (s. 50), thereby violating principles of fundamental justice (*Charter*, s. 7).

ii. Even in a constitutional challenge in which the IPC accepts jurisdiction (which in the instant case was not challenged), the exclusion provision prevents a fair appeal of an institution's denial of access, in that the appellant is not by right allowed equal and sufficient knowledge of the records at issue, thereby violating principles of fundamental justice (*Charter*, s. 7).

g. The Adjudicator erred in law when he concluded that the Applicant's *Charter* right to freedom of expression (s. 2(b)) was not breached sufficiently to trigger *Charter* protection or constitutional standing in challenging the *Act*. The error in law includes a cascade of errors that are sufficient, individually or in combination.

i. The Adjudicator erred in law when he concluded — having carved out and denied the privacy protection issue — that *Criminal Lawyers' Association* ("*CLA*") is not distinguished from the instant case, and relied entirely on *CLA* for the

violation threshold question regarding the *Charter* right of freedom of expression.

(1) In *CLA*, the constitutionality of the provisions of the *Act* that blocked access (ss. 14 and 19 exemptions) was not challenged by the requester/appellant. Constitutionality of the s. 23 public-interest override (specifically, its non-applicability to ss. 14 and 19) of the *Act* was at issue but it was determined that s. 23 was too distant to itself cause the alleged violation of the *Charter* right of freedom of expression, since it had no discernable effect on access. Sections 14 and 19 were themselves presumed constitutional and were determined to already provide a balance with the *Charter* right of expression in the public interest. Thus, prior statutory analysis of the impugned provision (s. 23) was determinative of the issue, and the facts did not appear to contradict the consequences of the evident statutory structure. In the instant case, the s. 65(6)3 exclusion is the provision that directly blocks access, its constitutionality is challenged, and it allows no statutory discretion for balancing with *Charter* values.

(2) In *CLA*, it was determined that a finding that the impugned s. 23 override is unconstitutional would not produce more access than the access already provided by a reasonable application of ss. 14 and 19; whereas in the instant case, a finding that the impugned s. 65(6)3 exclusion is unconstitutional would result in complete access to the records at issue.

(3) In *CLA*, the desired freedom of expression using the document sought through access was not on an identified matter distinct from the matters on which expression was possible without access; whereas in the instant case denied access directly bars expression on a matter that is distinct from and has no informational overlap with all other expression that has and can be made by the Applicant.

(4) *CLA* deals with an association's request for access, where no personal information of the requester was at issue, nor any claim for protection of the

requester's personal privacy, and where access was sought solely for the purpose of expression on a matter of public importance; whereas in the instant case access is inextricably linked to both the requester's privacy and expression. *CLA* contextually confines itself to a "public importance" criterion for s. 2(b) infringement, without considering the "self-fulfilment" and "truth-seeking" protected underlying values in the *Charter* right to freedom of expression.

ii. In the alternative, if it was not an error of law to carve out s. 2(b) for sole consideration and to use *CLA* for s. 2(b) violation determination, then the Adjudicator erred in law in his application of *CLA* for s. 2(b) violation determination to the factual circumstances of the instant case:

(1) The Adjudicator failed to discern the specifically claimed infringed or denied expression (on the form and content of the psychiatric report and other documents at issue, and connected comments that become permitted, enabled and supported) from all other expression regarding the Applicant's relationship with the University, which has no informational overlap with the psychiatric report or the other records at issue.

(2) The Adjudicator's assimilation of the informationally distinct and specific infringed expression to a general theme of expression leads to the absurdity that if one has amply publicly criticized an institution then one can legitimately be gagged from making a new criticism of the said institution.

(3) The Adjudicator's error amounts to deciding that the Applicant "has had enough freedom", which is an irrelevant criterion.

(4) The Adjudicator failed to consider and in-effect excluded the self-fulfilment and truth-seeking protected values underlying s. 2(b) in applying or modifying the *CLA* "test" to the instant and distinguished circumstances involving intimate personal information.

(5) Had the Adjudicator recognized that expression infringed or denied by denial of access is distinct and separate, then he would have been compelled to

correctly conclude that the Applicant's *Charter* right of freedom of expression is violated, and that a s. 1 analysis is required.

iii. The Adjudicator further erred in law by continuing to overextend application of *CLA* in concluding "even if the appellant had established that disclosure is necessary for meaningful expression [...] there would be no breach of section 2(b) because the second requirement articulated in CLA has not been met":

(1) The Adjudicator incorrectly concluded that the deemed undertaking seal on the psychiatric report and other documents at issue was an admissible and justified override (in the misappropriated sense of ss. 14 and 19 as used in *CLA*) precluding the *Charter* right of freedom of expression from being violated.

(2) In addition, the Adjudicator erred in law by reversing the onus of s. 1 justification of the impugned statute, from the government to the individual who is alleging a *Charter* violation. Taken on its face, the Adjudicator's conclusion leads to the absurdity that "a violation did not occur because the violation is justified".

h. In the alternative and in addition, the Adjudicator erred in law by failing to find that s. 65(6)3 of the *Act* is unconstitutional in its general effect under reasonable hypothetical circumstances that are sufficiently elucidated by the factual basis in the instant case, because:

i. Given the nature of the statutory framework of the *Act*, where generally the requester/appellant/applicant remains unaware of the contents of the records sought (which is not the instant case), in general every-day circumstances many of the arguments by necessity focus upon "imaginable circumstances".

ii. Reasonably, there will always be circumstances (elucidated by the instant factual framework) in which blanket and unchallengeable denial of access of employment-related documents leads to infringement or denial of expression on matters of public importance, or on matters of expressive value to the individual for self-fulfilment and/or truth-seeking.

iii. S. 65(6)3 constitutes a complete and unchallengeable loss of the concerned individual's right to access his own personal information in excluded records, which can be of the most intimate nature; which is contrary to the purpose of the *Act*, is an intolerable impediment to institutional accountability in a democratic society, and is contrary to Canada's international obligations.

iv. The unbalanced impediment against scrutiny created by s. 65(6)3 can apply (as in the instant case) even to a government institution having the express and statutory purpose to protect freedom of inquiry and expression, and to enable self-fulfilment and truth seeking.

i. The infringements of ss. 2(b), 7, and 8 of the *Charter* caused by the s. 65(6)3 exclusion cannot be justified under s. 1 of the *Charter* because:

i. The exclusion is not a limit "prescribed by law", in that limits must flow from a sufficiently clear legal standard that can inform legal debate.

ii. The exclusion has no pressing and substantial objective.

iii. There is no rational connection between the exclusion and a pressing and substantial objective.

iv. The exclusion is not minimally impairing of privacy and freedom of expression.

v. Its ills outweigh its benefits, and it is more absolute in nature rather than balancing.

vi. Furthermore, the University (and Ontario) have the onus to establish that s. 1 of the *Charter* saves the s. 65(6)3 exclusion, where none of the other provinces or territories (or the federal government) have this exclusion in their privacy protection and/or access legislations yet no known harm to our free and democratic society has resulted.

j. Such further grounds as counsel or the Applicant may advise and this Honourable Court permit.

DOCUMENTARY EVIDENCE TO BE USED

14. The following documentary evidence will be used at the hearing of the application:
    a. The decision of IPC Adjudicator John Higgins dated January 12, 2017 (PO-3686).
    b. The record of proceedings before the Adjudicator.
    c. Such further and other evidence as counsel or the Applicant may advise and this Honourable Court may admit.

Date of Issue: February 13, 2017

Dr. Denis Rancourt
Applicant

[redacted]
Ottawa, ON [redacted]
tel.: [redacted]
email: [redacted]

DENIS RANCOURT
Applicant

- and -

UNIVERSITY OF OTTAWA
Respondent

[74]

Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at OTTAWA

NOTICE OF APPLICATION TO DIVISIONAL COURT
FOR JUDICIAL REVIEW

Dr. Denis Rancourt
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Applicant

Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3686

Appeal PA12-537-2

University of Ottawa

January 12, 2017

Summary: The appellant is a former employee of the university. His employment was terminated by the university. He submitted an access request for a report about him prepared by a psychiatrist, and other records "about" the report. The university claims that the responsive records are excluded from the application of the *Act* under section 65(6)3 (employment or labour relations). This order upholds that claim. The appellant claims that he should receive access to the records, arguing that section 65(6) is either unconstitutional, or constitutionally inapplicable, based on the right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*. The appellant's *Charter* claim is not upheld. The appellant also claims that additional records should exist. This order determines that the additional records referred to by the appellant, if they existed, would not be responsive to the request, and/or would be excluded from the application of the *Act* under section 65(6)3. Accordingly, no additional searches are ordered. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24, 42(1)(m), 52(4), 52(8), 65(6)3; *Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), sections 2(b), 8 and 32; and *Constitution Act*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), section 52(1).

Orders and Investigation Reports Considered: P-880, PO-2074-R, PO-2554, PO-3323, PO-3325.

Cases Considered: *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 484; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239; *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.); *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *Doré v. Barreau du Québec*, 2012 SCC 12; *R. v. Clarke*, 2014 SCC 28; *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47; *McKinney v. University of Guelph*, [1990] 3 SCR 229; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624; *Moghadam v. York University*, 2014 ONSC 2429; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *R. v. Jarvis*, 2002 SCC 73; *R. v. Court* (1997), 36 O.R. (3d) 263, 1997 CanLII 12180 (ON SC); *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4; *Solosky v. the Queen*, [1980] 1 SCR 821, 1979 CanLII 9; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.), [2006] S.C.J. No. 39; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.).

Other Authorities Considered: *Administrative Law Matters*, June 12, 2014; *International Covenant on Civil and Political Rights*, sections 17 and 19(2).

OVERVIEW:

Background

[1] The appellant is a former employee of the University of Ottawa (the university). The appellant's employment was terminated by the university. The appellant's union brought several grievances on his behalf. The grievance pertaining to the termination of the appellant's employment was dismissed by the arbitrator. The arbitrator's decision is the subject of an ongoing application for judicial review.

[2] The records at issue in this appeal were generated during the processes followed by the university that led to the termination of the appellant's employment. The records were provided to the union by the university during the grievance arbitration process and the appellant has copies of all of them. However, the records were not entered into evidence at the grievance arbitration, and remain subject to an implied confidentiality undertaking.

[3] The appellant seeks access to the records under the *Act*. One effect of the university's decision to deny access to the records under the *Act* is that, in the appellant's hands, they remain subject to the implied confidentiality undertaking.

The access request and this appeal

[4] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report prepared by a psychiatrist, relating to himself (the report), and any other records "about the report."

[5] The university located responsive records and denied access to them on the basis that the request was "frivolous or vexatious" under section 10(1)(b) of the *Act*. The appellant appealed this decision to this office (also referred to in this order as the IPC), and Appeal PA12-537 was opened. Adjudicator Catherine Corban addressed that appeal in Order PO-3325. She did not uphold the university's decision, and ordered it to provide the appellant with an access decision.

[6] The university responded to Order PO-3325 by issuing a decision denying access to the responsive records, including the report. The university relied on the exclusion in section 65(6) of the *Act* (employment or labour relations). The appellant appealed that decision to this office, arguing that the university is not entitled to rely on the exclusion in section 65(6) and that this provision is unconstitutional. He also asserts that additional responsive records ought to exist, thereby challenging the adequacy of the university's search. To address the new appeal, the IPC opened Appeal PA12-537-2, which is the subject of this order.

[7] During the intake stage of this appeal, the university advised the IPC that, in particular, the university relies on section 65(6)3. Also during the intake stage, the appellant served the IPC, the university, the Attorney General of Canada and the Attorney General of Ontario with a Notice of Constitutional Question (NCQ). The NCQ asserts that section 65(6) of the *Act* is unconstitutional as it violates the appellant's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[8] In the NCQ, the appellant states that the records are a necessary precondition for making meaningful expression about the university's practices affecting its employees and students, and the public at large.

[9] After receipt of the NCQ, this appeal moved directly to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[10] The IPC began the inquiry by sending a Notice of Inquiry to the university, inviting it to provide representations, which it did. The IPC then sent a Notice of Inquiry to the appellant, inviting him to provide representations, along with a complete copy of the university's representations. The appellant responded with representations. The IPC then provided a complete copy of the appellant's representations to the university, inviting it to provide reply representations, which it did.

[11] This appeal was then transferred to me to complete the inquiry. I sent a complete copy of the university's reply representations to the appellant, inviting him to provide sur-reply representations, which he did.

[12] The Attorneys General of Ontario and Canada did not provide the IPC with representations or any other response to the NCQ.

[13] As noted previously, the appellant takes the position that the university did not conduct a reasonable search for records. Although this was not expressly addressed in the Notice of Inquiry, the appellant raised it in his representations. The university responded to the appellant's representations on this subject in its reply representations, and the appellant addressed these submissions at sur-reply. Accordingly, I will address the issue in this order under Issue C, below.

[14] In his representations, the appellant sometimes mentions the university's failure to contest some of the points or evidence he raises, as though that means they are established and cannot be questioned. This is not the case. It is my responsibility to weigh the evidence and arguments that have been presented. I am not compelled to accept evidence that is not credible, or arguments that are lacking in cogency or inconsistent with case law, simply because they have not been the subject of comment by the other party.[1]

[15] In conducting this inquiry, I have reviewed the voluminous material provided by the parties, and weighed all of the evidence and argument they have submitted. In the interest of keeping this order to a reasonable length, and focused on the issues before me, I will refer only to evidence and argument that are relevant to those issues.[2] I have also limited my references to the representations of the parties, in some instances, for reasons of confidentiality.

[16] In this order, I uphold the university's decision to apply section 65(6)3 to the responsive records. In addition, I find that the appellant's right to free expression under section 2(b) of the *Charter* has not been infringed as a result of the university's denial of access to the records. On the reasonable search issue, I conclude that the additional records that the appellant claims should exist would not be responsive to his request, and/or would be excluded from the application of the *Act* under section 65(6)3, and there is therefore no basis to order the university to conduct further searches.

[17] The appeal is therefore dismissed.

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[1] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 484.
[2] See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

RECORDS:

[18] The records at issue in the appeal consist of the report, two emails, a fax cover page, and an invoice for the preparation of the report.

ISSUES:

A. Are the records excluded from the operation of the *Act* as a result of the application of section 65(6)3 of the *Act*?

B. Is section 65(6) unconstitutional or constitutionally inapplicable under section 2(b) of the *Canadian Charter of Rights and Freedoms*?

C. Did the university conduct a reasonable search for records?

DISCUSSION:

Issue A: Are the records excluded from the operation of the *Act* as a result of the application of section 65(6)3 of the *Act*?

[19] Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[20] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[21] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[3]

[22] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human

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[3] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[4]

[23] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[5]

[24] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[6]

[25] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[7]

[26] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[8]

[27] The records collected, prepared maintained or used by the institution are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[9]

[28] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

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[4] Order PO-2157.
[5] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[6] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[7] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[8] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[9] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

Representations

University's initial representations

[29] The university submits that the records at issue were prepared by the psychiatrist who drafted the report on its behalf, and that they were subsequently maintained and used by the university. The university also submits that the records were prepared, maintained and used in relation to meetings, consultations, discussions and communications, including consultations with the author of the report, as well as internal meetings, discussions and communications at the university. The university submits further that these meetings, discussions and communications were about matters regarding the appellant's employment and his conduct in the workplace.

[30] The university cites *Ontario (Ministry of Community and Social Services) v. Doe*,[10] which found that to qualify for exclusion under section 65(6)3, ". . . the record must be *about* labour relations or employment-related matters." As the university notes, that case also refers to *Ontario (Ministry of Correctional Services) v. Goodis*,[11] where the Court characterized the types of records excluded under section 65(6) as "documents related to matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue."

[31] The university submits that the records meet the tests set out in these two decisions.

[32] The university submits further that: "[t]he appellant later put the report in issue in a labour arbitration proceeding regarding the termination of his employment with the university."

[33] With its representations, the university provided a copy of a sworn but undated affidavit by one of its lawyers. This affidavit states, among other things, that three ongoing grievances are currently before the arbitrator. This affidavit was originally provided to the IPC during the inquiry into Appeal PA12-537 which, as already noted, dealt with the university's initial claim, dismissed in Order PO-3325, that the appellant's request is frivolous or vexatious. As stated previously, the grievance arbitration is now complete, and the matter is before the Divisional Court in the form of a judicial review.

Appellant's initial representations

[34] The appellant objects to the university's contention that he "put the report in issue in a labour arbitration proceeding." He states that no evidence has been produced to this effect, and that this claim is utterly false.

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[10] (2014), 120 O.R. (3d) 451 at para. 29.
[11] (cited above), at para. 35.

[35] The representations I have received on this point demonstrate that the report was produced to the appellant's union during the grievance process, and that it was not entered into evidence by anyone. If the university itself had relied upon the report during the grievance process, this might have provided support for the application of section 65(6)1, which refers to proceedings that would include a grievance arbitration hearing. But the university does not rely on this provision.

[36] Perhaps the appellant's intention in disputing the claim that he "put the report in issue" during the grievance process was to suggest that the university's representations are not factual in a more general sense, but he does not say so. As already noted, it is my duty to weigh the evidence and arguments that are put to me, and I have done so in reaching my decisions in this appeal. I accept that the appellant did not "put the report in issue" during the grievance proceedings. However, this is not conclusive as regards the potential application of section 65(6)3, which does not require that a record was collected, prepared, used or maintained in relation to proceedings.

[37] The appellant also argues that the "university's undated and outdated affidavit has a potential to cause misdirection." Referring to the affidavit he provided with his representations, the appellant states that the university's lawyer's affidavit was used in an earlier submission by the university prior to the issuance of Order PO-3325. He also states that the university's lawyer's affidavit is "incorrect at the present time" in that it refers to three active grievances. As the appellant notes, those grievances were addressed in the arbitrator's decision which is now the subject of an application for judicial review.

[38] The concern advanced here by the appellant, that the grievances are no longer ongoing before the arbitrator, whose decision is now the subject of an application for judicial review, is irrelevant to any issue before me. Moreover, similar to my analysis of the appellant's argument that he did not put the report in issue in the grievance, the presence of an active grievance arbitration, or, for that matter, a judicial review relating to employment or labour relations matters, is not required in order for section 65(6)3 to apply. Also, section 65(6) is not time-limited in its application. As noted previously, if section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[12]

[39] The appellant submits that "[t]he stated or inferred purpose of the Report and the evidence of use of the Report are determinative." While I agree that any statement of purpose in the report may be relevant, I note that section 65(6) requires that records were "*collected, prepared, maintained* or used by or on behalf of an institution . . ." [emphasis added] in relation to the matters listed in the rest of section 65(6). Accordingly, I do not agree that evidence relating to "use" is determinative to the exclusion of evidence relating to collection, preparation or maintenance of the records.

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[12] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[40] In any event, part 1 of the test requires that "the records were collected, prepared, maintained or used by an institution or on its behalf," and the appellant "admits that the record was prepared on behalf of the university," based on the first sentence of the report, and that part 1 of the test is therefore satisfied.

[41] Under part 2, the appellant submits that "collection, preparation, maintenance or usage" of the records would not be "in relation to" meetings, consultations, discussions or communications" if, for example, the records themselves constitute communications about labour relations or employment-related matters in which the university has an interest. He asserts that the test under section 65(6) ". . . would be an absurdity if it meant that the two objects that are 'in relation' or that have 'some connection' are the same object." In other words, according to the appellant, the record that is collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications must be some separate document that is not, in and of itself, the communication, consultation, etc.

[42] As already noted, for the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them. In other words, there must be "some connection" between the collection, preparation, maintenance or usage of the records and "meetings, consultations, discussions or communications" about the subjects referred to in section 65(6)3. I fail to see how a record that is, itself, a communication that was prepared on behalf of the university, is not a record whose preparation was "in relation to" communications.[13] The appellant suggests that making this finding would be absurd. In my view, the opposite is the case. It would be absurd, artificial and unreasonable to adopt the approach advocated by the appellant and find that such a record was not prepared "in relation to" communications.

[43] Attempting to build on this argument, the appellant submits that there is no evidence of "distinct" meetings, consultations, discussions or communications having some connection to the report. For the reasons just given, this is not necessary to meet part 2 of the test.

[44] The appellant also makes arguments based on the chronology of events relating to his dismissal and the provision of the report to the university, arguing that this proves that the report could not have been "used in relation to" meetings, consultations, discussions or communications. This argument depends on the appellant's earlier attempt to impose a requirement that a record cannot itself be prepared or used as, and therefore "in relation to," a communication. I have already rejected that argument.

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[13] For an example of a decision where a communication was found to have been used in relation to communications under section 65(6)3, see Order PO-3323, cited by the university in its reply representations. See also Order PO-2074-R.

[45] The appellant argues that the report is not related in any functional way to his work. He argues that the report predicts events that may potentially occur after he was dismissed, and also refers to the fact that he had already been dismissed by the time the university received the report. Both these arguments are intended to demonstrate that the report is not employment-related. He also seeks to apply the dicta from *Ontario (Ministry of Correctional Services) v. Goodis*,[14] to the effect that "[e]mployment-related matters are separate and distinct from matters related to employees' actions."

[46] It is clear from the evidence that the university ordered the report before it dismissed the appellant, although it did not receive the report until after it had informed the appellant that he was being dismissed[15]. It is also clear that the report relates to the appellant's possible dismissal. In my view, this is an employment-related matter. This result is not contradicted by the Divisional Court's decision in *Ontario (Ministry of Correctional Services) v. Goodis*.[16]

[47] *Goodis* addressed the question of whether records relating to a lawsuit against the institution for vicarious liability relating to employee misconduct are excluded under section 65(6)1 or 3. It is in that sense that matters relating to "employees' actions" do not attract the application of section 65(6). Records prepared in relation to human resources issues such as possible dismissal are not comparable to those at issue in *Goodis*, and are, almost by definition, employment-related. As well, they appear to fit neatly within the description, given by the Divisional Court in that case, of the type of records that *would* be excluded under section 65(6): "documents related to matters in which the institution is acting as an employer, and . . . human resources questions are at issue."[17] Accordingly, the outcome in *Goodis* is distinguishable, and I do not accept this submission.

[48] The appellant suggests that section 65(6)3 cannot apply on the basis of the appellant's allegation that the university's actions in commissioning the report were improper. In particular, he submits that ". . . there is sufficient evidence to conclude that the Report and the manner in which it was produced constitute professional malfeasance to a sufficient degree that the Report and its production cannot be related to any matters 'in which the institution has an interest'. . . ." This suggests that the IPC is to become an arbiter of the behaviour of institutions, and if it is found to be lacking in some manner, the institution would be punished by losing its ability to rely on section 65(6)3. I reject this argument. As outlined below, this was also the subject of further discussion in subsequent representations. At this point, I would observe that the jurisprudence establishes that I am required to determine, on the facts, whether the

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[14] (cited above), at para. 23.
[15] The evidence shows that the author of the report conducted an interview relating to the preparation of the report several days before the university informed the appellant of his dismissal.
[16] Cited above.
[17] *Goodis*, at para. 24.

criteria in section 65(6)3 are met, and "has an interest" means "more than a mere curiosity or concern."[18]

[49] One factor cited by the appellant in relation to the university's alleged "malfeasance" is his allegation that detailed and intimate information about himself and his family in the report was hearsay provided to the author of the report by another university employee during an interview, and that this information "could not possibly have been collected for the purpose of making the Report. . . ." This is, in essence, an allegation that this information was collected, used or disclosed in a manner that is not consistent with the privacy rules in Part III of the *Act*. This allegation is not under consideration in this appeal, which is not a privacy complaint investigation. Rather, this appeal addresses the issue of access to the records. I will discuss the appellant's options in relation to his privacy concerns in more detail at the end of this order.

University's reply representations

[50] In reply, the university's submissions concerning the employment-related matter in which it claims to have an interest under section 65(6)3 refer to the appellant's possible dismissal and the university's rationale for obtaining the report, which is directly related to him possibly being dismissed.

[51] The university also responds to the appellant's argument that the report is not related in any functional way to his employment. The university submits that this ". . . imposes a higher threshold for the application of section 65(6)3 than has been accepted by the IPC and the Courts." The university goes on to state:

> The Report need only be about a matter in which the University is acting as employer, and the terms and conditions of employment are in issue. It need not be related to the "full spectrum" of the employee's duties, nor be related in a "functional way" to those duties.

[52] The university's reference to the terms and conditions of employment derives from *Ontario (Ministry of Correctional Services) v. Goodis*. Although the outcome in *Goodis* is distinguishable, the discussion it sets out, pertaining to the way in which section 65(6) is to be applied, remains relevant. For a better understanding of the criteria as actually stated by the Court, I will repeat the actual passage in question (which I have already reproduced above):

> . . . the type of records excluded from the Act by s. 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[19]

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[18] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[19] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, at para. 24.

[53] I agree with the university that section 65(6)3 does not require that the records, or the employment-related matter, be related to the "full spectrum" of the employee's duties, or related in a "functional way" to those duties. Moreover, as the quote from *Goodis* makes clear, the terms and conditions of employment, *or human resources questions*, must be at issue. The records clearly relate to the human resources issue of the appellant's possible dismissal. As already stated, records prepared in relation to human resources issues such as possible dismissal are, almost by definition, employment-related.

[54] The university also denies the appellant's allegations of misconduct, and argues that section 65(6)3 does not inquire into such matters. The university submits that the appellant's interpretation ". . . reads substantial new restrictions into s. 65(6)3 which are not found in the language of the statute, nor in the jurisprudence."

[55] Above, I have already rejected any suggestion that the IPC is to become an arbiter of the behaviour of institutions which, if found to be lacking in some manner, would cause the institution to lose its ability to rely on section 65(6)3. I will refer to this subject again in my discussion of the appellant's sur-reply representations, where he made additional comments about it, and will also refer in more detail to the university's position.

The appellant's sur-reply representations

[56] In sur-reply, the appellant makes further arguments about the question of whether the report itself can be a communication and in that way, meet the requirement that its collection, preparation, maintenance or use must be "in relation to" meetings, consultations, discussions or communications. He says that the university:

> . . . *falsely states* "The Appellant suggests it would be 'an absurdity' if the meetings, consultations, discussions or communications could be embodied in the record in issue." [Emphasis added.]

[57] The appellant now essentially denies having made this argument, arguing that, instead, he:

> . . . did not say or suggest that a record in issue could not be about meetings, consultations, discussions or communications in which the institution has an interest. Rather, the Appellant argued that there is no connection between the Report and consultations, discussions or communications in which the institution has an interest.

[58] However, the appellant did, in fact, make this argument, as outlined in my earlier discussion of his initial representations. None of his submissions in sur-reply would lead

me to alter my analysis, above, in which I rejected this argument. It is clear that the report was "prepared" in relation to "communications" because it is, itself, a communication.

[59] The appellant also refers to the "fact" that the university ". . . did not bring the Report in evidence in making its [initial] Submissions, nor did it reveal that it had disclosed the Report to the IPC." In that regard, I note that the university had provided all the records at issue, including the report, to this office prior to submitting its initial representations in this appeal.

[60] As for the appellant's comment that the university failed to reveal that it had provided the report to the IPC, I am left to surmise that the appellant finds this problematic from a privacy perspective. It is not. Section 52(4) of the *Act* gives the Commissioner the power to compel production of ". . . any record that is in the custody or under the control of an institution. . . ." This includes records that are claimed to be exempt and records that are claimed to be excluded from the application of the *Act* under section 65. In most appeals, including this one, institutions provide the records at issue in response to a request for documentation from the IPC, which is sent out in virtually every appeal at the intake stage. In such instances, the IPC is not required to order production, even though it could. The IPC is clearly empowered to review the records at issue in order to deal with appeals that come before it. Disclosure of personal information to the IPC is also authorized under section 42(1)(m) of the *Act* and is not a violation of personal privacy.

[61] In addition, the appellant submits that:

- the report only became available to the university after it had dismissed him; and

- there is no evidence or allegation that the report was ever "used."

[62] These submissions do not assist the appellant. The first bullet point does not mean that the report is not employment-related; as I have already observed, the evidence makes it clear that the university commissioned the report prior to dismissing the appellant. With respect to the argument that the report was not "used," section 65(6)3 applies to records that were "*collected, prepared, maintained* or used" [emphasis added] by an institution in relation to "meetings, consultations, discussions or communications about an employment-related matter in which the institution has an interest." Use is not required if the record was collected, prepared or maintained in relation to the matters referred to in the section. I have already noted that the report was prepared on behalf of the university and, because it is, itself, a communication, it was prepared "in relation to" communications.

[63] The appellant then returns to his argument based on *Ontario (Ministry of Correctional Services) v. Goodis*[20] and argues that the subject matter of the report is further removed from employment-related matters than allegations of misconduct against government employees in the course of employment. I reiterate that, in my view, the outcome in *Goodis* is distinguishable because it dealt with records pertaining to litigation against an institution for vicarious liability in relation to employee misconduct, which is very different than the circumstances here, where the records relate to the possible dismissal of the appellant, a human resources issue. As I observed earlier, human resources issues are, almost by definition, employment-related matters.

[64] Referring to the university's argument that the records need only "be about a matter in which the University is acting as an employer, and the terms and conditions of employment are at issue," the appellant also states that "the terms and conditions of employment" are not at issue in the report. As I explained above, in setting out the university's version of this argument, this is a reference to *Ontario (Ministry of Correctional Services) v. Goodis*, where the Court (in a passage I have already reproduced) observed that the type of records excluded from the Act by section 65(6) are documents "related to matters in which the institution is acting as an employer, and terms and conditions of employment *or human resources questions* are at issue."[21] [Emphasis added.]

[65] The dismissal or contemplated dismissal of the appellant is clearly a human resources issue in which the university acts as employer. When stated in full, the *Goodis* criteria do not assist the appellant here.

[66] The appellant also reiterates his earlier arguments that the university does not "have an interest" in the report as ". . . it cannot be in the interest of the institution to perform acts that are manifestly improper." I have already addressed this argument, above. Simply put, the question is not whether the commissioning of the report was in the university's interest; rather, the question is a different one: is the report about an employment-related matter in which the university has an interest (defined as "more than a mere curiosity or concern")? In my opinion, as further discussed below, the answer to that question is "yes."

[67] At the conclusion of his reply representations, the appellant amplifies this point further by stating:

> Therefore, misconduct – from misdirection in mandate to ethical breaches in criminal behaviour – is a factor that must be considered when pleaded on appeal, as is the case here. Otherwise, to turn a blind eye to the question of the Appellant's evidence-based pleading of misconduct and to

[20] Cited above.

[21] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, at para. 24.

> thereby allow the exclusion would have the effect of shielding the institution from public accountability, an effect that is contrary to the purpose of the *Act*. Public accountability is not restricted to a tunnel vision of the institution's statutory mandate but includes misconduct in all institutional activities, whether the said activities are justified or not.

[68] As I have already stated, above, this argument ". . . suggests that the IPC is to become an arbiter of the behaviour of institutions, and if it is found to be lacking in some manner, the institution would lose its ability to rely on section 65(6)3. I reject this argument." I also noted that ". . . I am required to determine, on the facts, whether the criteria in section 65(6)3 are met, and 'has an interest' means 'more than a mere curiosity or concern.'" As the university stated in its reply representations:[22]

> Needless to say, the University denies the Appellant's allegations of misconduct in this respect. In any event, the Appellant's submissions are without merit. The well-established test for the application of s. 65(6)3 does not inquire into whether the circumstances of the creation of a record, or the contents of a record were "materially inconsistent with the institution's statutory and legal obligations." The Court of Appeal has confirmed that the test does not even inquire into the nature of an institution's interest in a record, and that a "legal interest" is not required.[23] The test only asks whether an institution has "more than a mere curiosity or concern" in the employment-related matter to which the record relates. The test posed by the appellant reads substantial new restrictions into s. 65(6)3 which are not found in the language of the statute, nor in the jurisprudence.
>
> The appellant's proposed restriction would also assign to the IPC the task of assessing each record brought before it to determine whether the record could, in some way, be said to be inconsistent with an obligation on the part of the institution in question. This task would take the IPC far beyond its jurisdiction, requiring it to make findings of fact about the legitimacy of the actions of an institution through a "moral, ethical or civil-law" lens, in matters with no bearing on the institution's obligations under [the *Act*]. The Appellant's proposed restriction is impossible to interpret and apply in practice.

[69] I agree with the university. While inappropriate behaviour by institutions may attract the application of the "public interest override" found at section 23 of the *Act*, that override does not apply to exclusions such as section 65(6). Moreover, section 23 provides clear criteria for its application, such that there must be a compelling public

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[22] (set out here, rather than in my discussion of the university's reply representations, above, for ease of reference)

[23] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

interest in disclosure that clearly outweighs the purpose of an exemption. By contrast, as the university notes, the appellant's proposed approach is impossible to interpret and apply in practice. In any event, as I noted above, this office is required to determine, on the facts, whether the criteria in section 65(6)3 are met.

[70] As previously stated, "has an interest" means "more than a mere curiosity or concern."[24] That is the test I will apply here.

Analysis and Conclusions

Part 1: collected, prepared, maintained or used by an institution or on its behalf

[71] It is clear on the evidence, including the records themselves, that the report and the other records at issue were prepared by or on behalf of the university, meeting part 1 of the test. Some of the records were prepared by the psychiatrist, and others by university staff.

Part 2: "in relation to" meetings, consultations, discussions or communications

[72] All of the records are communications. For the reasons outlined above, I find that as the records themselves are communications, their preparation had "some connection" to communications, and part 2 of the test is met. In addition, I find that all of the records other than the report had "some connection" to the report, itself a communication, since they are ancillary documents that reference or deal with the report. Accordingly, I find that all of the records were prepared "in relation to" communications.

Part 3: about labour relations or employment-related matters in which the institution "has an interest"

[73] Referring to the criteria in *Goodis*, it is clear that the records are related to a matter in which the institution is acting as an employer, and human resources questions (namely, the contemplated dismissal of the appellant) are at issue, as discussed above. Having reviewed the records, I find that the report is a communication about the employment-related matter of the appellant's dismissal. Clearly, this was a matter about which the university had "more than a mere curiosity or concern." For these reasons, I find that this is a matter in which the university "has an interest" within the meaning of section 65(3)3. As regards the other records, I have just found that they were prepared "in relation to" the report, which is a communication about an employment-related matter in which the university has an interest.

[74] I therefore find that all of the records meet the third part of the test.

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[24] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

[75] As all three parts of the test are met, I find that the records are excluded from the scope of the *Act* under section 65(6)3.

Issue B: Is section 65(6) unconstitutional or constitutionally inapplicable under section 2(b) of the *Canadian Charter of Rights and Freedoms*?

[76] The appellant contends that he should receive access to the records on the basis of the right to freedom of expression in section 2(b) of *Canadian Charter of Rights and Freedoms* (the *Charter*).

[77] As already noted, the appellant's NCQ claims that the records are a necessary precondition for making meaningful expression about the university's practices affecting its employees and students, and the public at large. In his initial representations, he states that the *Act* is unconstitutional because, among other things, it does not allow him to communicate to anyone about the report. As regards freedom of expression, the appellant's concerns therefore relate to his ability to discuss the report publicly, and also to express himself about the university's relationship with its employees in a more general sense.

[78] He concludes both his initial representations and his sur-reply representations by requesting, among other items, the following relief:

- an order that access to the records must be granted forthwith because the application of section 65(6) to exclude the records is unconstitutional;
- a declaration that section 65(6) is unconstitutional.

[79] As the university relies on section 65(6)3, that section is the focus of the constitutional issues under consideration here. The first bullet point is, in effect, a request for a finding that section 65(6)3 is constitutionally inapplicable in the circumstances of this appeal. The second bullet point requests a declaration that the section is, *per se*, unconstitutional.

[80] The availability of these two forms of relief has been confirmed by the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)*:[25]

> There is no question, of course, that the *Charter* applies to provincial legislation; see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter*

[25] [1997] 3 SCR 624, at para. 20.

> right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

[81] If a breach of section 2(b) is found, traditional *Charter* analysis would then require consideration of section 1 of the *Charter*.

[82] Sections 1 and 2(b) of the *Charter* state:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Approach to Charter adjudication at the tribunal level

[83] It is clear that the IPC has the authority to decide constitutional issues, including those arising under the *Charter*.[26] A more complex question arises as to what form of analysis should be employed in deciding this issue.

[84] In *Doré v. Barreau du Québec*,[27] the Supreme Court of Canada reviewed the decision of the Tribunal des professions in an appeal from a disciplinary decision taken by the Disciplinary Council of the Barreau du Québec. The issue was whether a reprimand issued to a member of the Barreau for critical remarks about a judge constituted a violation of the member's right to freedom of expression as guaranteed under section 2(b) of the *Charter*.

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[26] See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 3, which states, in part: "Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law." The Commissioner's powers at sections 50 through 54 of the *Act* clearly include the power to decide questions of law including, for example, the interpretation and application of the exemptions at sections 12-22 and section 49, and the interpretation and application of exclusions such as section 65(6)3. There is no evidence that the Legislature intended to exclude *Charter* considerations from the Commissioner's mandate.

[27] 2012 SCC 12

[85] *Doré* focuses on the appropriate methodology for a court to apply when reviewing an administrative tribunal's decision applying the *Charter*. The Court's reasons compare the assessment of whether a law violates the *Charter* with the similar but distinct issue of whether a decision of an administrative tribunal does so.

[86] The Court decided that, in the latter case, an "administrative law" approach should be adopted rather than the *Oakes*[28] test, which is the usual method of determining whether, in the event of an established *Charter* breach, an impugned statutory provision should survive under section 1 of the *Charter* because it represents a "reasonable limit" that is "prescribed by law as can be demonstrably justified in a free and democratic society."

[87] The "administrative law" approach involves consideration of the statutory objectives and balancing those against the extent to which they interfere with a *Charter* right.

[88] In deciding to apply the "administrative law" approach on judicial review where *Charter* issues arise, the Court stated[29]:

> . . . Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.
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> It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to,

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[28] This is a reference to *R. v. Oakes*, [1986] 1 S.C.R. 103, which established the test for whether an established *Charter* breach would survive a constitutional challenge because of section 1 of the *Charter*. This could occur if the objective is pressing and substantial, and if it passes the following "proportionality" test: "First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. [Citation omitted.] Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'."

[29] *Doré*, at paras. 3-7.

minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. *In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.*

. . . In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[Emphases added.]

[89] The Court also observed that:[30]

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[30] at para. 24.

> It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values. . . . [Citations omitted.] The question then is what framework should be used to scrutinize how those values were applied?

[90] This analysis is primarily directed at the approach to be taken by a reviewing court, rather than an administrative law decision-maker such as myself. However, it is evident from these comments by the Court that, in adjudicating *Charter* issues, an administrative law decision-maker must achieve an appropriate balance between rights and objectives.

[91] The Court provided further guidance on this point later in its reasons.[31] It stated:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. . . .
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. . . .

[92] In *R. v. Clarke*,[32] in a passage that appears to be *obiter*, the Supreme Court amplified its discussion of the proportionality exercise:

> . . . Only in the administrative law context is ambiguity not the divining rod that attracts *Charter* values. Instead, administrative law decision-makers "must act consistently with the values underlying the grant of discretion, including *Charter* values" (*Doré*, at para. 24). The issue in the administrative context therefore, is not whether the statutory language is so ambiguous as to engage *Charter* values, it is whether the exercise of discretion by the administrative decision-maker unreasonably limits the *Charter* protections in light of the legislative objective of the statutory scheme.

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[31] at paras. 55 and 56.

[32] 2014 SCC 28, at para. 16. These comments appear to be *obiter* because this decision relates to a change in the law of sentencing in the criminal law context. It does not involve an administrative law decision. See also *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495 at paras. 54-55.

[93] This restatement of the principle in *Doré* helps to explain its meaning, and also provides a strong indication that the requirement for ambiguity in a legislative text before *Charter* values can be considered[33] does not apply in the administrative law context.

[94] In *Doré*, the alleged infringement of the Barreau member's freedom of expression arose from the application of section 2.03 of the *Code of ethics of advocates*, which stated: "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity." The constitutionality of this provision was not, itself, under attack. Rather, the question was whether the decision of the Tribunal des professions, upholding the earlier ruling of the Disciplinary Council of the Barreau du Québec, violated the member's right to freedom of expression.

[95] In the wake of *Doré*, a significant question is: how does an administrative tribunal assess *Charter* issues in order to "balance the severity of the interference of the *Charter* protection with the statutory objectives"? What methodology should be followed?

[96] In the appeal under consideration in this order, the appellant argues that section 65(6) of the *Act* is constitutionally inapplicable because of section 2(b) of the *Charter*, and in the alternative, that section 65(6), *per se*, is unconstitutional. The representations I have received that relate to section 2(b) focus on whether there has been a breach of section 2(b). In that way, they appear to be aimed at a traditional *Charter* analysis rather than the "*Charter* values" approach.

[97] I do not read *Doré* as precluding a traditional *Charter* analysis, in which the first step is to determine whether a *Charter* right has been breached, and if so, the second step would be to consider section 1 of the *Charter*. In fact, this approach has been followed in a subsequent case involving the judicial review of an administrative decision.[34]

[98] I also note the following comment by Paul Daly in "Charter Application by Administrative Tribunals: Statutory Interpretation," in a discussion of *Doré*:[35]

> Caveat: the individual retains the option of asking for a Charter remedy, in which case I presume a formal Charter analysis remains necessary.

[99] In the context of the *Act*, the framework for assessing whether there is a breach of the *Charter* is provided by the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[36] (*CLA*). Interestingly, although

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[33] See, for example, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 62.
[34] See *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47.
[35] *Administrative Law Matters*, June 12, 2014.
[36] 2010 SCC 23.

the approach taken in *CLA* resembles traditional *Charter* analysis, the Court in *Doré* characterizes it as an embodiment of the "administrative law" approach:

> Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in . . . *Criminal Lawyers' Association*. . . .[37]

[100] Accordingly, I will apply the criteria enunciated in *CLA*. After conducting that analysis, I will also review the statutory objectives and assess the balance between the severity of the interference with section 2(b) protection and the statutory objectives, as advocated in *Doré*.

The interpretation and application of section 2(b) of the Charter in relation to the Act

[101] As already noted, *CLA* provides the framework for assessing possible breaches of section 2(b) of the *Charter* in the context of the *Act*. In *CLA*, the Court considered whether the public interest override at section 23 of the *Act* was constitutionally underinclusive, based on section 2(b) of the *Charter*, because it omitted to provide for the possible override of the exemptions found in sections 14 (law enforcement) and 19 (solicitor-client privilege). In upholding an order of this office finding that section 23 is not constitutionally underinclusive on that basis, the Court articulated the following criteria for finding that section 2(b) of the *Charter* has been breached in relation to an access-to-information request:

> We conclude that the scope of the s. 2(b) protection includes a right to access documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.[38] . . .
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> . . .
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> To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a prima facie case for the production of the documents in question. But even if this prima facie case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the

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[37] at para. 32 of *Doré*. "*Criminal Lawyers' Association*" is fully cited elsewhere in *Doré* as a reference to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23.
[38] at para. 31.

> governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.[39]
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> . . .
>
> To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest. . . .[40]
>
> In sum, there is a prima facie case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded.[41] . . .
>
> If this necessity is established, a prima facie case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.[42]
> . . .
>
> The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(b) expression. This is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(b) is not engaged.[43]
>
> If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions.[44] . . .

[102] From this, it can be seen that in order to establish that section 2(b) of the *Charter* has been breached in relation to a request under the *Act*, the following two requirements must be satisfied: (1) access to the information must be necessary for the meaningful exercise of free expression on matters of public or political interest; and (2) if requirement 1 is met, it must also be the case that there are no countervailing

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[39] at para. 33.
[40] at para. 36.
[41] at para. 37.
[42] at para. 38.
[43] at para. 58.
[44] at para. 60.

considerations inconsistent with disclosure, such as privileges, and/or evidence that disclosure would impair the proper functioning of the university.

[103] The first full iteration of the test I have quoted from *CLA*, above, adds what might be seen as a third requirement: "The only remaining question is whether the government action infringes that protection." In the circumstances of this appeal, the action in question is the denial of access, which we know has occurred. Requirement 1 asks whether access is necessary for the meaningful exercise of free expression on matters of public or political interest, and requirement 2 asks whether, if that is the case, other factors such as privilege or impaired functioning of the university are engaged. The question of whether there is a breach of section 2(b) will therefore be determined, in this appeal, by applying requirements 1 and 2.

Preliminary Issues

The university's argument that it is not a "government actor" for the purposes of the Charter

[104] Referring to section 32 of the *Charter*,[45] the university submits that the *Charter* does not apply to it because it is not a "government actor."

[105] It relies on *McKinney v. University of Guelph*[46] as authority for this proposition. *McKinney* finds that the University of Guelph is not a "government actor" and that the *Charter* therefore does not apply to its retirement policies. These policies are not statutory, and therefore the question in *McKinney* was whether the *Charter* applies to free-standing activities of a university that were not undertaken to implement a statutory scheme or government policy. *McKinney* finds that "private activity" is excluded from the *Charter*. In that regard, the Court states that:

> . . . the *Charter* was not intended to cover activities by non-governmental entities created by government *for legally facilitating private individuals to do things of their own choosing* without engaging governmental responsibility. . . .
>
> . . .
>
> The *Charter* apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include in them provisions for mandatory retirement. *These actions are*

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[45] Section 32 of the *Charter* states, in part: "This Charter applies . . . (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

[46] [1990] 3 SCR 229.

> *not taken under statutory compulsion, so a Charter attack cannot be sustained on that ground.* [Emphases added.]

[106] In my view, however, *McKinney* is distinguishable because, in the appeal under consideration in this order, the university acts as an institution under the *Act*, and in so doing, it is expressly applying and administering the provisions of a statute enacted by the Ontario Legislature, and performing a statutory duty. As subsequent jurisprudence makes clear, non-government actors who effect public policies or programs are subject to the *Charter* with respect to those activities.

[107] A leading decision on that point is *Eldridge v. British Columbia (Attorney General)*,[47] in which the Supreme Court of Canada found that hospitals (who, like universities, are "private" entities, or, put slightly differently, are not part of "government"), are subject to the provisions of the *Charter* when they deliver statutorily mandated health services.

[108] The Court begins its analysis in *Eldridge* by asking whether the alleged *Charter* violation "arises from the impugned legislation itself or from the actions of entities exercising decision-making authority pursuant to that legislation."[48] This distinction plays into the question of whether legislation might be found to be unconstitutional *per se* (where the *Charter* violation "arises from the impugned legislation") or constitutionally inapplicable (where the violation "arises . . . from the actions of entities exercising decision-making authority"). As I have already noted, the appellant in this case argues both of these positions.

[109] Elsewhere in *Eldridge*, the Court describes its categorization of alleged *Charter* violations as a question of whether "the legislation itself is constitutionally suspect" or whether the alleged breach arises from the "actions of the delegated decision-makers in applying it." The Court finds that, in the circumstances of that case, the debate focuses on the latter – the actions and not the statute itself. Implicitly, however, the Court's language here suggests that the role of the "actor" – be it governmental or non-governmental – is not determinative where the question is whether the legislation in question is, *per se*, unconstitutional. This view finds further support in section 52(1) of the *Constitution Act, 1982*, which states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[110] Accordingly, in my view, where the constitutionality of section 65(6)3, *per se*, is at issue, the university's role as a non-governmental actor is irrelevant. The subject of scrutiny is the law itself.

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[47] Cited above.
[48] at para. 22.

[111] The university's role only takes on potential significance in the context of its *actions* or, put slightly differently, where the focus is whether a statutory provision purportedly applied by a non-governmental actor can be constitutionally inapplicable because of a *Charter* violation.

[112] Significantly, the Court in *Eldridge* determined that the source of the alleged *Charter* violation was the *actions* of the hospitals and the Medical Services Commission, and that these were subject to *Charter* scrutiny:

> . . . In my view, the *Charter* applies to both [hospitals and the Medical Services Commission] *in so far as they act pursuant to the powers granted to them by the statutes.*[49] [Emphasis added.]
>
> . . .
>
> . . . There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:
>
> > Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. *Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.*[50] [Emphasis added.]

[113] The clear import of these statements is that where an entity that is not "part of government" acts pursuant to a statute, the *Charter* is engaged by that action. This view is confirmed by the Supreme Court's reasons in *Blencoe v. British Columbia Human Rights Commission).*[51]

> Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. [52]

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[49] at para. 19.
[50] at para. 21.
[51] 2000 SCC 44.
[52] at para. 35.

[114] For all these reasons, I conclude that both positions advocated by the appellant – that section 65(6)3 itself is unconstitutional, and alternatively, that it is "constitutionally inapplicable" because of alleged damage to freedom of expression caused by the university's decision to rely on it in this case – are properly before me in this appeal. [53]

The appellant's argument that he has "public interest" standing

[115] The appellant makes a number of arguments to the effect that he has "public interest" standing to make a constitutional challenge.[54] These submissions are similar to arguments made to demonstrate that a party is entitled to be granted intervener status in a court action or application. Other than the authorization under section 52(8) for the Commissioner to summon and examine "any person who, in the Commissioner's opinion, may have information relating to the inquiry," the *Act* does not contemplate the granting of standing or special status in an appeal.

[116] In any event, it is not necessary for the appellant to establish public interest standing. He has standing to make constitutional arguments because he is a party to this appeal, and the *Act* must be constitutional if it is to apply.[55] Moreover, as already noted, it is clear that the IPC has the power to make constitutional determinations.[56]

The appellant's arguments that section 65(6)3 is unconstitutional because it limits privacy protection

[117] Because this order deals with an access request and the ensuing appeal from a denial of access, the *Charter* issue before me is whether section 65(6)3 is unconstitutional, or constitutionally inapplicable, based on section 2(b) of the *Charter*.

[118] In addition to providing representations on this subject, however, the appellant's submissions on the *Charter* contain many arguments based on his view that section 65(6) is unconstitutional because it abrogates his privacy rights.

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[53] The university also relied on *Moghadam v. York University*, 2014 ONSC 2429, a brief judgment of the Divisional Court that cites *McKinney* and finds that York's actions in a number of matters, including the treatment of a request under the *Act*, were "not governmental in nature" and the applicant's *Charter* rights to procedural fairness had therefore not been impinged. As the present appeal does not relate to procedural fairness rights, *Moghadam* is distinguishable on its facts and, in any event, does not engage in any detailed discussion of occasions when a private entity's actions warrant *Charter* scrutiny, as extensively canvassed in *Eldridge*, which is a decision of a higher court that is, clearly, binding.

[54] In this regard, the appellant refers to *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236.

[55] See section 52(1) of the *Constitution Act, 1982* (quoted in full above).

[56] See *Nova Scotia (Workers' Compensation Board) v. Martin,* as cited and quoted at footnote 26, above.

[119] For example, he submits that the report was prepared without his knowledge or consent, and this activity is shielded from any transparency or accountability by section 65(6)3. He also states that, due to the section 65(6)3 statutory exclusion, his privacy regarding the report and other records in the hands of the university is not protected by law. He argues that if section 65(6)3 has the effect of negating the application of privacy protection to these alleged violations of his privacy, this would be grounds to find section 65(6)3 unconstitutional.

[120] For the most part, this is a separate and distinct issue from the question of whether section 65(6)3 is unconstitutional with respect to *access* rights, which are at issue in this appeal. This is not a privacy complaint investigation, and the appellant's allegations of privacy breaches in the preparation of the report do not assist with the threshold question of whether the denial of access to the records under the *Act* breaches his right to the meaningful exercise of free expression under section 2(b) of the *Charter*.[57] At most, the privacy issues raised by the appellant could impact the question of whether the subject matter he wishes to discuss is a matter of public or political importance.

[121] In any event, for the sake of completeness, I will review the appellant's foundational arguments in relation to privacy.

[122] As part of this discussion, the appellant refers to jurisprudence describing the federal *Privacy Act* as having a quasi-constitutional mission.[58] Even if this means that the *Act* is quasi-constitutional, however, this does not alter the general principles of statutory interpretation.[59] Nor does this create a more general constitutionally-mandated right of privacy. Accordingly, I do not accept the appellant's argument that section 65(6) is unconstitutional because privacy is a constitutionally protected value, and section 65(6) precludes privacy protection of excluded materials such as the report.[60]

[123] The appellant also argues that, under section 8 of the *Charter*, privacy is a protected right. However, section 8 of the *Charter*, which provides that "Everyone has the right to be secure from unreasonable search or seizure," comes into play most often when an individual is under investigation for a possible offence. In order for section 8

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[57] Access to one's own personal information is also an aspect of privacy. The *Act* implicitly recognizes this right in section 47(1), which provides a right of access to one's own personal information, subject to the exemptions in section 49.

[58] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para. 24.

[59] See *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at para. 40, where the Court makes this observation about the quasi-constitutional *Access to Information Act*.

[60] This finding that there is no general free-standing constitutionally-mandated right of privacy includes a finding that there is no free-standing constitutionally-mandated right of access to one's own personal information based on privacy principles. Moreover, as already noted, this right is formally recognized in section 47(1) of the *Act*.

to apply, there must be an actual search or seizure.[61] That has not occurred here. Moreover, it is clear from its wording and interpretation that section 8 does not create constitutionally-protected privacy rights of more general application.

[124] While I agree with the appellant that ". . . the *Act* must itself be constitutional," I disagree with his statement that the *Act* ". . . cannot without sufficient justification exclude a particular area from both privacy protection and oversight of privacy protection." [Emphasis in original.] The *Act* is simply providing that the privacy rights it creates (which have not been found to be constitutionally required) do not apply in some instances.

[125] The appellant makes further arguments to the effect that the contents of the report demonstrate that its preparation involved "egregious violations of the appellant's privacy;" that searches for additional records may reveal additional privacy breaches; and he was not informed by the university that it had provided the records at issue to the IPC. As regards the first two points, I will address the appellant's privacy concerns, and the issue of reasonable search, later in this order. I have already dealt with the fact that the records were provided to the IPC in the discussion of section 65(6)3, above.

International Covenant on Civil and Political Rights

[126] The appellant also refers to the *International Covenant on Civil and Political Rights* (the *Covenant*) and argues that, unless it conforms to Canada's obligations under this instrument, the *Act* is invalid. The *Covenant* was adopted by the United Nations General Assembly and has been in force since 1976.

[127] In different parts of his representations, the appellant refers to the articles in the *Covenant* that protect privacy and freedom of expression. These articles state:

> *Article 17.* 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.
>
> *Article 19.* 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[128] In his initial representations, the appellant submits that that an objective definition of "free and democratic society" cannot be confined to mean whatever

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[61] *R. v. Jarvis*, 2002 SCC 73 at para. 69

Canada does, but rather, must be informed by the relevant international declarations and covenants ratified by Canada, and especially the *Covenant*. In making this argument, the appellant is referring to one of the elements of section 1 of the *Charter*. Section 1 only comes into play where there is an established *Charter* breach. I agree that the contents of international agreements may have a bearing on the meaning of "free and democratic society," and this could be an indication that in some cases, they merit consideration in assessing section 1 issues. Because of the conclusions reached in this order, it will not be necessary for me to refer to section 1 of the *Charter*.

[129] At sur-reply, in a reference to *CLA*, the appellant concedes that the IPC does not have the authority to override a Supreme Court of Canada judgement (*CLA*) that establishes a test about the interpretation of the *Charter*. However, he also submits that the IPC has both the authority and the duty to interpret the *CLA* test in a manner that is consistent with the *Covenant*, in the circumstances of this appeal.

[130] In support of this argument, the appellant quotes from *Saskatchewan Federation of Labour v. Saskatchewan*.[62] In that case, the Supreme Court of Canada struck down a Saskatchewan law that limited the right of public sector employees to strike as a violation of section 2(d) of the *Charter* that was not saved under section 1. The Court considered international covenants as part of its *Charter* reasoning. The appellant submits that:

> . . . the authority and duty of the IPC [to interpret the *CLA* test in a manner that is consistent with the *Covenant*] derive from recently reaffirmed Supreme Court of Canada jurisprudence:[63]
>
> > LeBel J. confirmed in *R. v. Hape*, 2007 SCC 26 (CanLII), [2007] 2 S.C.R. 292, that in interpreting the Charter, the Court "has sought to ensure consistency between its interpretation of the Charter, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".

[131] This presumption is described by the Court in *Saskatchewan Federation of Labour* as helping to "frame the interpretive scope" of the section of the *Charter* under consideration there.

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[62] 2015 SCC 4.

[63] *Saskatchewan Federation of Labour v. Saskatchewan*, cited above, at paras. 64-65.

[132] It is also to be noted that in *Hape*, the Supreme Court affirmed that the presumption of conformity is rebuttable, and that clear and unequivocal legislation that is in breach of international law must be followed by domestic courts. The Court expressed these points as follows: [64]

> . . . It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. *Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation.* . . . [My emphasis.]
>
> The presumption of conformity has been accepted and applied by this Court on numerous occasions. In *Daniels v. White*, [1968] S.C.R. 517, at p. 541, Pigeon J. stated:
>
> > [T]his is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. . . . *[I]f a statute is unambiguous, its provisions must be followed even if they are contrary to international law . . . .* [Underlining added by the Court for emphasis. Italics are my emphasis.]

[64] 2007 SCC 26 at paras. 53-54.

[133] The Court also stated:[65]

> In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of such a construction.

[134] I now turn to consider the impact of the two sections of the *Covenant* cited by the appellant in the context of this appeal.

[135] Article 19, paragraph 2 of the *Covenant* and section 2(b) of the *Charter* both address freedom of expression. In my view, the wording of section 2(b) of the *Charter* as interpreted in *CLA* is in conformity with Article 19, Paragraph 2 of the *Covenant*. I reach this conclusion because *CLA* recognizes the right of freedom of expression, and also recognizes that section 2(b) may require access to government-held documents. No special interpretation is required to enforce conformity as it is already present in the existing *Charter* provision and the relevant jurisprudence that interprets it in the context of the *Act* (*CLA*).

[136] With respect to section 17 of the *Covenant*, I note that privacy rights are protected in Part II of the *Act* ("Protection of Individual Privacy"), including rules about collection, use and disclosure of personal information by institutions, and a right of access to one's own personal information, subject to exemptions and exclusions.

[137] From the jurisprudence I have referred to above, it is clear that the approach of encouraging tribunals to adopt interpretations that are "consistent" with the *Covenant* (as urged by the appellant) has its limits. Where the statutory language will not bear such an interpretation, courts and tribunals are required to follow the statutory language.

[138] In this case, I have found that section 65(6)3 applies to exclude the records from the scope of the *Act*. Section 65(6)3 is clear and its application to the records is, in my view, irrefutable regardless of the interpretive lens that is used. Accordingly, based on the relevant jurisprudence, I have concluded that even if section 65(6)3 of the *Act* does not conform to the requirements of the *Covenant* (a conclusion which, to be clear, I have *not* reached), this is not a case where I can intervene and, in effect, amend the *Act* in order to ensure conformity with the *Covenant*.

[139] In the discussion that follows, the remaining issue is whether the appellant is entitled to access, despite section 65(6)3. I have found, above, that the test in *CLA* is consistent with Canada's obligations under Article 19, Paragraph 2 of the *Covenant*. Accordingly, in this order, I will apply the *CLA* test.

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[65] at para. 56.

Representations

University's initial representations

[140] Some of the university's representations address the onus of proof the appellant must meet in order to establish a breach of section 2(b). In that regard, the university submits:

- the right of access to government records discussed in *CLA* in relation to section 2(b) is a narrow, derivative right, arising from an appellant's freedom of expression only where the appellant can demonstrate the existence of specific preconditions; and

- as a result, it is not enough to consider whether section 65(6) may hypothetically lead to an infringement; rather, the appellant must demonstrate that, in his specific circumstances, section 2(b) is engaged and the application of section 65(6) has resulted in an infringement of his section 2(b) rights based on the facts of this case.

[141] In *CLA*, the Supreme Court did not use the word "narrow" to describe the right of access that might arise under section 2(b). I will apply *CLA* by referring to words that the Court actually did use in describing the circumstances in which section 2(b) would require access to records under the *Act*.

[142] However, I agree with the university that the onus is on the appellant to demonstrate, based on the evidence, that his section 2(b) *Charter* rights have been infringed. As the Supreme Court notes in *CLA*,[66] "[t]o demonstrate that there is expressive content in accessing such documents, *the claimant must establish* that the denial of access effectively precludes meaningful commentary. *If the claimant can show this*, there is a prima facie case for the production of the documents in question." [Emphasis added.]

[143] The university also submits that *CLA* sets out a test based on the *necessity* of access in order to permit meaningful public discussion on a matter of public importance. The university submits that the appellant has not met the section 2(b) test articulated in *CLA* because:

- access to the report is not necessary as the appellant has already demonstrated that he is capable of "meaningful discussion" regarding the university's relationship with its employees, which he alleges to be a matter of public importance;

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[66] at para. 33.

- the appellant has already received a copy of the report;
- the university's relationship with its employees is a private matter and not a matter of public importance;
- the report is in any event related to the university's relationship with the appellant, rather than its relationship with its employees broadly.

[144] These arguments relate primarily to the first requirement under section 2(b) as articulated in *CLA*, which stipulates that access must be necessary for the meaningful exercise of free expression on matters of public or political interest.

[145] In that regard, the university goes on to submit that "necessity" is a high threshold and even if the appellant can show that discussion would be limited or incomplete without access, this is not sufficient; rather, the appellant must demonstrate that meaningful discussions cannot occur without access. The Court did not state that necessity is a high threshold. To reiterate, I will apply the language that the Court actually used in *CLA* in my assessment of whether access is required under section 2(b).

[146] The university also argues that since his dismissal, the appellant has engaged in "meaningful expression" regarding his alleged mistreatment by the university, and that he maintains websites dedicated to highlighting events at the university that he believes warrant public discussion, including repeated and public questioning of the university's approach to his employment and dismissal. The university provides links to these websites, only one of which appears to be functional at the present time.

[147] The website that remains active contains many posts that illustrate the university's point, including the following:

- commentary on the arbitration process and the progress of the judicial review of the arbitration award;
- commentary on the disclosure process within the arbitration;
- commentary on the appellant's dismissal and the legal proceedings that followed it;
- links to media stories about the appellant and the grievance arbitration;
- video links to commentary by the appellant and others concerning his suspension, dismissal and treatment by the university; and

- critical references to the university's tactics in connection with the dismissal of the appellant.

[148] The website also attributes the views it sets out to the appellant, unless stated otherwise.

[149] One of the video links is a television interview with the appellant, which the university describes as "a vivid summary" of the conflict between the appellant and the university. I have reviewed the interview. It represents a significant expression of opinion by the appellant concerning his relationship with the university. Another is a link to a trailer for a film documentary, in which the appellant is prominently featured expressing his views about the university's decision to dismiss him.

[150] The university submits that:

> . . . it is clear from the Appellant's vigorous criticism of the University on his websites that his ability to engage in meaningful expression of his views regarding the University's treatment of its employees has not been prevented – or even impaired.

[151] The university states that in *CLA*, the Supreme Court found that the requester had not demonstrated that the withheld report was necessary for meaningful expression because this could occur on the basis of the public record. As noted earlier, *CLA* involved a request for an OPP investigation report and other records relating to alleged wrongdoing by the Crown and police in a murder case. The Supreme Court found that disclosure of the report and the other records was not required to permit meaningful discussion as the latter could take place based on the public record, which included the trial court's judgment staying the charges against the accused.

[152] The university then refers to the grievance arbitration process and the disclosure of documents to the appellant through that route. The university challenges the notion that disclosure of the records at issue, including the report, could be necessary to permit meaningful discussion because the appellant has "already received and reviewed the report."

[153] As already noted, the appellant is constrained from publicly discussing the contents of the report because of the implied confidentiality undertaking that attaches to records produced during the grievance arbitration and not introduced in evidence. In my view, because of this constraint, the fact that the appellant has received a copy of the report and the other records at issue does not negate the possibility that access under the *Act* could be required to permit meaningful discussion. As Adjudicator Catherine Corban stated in Order PO-3325, ". . . such restricted access is clearly not equivalent to the kind of unrestricted access that would be granted under the *Act* if it is

found that no exclusions or exemptions apply. . . ."[67] I therefore reject the university's arguments to the effect that the appellant's *Charter* right to freedom of expression is not engaged because he has received the records at issue.

[154] Referring to the second requirement articulated in *CLA*, under which it must be demonstrated that disclosure "would not impinge on privileges or impair the proper functioning of relevant government institutions," the university submits that any resulting section 2(b) interest is "outweighed by the functional need for confidential space for the University to act as employer." The university submits that the Legislature clearly had this purpose in mind in enacting section 65(6). While that may be the case, I would find, on the evidence before me in this case, that disclosure would not, in any significant way, impinge on the proper functioning of the university, whether or not it can accurately be described as a "government institution."

[155] In its discussion of the second requirement articulated in *CLA*, the university does not refer to the impingement of privileges, nor to the fact that if I find that section 2(b) of the *Charter* applies to mandate disclosure, such disclosure might contradict and render meaningless the implied confidentiality undertaking imposed in the grievance arbitration proceedings. However, it is clear that such an application of section 2(b) would, in effect, constitute an "end run" around this undertaking. I will refer to these issues again in my discussion of the second requirement under "Analysis," below.

Appellant's initial representations

[156] Under the heading of "preliminary issues," the appellant submits that the university's statement that he already has the report "should be struck from its submissions as an abuse of process." The appellant describes this as a "false" argument.

[157] The *Act* does not contemplate a procedure for "striking" portions of a party's representations. In my view, the university's references to the appellant's possession of the records, a fact that is established on the evidence (given that he provided a copy to this office with his representations), is not an abuse of process. Regardless, in my discussion above, I did not accept the university's arguments to the effect that, because he has received the records at issue, the appellant's *Charter* right to freedom of expression is not engaged. I rejected these arguments because the records in the appellant's possession are constrained by the implied confidentiality undertaking.

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[67] See also the commentary in *Ontario (Ministry of Correctional Services) v. Goodis* (cited above), at para. 50. In that case, the request was for records that were "informed by and reveal information learned on discovery," but the implied undertaking did not affect the access request. The Court stated that: ". . . the implied undertaking rule does not apply to these records. To the extent that these records reveal information provided on discovery, the information originates with the ministry and is not subject to an implied undertaking in its hands."

[158] Later in his representations, the appellant introduces his submissions under section 2(b) by setting out some of the main themes of his argument.

[159] He alleges that the report contains "proof" of improper activities in the course of its preparation, and that he is barred from fully knowing about or communicating about it. He submits that these circumstances are incompatible with a free and democratic society, and Ontario's statutory exclusion that permits such a state of affairs is unconstitutional. It is evident that the appellant is fully aware of the contents of the report. The issue is his ability to discuss it publicly.

[160] The appellant also submits that access-to-information statutes have quasi-constitutional status in Canada.[68] On that point, I note that in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[69] the Court observed that "[w]hile I agree that the Access to Information Act may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation." Similarly, in my view, the fact of quasi-constitutional status does not, *per se*, impact on the question of whether the appellant's section 2(b) rights have been breached.

[161] He submits that the more an institution resists transparency, the more important it is to undertake a constitutional examination of statutes that protect access and privacy, and states that the university is using the *Act* as a shield against transparency. With respect to the importance of constitutional review where transparency is resisted, I am baffled as to what point the appellant is trying to make, given that one of the major issues to be addressed in this appeal is the constitutionality of section 65(6)3. I do not see that this statement adds anything to the constitutional analysis being undertaken here.

[162] Nor is the appellant assisted by his argument that the university is using the *Act* as a "shield against transparency." The *Act* contains numerous exemptions and exclusions, which represent the Legislature's assessment of when access and privacy rights may or, in the case of mandatory exemptions, must bow to other public policy goals. In any such instance, the institution relying on these provisions may be alleged to be using them as a "shield against transparency." That does not, *per se*, make them unconstitutional. Rather, when the claim of unconstitutionality arises under section 2(b) of the *Charter*, the test in *CLA* must be applied.

[163] The appellant also states that by including section 65(6), the *Act* is out of step with modern norms of transparency and protection of privacy in modern free and democratic societies. He asks that I take judicial notice of the absence of a provision like section 65(6) in other Canadian and international access-to-information statutes.

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[68] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* and *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, both cited above.
[69] Cited above.

However, even if this were the case, the absence of similar provisions in other access-to-information legislation would not demonstrate that section 65(6)3 is unconstitutional.

[164] Later in his representations, the appellant makes a number of arguments specifically aimed at demonstrating that *CLA*'s criteria for determining whether section 2(b) has been breached, as set out above, have been met.

[165] With respect to the first requirement articulated in *CLA*, to the effect that access is necessary to permit meaningful discussion of matters of public or political interest, the appellant submits:

- the report demonstrates improper activity by the university;
- the report was prepared without him being interviewed;
- the report contains his personal information provided by others and he has no control over this personal information;
- there are no adequate legal protections to prevent such a report from being written and no mechanism for him to respond to and correct any harmful elements;
- the report is based on hearsay and its reasoning is faulty;
- examining the report will provide an opportunity to study, assess and critique professional methodology;
- the appellant is absolutely and permanently gagged from discussing the report, and therefore, from "meaningfully contributing to public discourse potentially affecting an array of statutory and policy issues of importance to workers, students and concerned citizens at large;"
- the appellant has no other way to get access to the report and related records because both the author of the report and the university are refusing access;
- because section 65(6) is an exclusion, this office cannot review the university's exercise of discretion;
- the appellant has the means to make the meaningful expression that access would permit;

- the public's right to information is a fundamental value recognized by the *Charter*'s guarantees of free expression and freedom of the press.[70]

[166] With respect to the second requirement articulated in *CLA*, which deals with circumstances that are inconsistent with disclosure, the appellant submits that access would not encroach on protected privileges. He indicates that the university does not claim solicitor-client privilege and that the implied undertaking rule does not limit access obtained outside the arbitration process.[71] He also submits that access is compatible with the functioning of the university.

[167] The appellant also alleges that section 65(6) produces an absurdity that makes constitutional protection ineffective. In this regard, he states, in effect, that exclusion of the records from the *Act* would mean that he would not know the contents of the records and the IPC could not review them. However, neither of these allegations is true in the present case. The appellant has the records and knows their contents, and they have also been provided to the IPC for review.

[168] He also attempts to distinguish *CLA* because it dealt with exemptions and the exercise of discretion, whereas this appeal deals with an exclusion. I reject this distinction. As already pointed out, this office is entitled to review the records in appeals where exclusions have been claimed. The criteria established for a section 2(b) *Charter* breach in *CLA* are not specifically geared to discretionary exemptions, but are, rather, specific to the entire access-to-information context. The appellant seeks to buttress this argument by referring to the fact that in *CLA*, the records were subject to solicitor-client privilege, a recognized societal value override, and that extensive information was already known about the specific matter. These arguments only go to the issue of whether the result here should be the same as it was in *CLA*, as discussed later in this order. They do not lessen the applicability of the requirements for a breach of section 2(b) articulated in that case.

[169] The appellant also argues that section 65(6) is unconstitutional because it violates the fundamental principle of the rule of law. He submits that the section 65(6) exclusions "effectively bar him from access to justice." I disagree. I am not aware of any reason why, for example, the appellant would be constrained from making a professional complaint against the author of the report, if that were warranted, or from pursuing other actions at law if he has a cause of action, or from requiring production and introduction of the report in evidence if it is relevant in proceedings to which he is a

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[70] see section 2(b) of the *Charter*.

[71] The appellant cites Order PO-3325, which determined that the request that is at issue in this order was not frivolous or vexatious.

party.[72] I also note that the judicial review of the arbitration award relating to his dismissal is ongoing.

[170] In a further argument, the appellant submits that the section 65(6) exclusions are arbitrary and contrary to the purposes of the *Act*. He says this means that, under the principle of the rule of law, they are unconstitutional. I disagree with this analysis. The rationale behind section 65(6) is explained in its legislative history. This was discussed in *Ontario (Ministry of Correctional Services) v. Goodis*[73] as follows:

> . . . Subsection 65(6) was added to the Act by the Labour Relations and Employment Statute Law Amendment Act, S.O. 1995, c. 1, s. 82. In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a "package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations" (Ontario, Legislative Assembly, Official Report of Debates (Hansard) (4 October 1995)). The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were "to ensure the confidentiality of labour relations information" (ibid.).
>
> Moreover, s. 65(6) should be interpreted in light of the purpose of the Act, which is found in s. 1. . . .

[171] Two things are immediately clear from this: (1) the legislation that added section 65(6) to the *Act* was considered by the Legislature in light of the purpose of the new section being enacted, and (2) rather than contravening the purpose of the *Act*, section 65(6) is to be interpreted in light of that purpose, as it has been in the jurisprudence, including *Goodis*.

[172] Accordingly, in my view, the appellant's arguments relating to the rule of law and the purposes of the *Act* cannot succeed.

[173] The appellant provided an affidavit with his initial representations, which I have reviewed. In many respects, it makes the same points as the appellant's representations, as already outlined above, but the appellant also includes what he describes as "evidence" of the public importance of the conflict between himself and the university. In that regard, he refers to media coverage dealing with his relationship with the university and the grievance arbitration. He also cites conflicts between the university and others as evidence of the public importance of the university's relations with other employees.

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[72] The implied undertaking rule that constrains the appellant does not constrain the university because the report originated with it, as the body that produced it during the grievance arbitration. See *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, at para. 50.

[73] Cited above, at paras. 25-26.

University's reply representations

[174] In reply, the university clarifies that its purpose in raising the fact that the appellant already has a copy of the report was simply to argue that, since he already has the report, access cannot be a precondition of meaningful discussion.

[175] I have already addressed this argument in the discussion of the university's initial representations, above. I observed that the appellant's use of the records, which include the report, is restricted by the implied undertaking explicitly set out in an interim award issued by the grievance arbitrator. For this reason, I stated the appellant has not had the equivalent of access under the *Act*, and further, the appellant's receipt of a copy of the report, and the other records at issue, subject to the implied confidentiality undertaking, does not negate the possibility that access under the *Act* could be required to permit meaningful discussion.

[176] In response to this submission by the university, I reiterate this point. The issue here is whether access *under the Act* is necessary to permit meaningful discussion of an issue of public importance. The appellant's possession of the records is not the equivalent of access under the *Act*, as it is constrained by the implied undertaking. Again, I do not find the university's argument based on the appellant's constrained possession of the records to be persuasive.

[177] The university also reiterates that it is not a government actor for the purposes of the *Charter*. I have already addressed these arguments, above.

[178] The university characterizes many of the appellant's arguments relating to its alleged misconduct as a quest for evidence of that misconduct, and indicates that nothing in *CLA* ". . . provides an individual with a right of access to a record in order to 'prove' an assertion." While that may be true, I note that without receiving access to the report under the *Act*, the implied undertaking would preclude the appellant from making any comments that would divulge its contents, let alone using it to "prove" anything.

[179] The university amplifies its earlier submissions relating to the fact situations in *CLA* and in this appeal. The university states that in *CLA*, ". . . details regarding the murder investigation and prosecution were already in the public domain as a result of judicial proceedings in respect of same," and here, "the details of the University's treatment of the appellant have already been explored in the public domain through an arbitration process." In *CLA*, these details were contained in a published judgment,[74] and in this appeal, the arbitration process produced reasons in the form of the final arbitral award, which contains significant details of the appellant's relationship with the

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[74] *R. v. Court* (1997), 36 O.R. (3d) 263, 1997 CanLII 12180 (ON SC).

university. This submission goes to the first requirement articulated in *CLA*, which stipulates that disclosure of the records at issue under the *Act* must be necessary to permit the meaningful exercise of free expression on matters of public or political interest. I will discuss this further under "Analysis," below.

[180] Referring to the implied confidentiality undertaking that attaches to the records as produced during the arbitration, the university submits that:

- the restrictions on use resulting from the undertaking were imposed with the consent of the parties, including the union, and the appellant could have challenged them through the union but chose not to;

- the constraints on the appellant's ability to make "meaningful expression" are therefore by his own agreement;

- the appellant could have raised the criticisms of the university set out in his initial representations during the arbitration, and thereby could have made "meaningful expression" at that time; and

- the appellant could have decided to introduce the report into evidence at the arbitration, which would have removed the implied confidentiality undertaking, but did not do so.

[181] I believe that the existence of the confidentiality undertaking is relevant to the appellant's *Charter* challenge, and in particular, to requirement 2 articulated in *CLA*, as discussed under "Analysis," below. However, I am not persuaded by these arguments of the university which, in essence, allege that the appellant is the author of his own misfortune in relation to the confidentiality undertaking.

[182] Again, the question before me is whether disclosure under the *Act* is necessary to permit meaningful expression concerning a matter of public importance, and if so, whether such disclosure is inconsistent with privileges or would interfere with the proper functioning of the university. The appellant's failure to take the steps in the arbitration that could have avoided the confidentiality undertaking applying to the report or other records at issue is not determinative of this issue.

[183] The university also submits that the subject matter on which the appellant wishes to make "meaningful expression" is ". . . actually in essence a continuation of the Appellant's personal dispute with the university regarding the termination of his employment." The university submits that this is a private matter, not a matter of public importance, and therefore does not enjoy *Charter* protection under section 2(b). In support of this, the university refers to the points raised by the appellant in his affidavit and observes that they concern the relationship between the appellant and the university.

[184] Although it would only be necessary to consider this issue if I were to conclude that access under the *Act* is required for meaningful expression, I feel compelled to point out that I do find this argument persuasive. The university is an important publicly-funded institution. Depending on the circumstances, I believe that allegations of impropriety in the university's relationship with its employees, including the appellant, may be a matter of public importance. Because of my conclusions, below, it is not necessary to determine whether that is so in the present case.

[185] With respect to the appellant's "rule of law" arguments, which I have rejected above, the university essentially submits that the basis for granting the *Charter* relief the appellant seeks is the approach articulated by the Supreme Court in *CLA*. For the reasons stated earlier in this order, I agree.

Appellant's sur-reply representations

[186] In sur-reply, the appellant refers to the university's arguments that section 2(b) of the *Charter* does not require disclosure of "evidence" to support meaningful expression, and makes the following submission which, in my view, raises a slightly different question, namely, how much expressive ability constitutes "freedom of expression" and how textured is the information that must be disclosed in order to support it? The appellant submits:

> . . . the [university] is again trying to cast the *Criminal Lawyers* test as whether meaningful expression about any related but broad and generic topic "is possible without the record". . . .

[187] He argues that this view "would render the *Criminal Lawyers* test meaningless." He goes on to focus in particular on the report and the other records at issue, stating that "it is illegal for the Appellant to make expression about the Report, and about other respondent records." [Emphasis in original.]

[188] He states further:

> To be clear, the Appellant argues that to adopt the institution's overly broad alleged interpretation of the words "on a matter" in the Criminal Lawyers test "where access is necessary to permit meaningful discussion on a matter of public importance" — alleged to mean generically about the Appellant's . . . labour conflict with the institution, without needing to include the matters about the Report and about all the records in issue — would, in the circumstances of the instant appeal, lead to a result that makes no logical sense. . . .

[189] With respect to the kind of access that is required under section 2(b), the appellant submits:

> The [university]'s insistence that the case-law phrase "where access is necessary to permit meaningful discussion on a matter of public importance" [citation omitted] in-application [sic] means any generic expression about any broadly-related matter, which does not depend on access, is incorrect. The institution's position would make the [*CLA*] test both meaningless and unconstitutional.

[190] The appellant also states that "generic" is antithetical to "meaningful." In my view, the degree to which access must be provided to comply with section 2(b) is a significant issue. I will discuss it further under "Analysis," below.

[191] The appellant also responds to a number of the university's other arguments made at reply.

[192] He argues that the university's submissions relating to the failure to introduce the records into evidence at the grievance arbitration are without merit and "should be struck." As I have already observed, the *Act* does not contemplate a procedure or "striking" portions of a party's representations. However, in my review of the university's representations, I have already rejected its submissions relating to the fact that the records were not introduced at the arbitration.

[193] In responding to an argument by the university that the IPC has the power to compel production of records claimed to be excluded, which is in fact the case as alluded to earlier, the appellant argues that he must still make fact-dependent arguments without seeing the records, which is the "'absurdity' that is argued by the Appellant." He goes on to say that "[t]he said absurdity occurs if one applies the [*CLA*] test without contextual interpretation and without recognizing that the circumstances of the [*CLA*] case are distinguished from the instant appeal. . . ."

[194] This argument does not stand up to scrutiny. The appellant has the records, and he has discussed them extensively – particularly the report – in his representations in this appeal. Therefore, he has had the opportunity to "contextualize" his arguments. As regards his attempt to distinguish *CLA* from this appeal, I have rejected these arguments in my discussion of the appellant's initial representations, above.

Analysis

[195] The essential issue remaining after the discussion of the parties' representations, above, is whether the requirements developed in *CLA* to establish a breach of section 2(b) have been satisfied in the circumstances of this appeal. If so, subject to any additional analysis that may be required under section 1 of the *Charter*, the possible

outcomes of this appeal include a declaration that section 65(6)3 is unconstitutional, or a finding that it is constitutionally inapplicable in the circumstances of this case.

[196] To reiterate, as determined in *CLA*, in order to conclude that there has been a breach of section 2(b) at first instance, both of the following requirements must be satisfied: (1) access to the information must be necessary for the meaningful exercise of free expression on matters of public or political interest; and (2) if requirement 1 is met, it must also be the case that there are no countervailing considerations inconsistent with disclosure, such as privileges, and/or evidence that disclosure would impair the proper functioning of the university.

Requirement 1: Is access necessary for the meaningful exercise of free expression on matters of public or political interest?

[197] An examination of this requirement reveals two components: (1) is access necessary for the meaningful exercise of free expression? (2) if so, is the subject of the proposed expression a matter of public or political interest?

[198] With respect to item (1), the positions of the parties may be summarized as follows.

[199] The university submits that access is not necessary because the appellant has already demonstrated that he is capable of "meaningful discussion" regarding the university's relationship with its employees. To support this contention, the university refers to websites that serve as vehicles for the appellant's discussion of his dismissal. I have discussed one of these websites, and other examples of the appellant's expressions of opinion concerning his dismissal, above.

[200] The appellant submits that he is absolutely and permanently gagged from discussing the report, and therefore, from "meaningfully contributing to public discourse potentially affecting an array of statutory and policy issues of importance to workers, students and concerned citizens at large." He also states that he has no other way to get access to the report and related records because both the author of the report and the university are refusing access.

[201] In reply, responding to the appellant's arguments that *CLA* is distinguishable (which I have already discussed above, and found that the *CLA* test must be applied in this case), the university submits that the facts here are analogous to those in *CLA* because in that case, details regarding the investigation and prosecution were already in the public domain as a result of judicial proceedings, and in this case, details of the university's treatment of the appellant have already been explored in the public domain through the arbitration process. In *CLA*, the details were contained in a published

judgment,[75] and in this appeal, the arbitration process produced reasons in the form of the final arbitral award, which contains significant details of the appellant's relationship with the university.

[202] In sur-reply, the appellant submits that the *CLA* test is broader than the university says it is, and that because of the implied confidentiality undertaking, "it is illegal for the Appellant to make expression about the Report, and about the other respondent records." He characterizes the university's position as meaning that the ability to make generic expression about any broadly-related matter is sufficient to meet the requirements of section 2(b), and he disputes this approach. He also observes that "generic" is antithetical to "meaningful."

[203] I agree with the university. The appellant has had the opportunity to engage in a very detailed and public expression of opinion about his relationship with the university, including his dismissal and the grievance proceedings that followed it. This is evident from the discussions in the website cited by the university that I looked at. It is also evident from media articles that discuss the situation, and the television interview I have referred to above.

[204] The appellant has asserted that he is not able to discuss the report. However, the report is but one aspect of the appellant's dismissal. In assessing the interests at stake here, the context is significant. The appellant seeks access to the records by applying the *Charter* to invalidate or render inapplicable an enactment of the Ontario Legislature. This is not a finding to be made lightly. Accordingly, I have concluded that the appellant's claim that section 65(6)3 is unconstitutional or constitutionally inapplicable under section 2(b) is not established where the evidence demonstrates that he is able to express himself meaningfully in relation to the subject matter in question, which in this case is his relationship with the university, including his dismissal. In my opinion, the evidence establishes this ability here. Nor, in my view, is he constrained from entering into meaningful public discussion of the university's relationship with its employees.

[205] I also conclude that the facts in relation to freedom of expression are analogous to those in *CLA*. In *CLA*, the court's judgment staying the murder charges contained a great deal of information about the grounds for doing so. However, access to the records, which were reports and other documents containing information relating to the subsequent police investigations, had been denied.

[206] The Court stated:

> In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic

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[75] *R. v. Court*, cited above.

> Racco, and the prosecution of those suspected of that murder, cannot take place under the current legislative scheme. Much is known about those events. In granting the stay against the two accused, Glithero J. stated:
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> > . . . I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. [p. 300]
>
> The record supporting these conclusions is already in the public domain. The further information sought relates to the internal investigation of the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police and the Crown Attorney in this case. It may be that this report should have been produced under the terms of the Act, as discussed below. However, the CLA has not established that it is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

[207] Similarly, in this case, the appellant has engaged in a grievance arbitration process that resulted in an arbitration award that is in the public domain and outlines the university's reasons for dismissing the appellant and his reasons for objecting to it. The university has denied access to records that contain further information about one aspect of the university's process in dismissing the appellant. In my view, the appellant has not demonstrated that access to this further information is necessary for meaningful public discussion of his dismissal, or of the university's relationship with its employees.

[208] That being so, it is not necessary to consider the second component under requirement 1 of the *CLA* test, *i.e.* whether the expression the appellant wishes to engage in is a matter of public or political interest.

[209] Because of my conclusion that access is not required in order for the appellant to exercise the right of free expression concerning his relationship with and dismissal by the university, or concerning the university's relationship with its employees, I find that the first part of the *CLA* test has not been met, and therefore, a breach of section 2(b) of the *Charter* has not been established.

[210] That is sufficient to conclude my discussion of this issue. However, I will also consider the second requirement established in *CLA*.

Requirement 2: Are there countervailing considerations inconsistent with disclosure, such as privileges, and/or would disclosure impair the proper functioning of the university?

[211] As I have already stated, I believe that the implied confidentiality undertaking is relevant to this requirement, and in particular, to the fact that under *CLA*, a section 2(b) claim ". . . may be defeated by factors that remove section 2(b) protection, e.g. if the documents sought are protected by privilege. . . ."[76] Similarly, the Supreme Court in *CLA* refers to the onus on the applicant to "show that the protection is not removed by countervailing considerations inconsistent with production."

[212] From these quotes, it is clear that the Court is using privilege as an example of a circumstance that might be inconsistent with production. Like the implied confidentiality undertaking, the whole point of privileges is to keep information confidential. For example, solicitor-client privilege exists to ensure the confidentiality of communications between lawyers and their clients.[77] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[78] Settlement privilege is ". . . a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute."[79]

[213] In my opinion, the implied confidentiality undertaking under consideration in this case, which applies by virtue of the interim award of the grievance arbitrator, exists for a similar purpose: to ensure that records produced to the opposing party during the arbitration remain confidential unless they are introduced into evidence. Among other restrictions, it provides that "all documents are to be kept confidential as among the parties." As I observed earlier, applying the *Charter* to facilitate access would constitute an "end run" around the implied confidentiality undertaking.

[214] Past decisions have held that the access process under the *Act* is separate from discovery in the context of litigation.[80] In *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*[81], Lane J. had issued an order prohibiting publication of information obtained in the civil discovery process, including publication by third parties. A request was submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to the contents of police files that were to be produced in the discovery process. Lane J. stated that his order in the civil proceeding was not

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[76] at para. 33 of *CLA*.
[77] See *Solosky v. the Queen*, [1980] 1 SCR 821 at p. 835. Also reported at 1979 CanLII 9.
[78] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[79] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para. 31.
[80] See, for example, Order PO-2490.
[81] (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.).

intended to interfere with the operation of *MFIPPA*, and would not bar the publication of records obtained under *MFIPPA*. He stated:

> In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

[215] That decision arose in the context of a situation in which *MFIPPA* applied, and the scheme of exemptions it contains might or might not have come into play. That is a very different situation from the present case, where the impact of the confidentiality undertaking is being considered in a request for *Charter* relief that would render a section of the *Act* either unconstitutional or constitutionally inapplicable. In particular, the question arises under the second requirement established in *CLA* with respect to whether there are countervailing considerations inconsistent with disclosure, such as privileges. In this way, *CLA* requires me to consider whether the implied confidentiality undertaking is such a countervailing consideration.

[216] As I have already noted, privilege is given as an example of a circumstance that is inconsistent with production. There are striking similarities between the impact of privilege, as outlined above, and the confidentiality undertaking imposed during the grievance arbitration. Accordingly, I conclude that the implied confidentiality undertaking is akin to a privilege at law, and must therefore be considered as a circumstance that would be inconsistent with production. This means that, even if the appellant had established that disclosure is necessary for meaningful expression under requirement 1 (which I have found he has not done), there would be no breach of section 2(b) because the second requirement articulated in *CLA* has not been met.

Conclusion

[217] As discussed earlier in this order, in *Doré*,[82] the Supreme Court of Canada stated that in assessing claims under the *Charter*, an administrative law decision-maker ". . . balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives."[83] The Court cites the approach taken to section 2(b) claims under the *Act* in *CLA* as an application of the "administrative law" approach, which *Doré* adopts as an alternative to more traditional

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[82] Cited above.

[83] *Doré* at para. 55.

Charter analysis in the administrative law context. I have already quoted this part of the judgment in *Doré*, but it bears repeating here:

> Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in . . . *Criminal Lawyers' Association*. . . .[84]

[218] Having applied the template provided by *CLA*, I have followed the approach advocated in *Doré*. Moreover, my finding that section 2(b) has not been breached is consistent with the analysis advocated in *Doré*. As noted in *Ontario (Ministry of Correctional Services v. Goodis)*,[85] the legislative history of section 65(6) shows that its purpose was "to ensure the confidentiality of labour relations information." Given the wording of the section, this purpose must also include protecting the confidentiality of information about relations with employees. In this case, even without access under the *Act*, the appellant has had the opportunity to engage in a very detailed and meaningful public expression of opinion concerning his relationship with the university, including his dismissal and the grievance proceedings that followed it. He is not constrained from meaningful public discussion of the university's relationship with its employees. This respects the appellant's section 2(b) rights while also honouring the statutory purpose of section 65(6).

[219] For all these reasons, I find that the appellant's claim for *Charter* relief must fail.

Issue C. Did the university conduct a reasonable search for records?

[220] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[86]

[221] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[87] To be responsive, a record must be "reasonably related" to the request.[88]

[222] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[89]

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[84] Para. 32 of *Doré*. See also footnote 37.
[85] Cited above.
[86] Orders P-85, P-221 and PO-1954-I.
[87] Orders P-624 and PO-2559.
[88] Orders P-880 and PO-2554.
[89] Orders M-909, PO-2469 and PO-2592.

[223] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[90]

[224] In this case, the request was for access to a report prepared by a psychiatrist, relating to the appellant, and any other records "about the report." In both his initial and sur-reply representations, under the heading "Order requested," the appellant requests the following:

- an express finding that the search was inadequate, in that there is proof that there are more responsive records, including those used in making the Report, and including all meeting notes about preparing or using the report;

- An Order that a new search be performed, which is not limited to the offices of outside counsel and which includes a number of specified areas at the university.

Representations of the parties

Appellant's initial representations

[225] In his initial representations and affidavit, the appellant submits that:

- various written and audio records were used by the psychiatrist in preparing the report;

- such records are responsive to the request and have not been produced;

- the psychiatrist's interview notes relating to an interview he conducted while preparing the report would be a responsive record;

- the university's decision letter "appears to state" that only its external counsel's offices were searched, but no university offices were searched;

- the search is therefore inadequate.

[226] He also states:

> The Appellant seeks the Adjudicator's directions on how best to include the important issue of incomplete search. *The Appellant would not object*

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[90] Order MO-2246.

> *at this stage to postponing a resolution of the incomplete search issue until after the Adjudicator's determination is made concerning access to the report.* [Emphasis added.]

University's reply representations

[227] The university submits:

> As suggested by the appellant, consideration of this issue should be deferred until after the application of s. 65(6) is determined. If the IPC accepts the University's submission that [the report] is a communication about an employment-related matter in which the University has an interest, then all records with "some connection" to the Report are excluded from the *Act* under s. 65(6)3, and further searches for those records would be moot. If the IPC rejects the University's submissions, then the university would be pleased to address the reasonableness of its searches at that time.

Appellant's sur-reply representations

[228] Given the appellant's statement in his initial representations to the effect that he would "not object at this stage to postponing a resolution of the incomplete search issue," it is somewhat surprising that he would open his submissions on this issue at sur-reply with the following statement:

> Contrary to the institution's statement [paragraph reference omitted], the Appellant did not suggest that "this issue should be deferred until after the application of s. 65(6) is determined". . . .

[229] While it is true that the appellant's comment relating to deferring this issue does not specifically refer to section 65(6), the appellant's initial representations clearly stated that the issue could be deferred.

[230] He also observes that the university had a duty to respond to his "evidence-based" submissions on this issue but instead remained silent. Given the appellant's statement that the issue could be deferred, I disagree. Moreover, as already noted, the failure of a party to respond to a particular argument does not mean that that I am bound to accept that argument. It is my responsibility to weigh the evidence and argument that has been presented.[91]

[231] The appellant also refers to a judicial finding that does not appear to address the existence of additional responsive records in relation to the request that is at issue here

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[91] See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)*, cited above.

(*i.e.* records "about the report"). For reasons of confidentiality, I will not elaborate further on this judgment.

[232] He then submits that:

> . . . in the circumstances of this case, the [IPC] has the jurisdiction and the duty to request and examine all the respondent records obtained by a new and complete search, as these could be material to the main issues in the instant appeal.

[233] Here, the appellant attempts to conflate the issue of reasonable search with the supposed "duty" of this office to order new searches in order to assist with the adjudication of this appeal.

[234] Although section 52(4) permits this office to require production of and examine any record in the custody or under the control of an institution, I have concluded that the evidence and argument before me are sufficient to permit the adjudication of the issues in this case without requiring the production of the additional records the appellant identifies, all of which appear to be documents that were referred to or relied on by the psychiatrist in his preparation of the report. Moreover, beyond the bald assertion I have just quoted, the appellant makes no suggestion as to how these records could be relevant to my determinations under section 65(6) of the *Act* or section 2(b) of the *Charter*.

Analysis

[235] Given the appellant's suggestion to defer the determination of this issue and the university's acceptance of it, and in spite of the appellant's attempt to resile from his earlier position, I could simply defer the issue and decide it in a future order.

[236] However, as the issue can be resolved now, there is no need to defer.

[237] As I have noted, the appellant's request was for access to a report prepared by a psychiatrist, relating to himself, and any other records "about the report." The primary records identified by the appellant and claimed by him to be responsive, in addition to those located by the university, are various written and audio records used by the psychiatrist in preparing the report, as well as interview notes he would have created in the course of preparing it.

[238] In my view, such records, which were underlying records relied on in preparing the report, as opposed to records describing or commenting on it, cannot reasonably be said to be "about the report." "About" in this context can be defined as "on the subject

of; concerning"[92] A record that pre-existed the completion of the report and does not comment on it cannot reasonably be said to be "about" the report. Accordingly, such records are not "reasonably related" to the request[93].

[239] As noted above, under the heading "Order requested," in his representations, the appellant also refers to "*meeting notes* and *communications* about preparing or using the report." [Emphasis added.] In my view, such additional records, if they existed, would be excluded from the application of the *Act* under section 65(6)3, as the university submits, for essentially the reasons given above in my discussion of that provision.

[240] As they are described by the appellant, it is clear that such additional records, if they existed, would have been collected, prepared, maintained or used by or on behalf of the university in relation to meetings, consultations, discussions or communications about the termination of the appellant's employment, which I have already found to be an employment-related matter in which the university has an interest. The records described by the appellant, if they existed, would either be prepared in relation to "communications" because they actually consist of communications, like the records under adjudication in this order, or they would have been prepared, used, etc. in relation to meetings.

[241] It is also clear that, if they were responsive, any written and audio records used by the psychiatrist in preparing the report, as well as interview notes he would have created in the course of preparing it, would also be excluded under section 65(6)3 for these same reasons.

[242] Accordingly, there is no basis to order the university to conduct further searches.[94] The appellant's appeal on the issue of reasonable search is therefore dismissed.

Additional Issue: The appellant's privacy concerns

[243] Under "Order Requested" at the end of both his initial and sur-reply representations, the appellant asks for "A Commissioner's undertaking to investigate the [university] for possible violations of the *Act*, given the evidence provided in the instant submissions."

[244] As I have pointed out previously, I am adjudicating an access appeal, not a privacy complaint. There is an established process for filing a privacy complaint with

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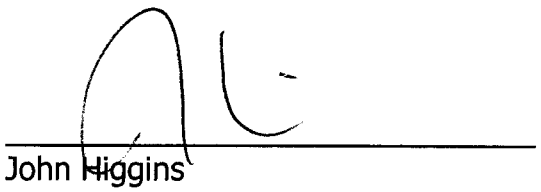
[92] Oxford online dictionary: https://en.oxforddictionaries.com/definition/about
[93] Orders P-880 and PO-2554.
[94] Similar determinations were reached in Orders MO-1412, PO-2015-F and PO-3004.

this office which the appellant should follow if he wishes to initiate such a complaint concerning the preparation of the report or any other matter.[95]

ORDER:

This appeal is dismissed.



January 12, 2017

John Higgins
Adjudicator

[95] An explanation of the complaint process is found at https://www.ipc.on.ca/privacy/processing-privacy-complaints/. The complaint form is found at https://www.ipc.on.ca/wp-content/uploads/Resources/cmpfrm-e.pdf.

[131]

DENIS RANCOURT
Applicant

- and -

UNIVERSITY OF OTTAWA
Respondent

Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at OTTAWA

APPLICANT'S APPLICATION RECORD

(JUDICIAL REVIEW OF IPC TRIBUNAL DECISION)

Dr. Denis Rancourt
[redacted]
Ottawa, ON [redacted]
Tel.: [redacted]
Email: [redacted]

Applicant

[132]

Court File No. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

- and -

UNIVERSITY OF OTTAWA

Respondent

PUBLIC RECORD OF PROCEEDINGS OF THE RESPONDENT INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

VOLUME 1 OF 3

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Court File No. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N :

DENIS RANCOURT

Applicant

- and -

UNIVERSITY OF OTTAWA

Respondent

PUBLIC RECORD OF PROCEEDINGS OF THE RESPONDENT INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

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B. Severed affidavit of the applicant [paragraphs 35(c), 35(e) and Exhibit "1" redacted], dated April 13, 2015 – see Tab 3 of the Private Record for unsevered version of the affidavit. A copy of the Report attached as Exhibit "1" of the affidavit can be found at Tab 1 of the Private Record
C. CD-ROM containing the Book of Authorities and Exhibit "26" of the applicant's affidavit (TVO interview of the applicant), [copy of disk received by the Commissioner also included electronic copies of the full representations dated, April 14, 2015 and affidavit dated, April 13, 2015 of the applicant - see Tabs 50A and 50B of the Public Record]

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Court File no. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

-and-

UNIVERSITY OF OTTAWA

Respondent

-and-

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Intervenor

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Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

-and-

UNIVERSITY OF OTTAWA

Respondent

FACTUM OF THE RESPONDENT, UNIVERSITY OF OTTAWA

OVERVIEW

1. On January 12, 2017, Adjudicator John Higgins (the "Adjudicator") of the Information and Privacy Commissioner of Ontario (the "IPC") issued a thorough and well-reasoned decision dismissing an Appeal by Denis Rancourt (the "Applicant"), which had alleged that Section 65(6) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA" or the "Act") was unconstitutional.

   ***Order PO-3686,* Record of Proceedings of the Respondent Information and Privacy Commissioner of Ontario at Tab 61A.**

2. The Applicant had filed a request to the University of Ottawa (the "University") under the Act for a medical report and associated documents relating to the Applicant's employment, which was terminated in 2009 (the "Request"). The Applicant had already received a copy of the Report through the production process in the labour arbitration proceedings regarding the termination of his employment. The Applicant filed his request seeking to obtain a fresh copy of the Report, which would not be subject to the undertakings of confidentiality which were a condition of the production process in those proceedings. The University denied his Request on the basis that the Report and associated documents were excluded from the Act pursuant to s. 65(6)3, which excludes certain records about labour and employment-related matters from the scope of the *Act*.

3. The Applicant alleged before the IPC that the University's refusal to disclose the documents breached his rights under the *Canadian Charter of Rights and Freedoms*, including by limiting his ability to make meaningful expression on the relationship between the University and its employees. The Adjudicator correctly applied the decision of the Supreme Court of Canada in *Ontario (Public Safety) v. Criminal Lawyers' Association*, which held that the freedom of expression guaranteed by s. 2(b) of the *Charter* may include a derivative right of access to information in the hands of government, arising only where access is "a necessary precondition of meaningful expression on the functioning of government." The IPC found that the Applicant had been able to make meaningful expression without access to the document, and so he had failed to establish that the *Criminal Lawyers* right of access was engaged in this case.

> ***Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) (the "*Charter*").**
>
> ***Ontario (Public Safety) v. Criminal Lawyers' Association*, 2010 SCC 23 ("*Criminal Lawyers Association*").**

4. Since the IPC's decision, the University has elected to provide the Applicant with a fresh copy of the Report, outside of the framework of the *Act*. The University submits that this Application is now moot and should be dismissed accordingly. The University will make a preliminary Motion to this effect at the outset of the hearing of this matter.

> **Affidavit of Michelle Groundwater sworn October 20, 2017.**

5. In the alternative, the Applicant now has an unrestricted copy of the Report he is seeking, and furthermore has had ample opportunity to make meaningful expression on the University's relationship with its employees over the past ten (10) years. The IPC was correct to find that the Applicant cannot meet the onus of establishing that his s. 2(b) rights were engaged in this case, and the IPC's finding should not be disturbed. This Application should be dismissed, with costs to the Respondent.

PART I – SUMMARY OF FACTS

6. The Applicant is a former employee of the University. His employment was terminated by the University in March 2009.

Submissions of the University of Ottawa dated Dec 19, 2014 to the IPC, IPC Record Tab 45, at para. 41 (the "University's December 2014 Submissions").

7. The Applicant's union, the Association of Professors of the University of Ottawa ("APUO"), filed various grievances on his behalf, including in relation to the termination of his employment. The termination grievance was advanced through a process of labour arbitration, culminating in a hearing which was conducted before Arbitrator Claude Foisy, QC, resulting in an Award which upheld the termination of the Applicant's employment by the University. The APUO has applied for judicial review of the Award.

University's December 2014 Submissions, at para 47

***University of Ottawa and Association of Professors of the University of Ottawa*, unreported, January 27, 2014 (CH Foisy).**

The Records

8. In the course of the arbitration process, the University disclosed large volumes of documents to the Appellant, through the APUO.

University's December 2014 Submissions, at para 48.

9. Included among these documents was a medical report, prepared by Dr. Louis Morissette at the request of the University and dated December 12, 2008 (the "Report"). The Report was obtained by the University in respect of matters relating to the Applicant's employment.

University's December 2014 Submissions, at para. 9 and para. 14.

Report, Private Record of Proceedings of the Respondent Information and Privacy Commissioner of Ontario, Tab 1.

10. Arbitrator Foisy issued an Interim Order on or about October 27, 2011, in relation to the production of documents in the arbitration (the "Confidentiality Order"). The Confidentiality Order provided, *inter alia*:

> *[32] The Employer is also seeking an Order pertaining to the confidentiality of documents. The parties are in agreement on the principle that documents*

[147]

produced in arbitration proceedings are subject to an implied undertaking with respect to maintenance of their confidentiality. Further to their respective oral representations before me, they have agreed to the following Order, which is taken from a recent decision of the Ontario Labour Relations Board in Morris Brown & Sons Co. V. UFCW Canada, Local 1993. I therefore issue the following confidentiality Order:

(A) The parties to the proceedings are directed:

i) to comply with the following directions;

ii) to direct their agents, officers, employees and counsel to comply with the following directions; and

iii) to obtain the agreement of any third party to whom they might properly give any of the documents that such third party shall comply with the following directions.

(B) With respect to the use of documents produced, all parties are directed to follow these requirements:

i) all documents are to be kept confidential as among the parties;

ii) no copies are to be made of any document except for the purpose of the hearing of these applications;

(iii) no copies are to be circulated to third parties, except as necessary for the conduct of the litigation of these applications, and once that purpose has been completed the copies are to be retrieved from the third parties;

(iv) the documents are to be used for the purpose of this hearing only and for no other or improper purpose;

(v) all copies of all documents are to be returned to the provider of the documents at the conclusion of these applications and any judicial review proceedings arising out of these applications, save for one copy to be retained by each counsel in their file; and

(vi) no commercial information contained in any of the documents, and in particular no financial information found in a document, shall be disclosed to any person except for the purposes of these applications, or except as required by law.

***University of Ottawa and Association of Professors of the University of Ottawa*, 2011 CanLII 98078, at para. 32 ("Foisy Interim Decision").**

11. The effect of the Confidentiality Order was to prohibit the Applicant from using or disclosing the Medical Report for any purpose other than the purpose of the Arbitration Proceedings in relation to his termination. The Confidentiality Order ceased to apply to any documents which, after being produced, were entered into evidence in those Proceedings.

12. After receiving the Report through the University's production to the APUO, the Applicant filed a request under *FIPPA* with the University on or about October 31, 2012, seeking a copy of the Report and all related documents. The Applicant's intention in doing so was to obtain a copy of the Report which was not subject to the restrictions in the Confidentiality Order.

13. The University initially rejected the Applicant's request on the basis that it was frivolous and vexatious. The Applicant appealed, and the IPC directed the University to issue a decision regarding release of the Medical Report.

> ***Order PO-3686*, at para. 5.**
>
> ***Order PO-3325*, Record of Proceedings of the Respondent Information and Privacy Commissioner of Ontario at Tab 29A.**

14. The University issued a decision denying access to the Medical Report and other responsive records, on the basis of the exclusion in s. 65(6) of the *Act*. The Applicant appealed that decision to the IPC, and served a *Notice of Constitutional Question* alleging that s. 65(6) of the Act is unconstitutional because it violates his freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

> ***Order PO-3686*, at para 7.**
>
> **Notice of Constitutional Question, Public Record, Tab 36D, at para. 6 (p. 249) ("NCQ").**

15. The Notice of Constitutional Question described the legal basis for the constitutional question before the IPC as follows:

> *In the instant case, the exclusion embodied in s. 65(6) of the* Act *significantly impairs the appellant's ability to obtain the documents sought, and the documents sought are a necessary precondition for making meaningful expression about the institution's practices affecting its employees, and tenured university professors in*

particular, but also affecting university students and the public at large.

NCQ, at para. 6 (p. 249).

The Decision Under Review

16. The Appeal was assigned to IPC Adjudicator John Higgins, who received and considered multiple rounds of submissions from the University and the Applicant. He issued a decision which reviewed these submissions at length.

***Order PO-3686*, at paras 10-12.**

17. The Adjudicator noted that he had reviewed all of the evidence and argument submitted by the parties, and confirmed that he would reference only those arguments and only that evidence which he found relevant to the questions before him. He affirmed his jurisdiction and responsibility to weigh the evidence and argument advanced, and to assess its credibility and cogency.

***Order PO-3686*, at paras. 14-15.**

18. The Adjudicator held that the Medical Report and other responsive records were excluded from the *Act* by virtue of s. 65(6)3. The Applicant does not challenge this finding on this Application.

***Order PO-3686*, at paras. 71-75.**

19. The Adjudicator then considered the Applicant's arguments that s. 65(6)3 was unconstitutional. The IPC specifically rejected his argument that s. 65(6)3 breached his alleged *Charter* right to privacy, finding that the *Charter* does gave rise to a positive obligation to provide statutory protection to the privacy of personal information held by government institutions.

***Order PO-3686*, at paras. 122-124.**

20. The Adjudicator rejected the Applicant's further arguments that the exclusion of the Records from the scope of *FIPPA* breached the *International Covenant on Civil and Political Rights*.

***Order PO-3686*, at paras. 126-138.**

[150]

21. The Adjudicator reviewed and accepted the test in *Criminal Lawyers' Association*, including the requirement that the Applicant bear the burden of showing that access to the Records was necessary for the meaningful exercise of free expression on matters of public interest.

***Order PO-3686*, at paras. 102, 142.**

22. The Adjudicator reviewed the material submitted by the University which established that the Applicant had engaged in "meaningful expression" regarding his alleged mistreatment by the University, and found as follows:

> *[146] The university also argues that since his dismissal, the appellant has engaged in "meaningful expression" regarding his alleged mistreatment by the university, and that he maintains websites dedicated to highlighting events at the university that he believes warrant public discussion, including repeated and public questioning of the university's approach to his employment and dismissal. The university provides links to these websites, only one of which appears to be functional at the present time.*
>
> *[147] The website that remains active contains many posts that illustrate the university's point, including the following:*
>
> • *commentary on the arbitration process and the progress of the judicial review of the arbitration award;*
>
> • *commentary on the disclosure process within the arbitration;*
>
> • *commentary on the appellant's dismissal and the legal proceedings that followed it;*
>
> • *links to media stories about the appellant and the grievance arbitration;*
>
> • *video links to commentary by the appellant and others concerning his suspension, dismissal and treatment by the university; and*
>
> • *critical references to the university's tactics in connection with the dismissal of the appellant.*
>
> *[148] The website also attributes the views it sets out to the appellant, unless stated otherwise.*
>
> *[149] One of the video links is a television interview with the appellant, which the university describes as "a vivid summary" of the conflict between the appellant and the university. I have reviewed the interview. It represents a significant expression*

> *of opinion by the appellant concerning his relationship with the university. Another is a link to a trailer for a film documentary, in which the appellant is prominently featured expressing his views about the university's decision to dismiss him.*
>
> ***PO-3686*, at paras. 146-149.**

23. The Applicant himself put substantial volumes of evidence before the Adjudicator revealing his own meaningful expression on his relationship with the University, including some forty-five (45) media articles, many of which contain interviews with or comments from the Applicant regarding his relationship with the University and the termination thereof, as well as his treatment by the University more broadly.

> **Applicant's Affidavit, dated April 13, 2015, Private Record of Proceedings of the Respondent Information and Privacy Commissioner of Ontario, at tab 3, p. 89.**

24. The Adjudicator ultimately accepted the University's arguments on this point:

> *[203] I agree with the university. The appellant has had the opportunity to engage in a very detailed and public expression of opinion about his relationship with the university, including his dismissal and the grievance proceedings that followed it. This is evident from the discussions in the website cited by the university that I looked at. It is also evident from media articles that discuss the situation, and the television interview I have referred to above.*
>
> *[204] The appellant has asserted that he is not able to discuss the report. However, the report is but one aspect of the appellant's dismissal. In assessing the interests at stake here, the context is significant. The appellant seeks access to the records by applying the Charter to invalidate or render inapplicable an enactment of the Ontario Legislature. This is not a finding to be made lightly. Accordingly, I have concluded that the appellant's claim that section 65(6)3 is unconstitutional or constitutionally inapplicable under section 2(b) is not established where the evidence demonstrates that he is able to express himself meaningfully in relation to the subject matter in question, which in this case is his relationship with the university, including his dismissal. In my opinion, the evidence establishes this ability here. Nor, in my view, is he constrained from entering into meaningful public discussion of the university's relationship with its employees.*
>
> …
>
> *[207] Similarly, in this case, the appellant has engaged in a grievance arbitration process that resulted in an arbitration award that is in the public domain and outlines the university's reasons for dismissing the appellant and his reasons for objecting to it. The university has denied access to records that contain further information about one aspect of the university's process in dismissing the appellant. In my view, the appellant has not demonstrated that access to this*

> *further information is necessary for meaningful public discussion of his dismissal, or of the university's relationship with its employees.*
>
> **PO-3686, at para. 203.**

25. The Adjudicator held that it was unnecessary to determine whether the proposed expression by the Applicant was on a matter of public importance, as alleged by the Applicant, or on an essentially private matter, namely his employment relationship with the University, as the University argued.

> **PO-3686, at para. 184, 208.**

26. Because the Adjudicator found that disclosure of the Records was not required for the Applicant to make meaningful expression on his relationship with and dismissal by the University, nor concerning the University's relationship with its employees, he held that the *Criminal Lawyers' Association* test was not met and a breach of s. 2(b) was not established.

> **PO-3686, at para. 209.**

27. The Adjudicator further held, in reasons which are effectively *obiter*, that the existence of the confidentiality order in the Interim Award was a countervailing consideration which would weigh against a finding that s. 2(b) was engaged on the test set out in *Criminal Lawyers' Association*. The Adjudicator was clear that this finding was not necessary to his conclusion that the Applicant's s. 2(b) *Charter* right was not engaged, and therefore could not be breached.

> **PO-3686, at para. 216.**

28. The Adjudicator rejected the Applicant's claim that the University's search for responsive records was unreasonable, on two grounds. First, that the further records which the Applicant alleged existed (records relied upon by Dr. Morissette in preparing the Report), could not reasonably be said to be records "about the report" and therefore were outside the scope of the request. Second, that any further records about the Report would also be excluded from the Act under s. 65(6)3. The Adjudicator declined to Order the University to conduct a further search for records.

> **PO-3686, at paras. 237-242.**

[153]

PART II – RESPONDENT'S POSITION ON APPLICANT'S ISSUES

Preliminary Issue: Mootness

29. Subsequent to the Adjudicator's Decision, the University has elected to voluntarily provide the Applicant with a copy of the Report, outside the framework of the *Act*. This additional copy of the Report is not subject to the Confidentiality Order in the Interim Decision.

Affidavit of Michelle Groundwater, sworn October 20, 2017.

30. A Court may decline to decide a case which raises merely a hypothetical or abstract question, and in which the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties.

***Borowski v. Canada (Solicitor General)*, [1989] 1 S.C.R. 342, at 353.**

31. Determining whether a proceeding should be dismissed for mootness requires a two-step analysis. First, the court must determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if so, the court must decide whether to exercise its discretion to nonetheless hear the case.

***Borowski*, at 353.**

32. An Application for Judicial Review may be quashed for mootness:

> *[18] A case will therefore be moot if there is no live controversy between the parties. There is no live controversy where the question before the Court has ceased to exist or the substratum of the litigation has disappeared. Further, there is no live controversy where a decision on the merits would have no practical effect on the parties' rights or where the question the Court is now being asked to resolve has been overtaken by post-decision events or a subsequent decision of a board (as in this case). It is not enough that a party has a continuing interest in the outcome of the litigation.*

***Stewart v. IPD*, 2013 ONSC 7907, at para. 18 ("*Stewart*").**

33. The Applicant's Appeal and this Application sought production of the Report and "related records". The University located the Report and four (4) other records in its search. The four (4) related records have all been entered into the public record in this proceeding. The Report is the only remaining record is issue and this Application is, at heart, about whether or not the Applicant should be provided with a copy of that Report pursuant to his rights under the *Charter*. The University's decision to voluntarily release the Report outside of the *FIPPA*

framework ends the live controversy between the parties.

34. In exercising its discretion on the second step of the test, the Court will consider three factors:

> *(a) The presence of an adversarial context;*
>
> *(b) the concern for judicial economy; and*
>
> *(c) the need for Court to be sensitive to its role as the adjudicative branch in our political framework.*
>
> ***Stewart* at para. 30.**
>
> ***Mental Health Penetanguishene*, 2010 ONCA 197, at paras. 38-42 ("*MHP*").**

35. The first factor requires that there be an adversarial context between the parties for the case to proceed despite the lack of a live controversy. However, while required, a continued adversarial context between the parties clearly does not in and of itself warrant proceeding with a dispute which is otherwise moot.

> ***MHP*, at para. 38.**

36. The second factor recognizes that the courts should ration scarce judicial resources, and absent special circumstances should not expend those resources on moot cases. Special circumstances may arise where there are significant practical effects on the parties, where the matter is likely to recur and is evasive of judicial review, or where the issues are of such public importance that it warrants a continuation of the hearing.

> ***MHP*, at para. 38.**

37. Even if a matter is likely to recur, this is not in itself sufficient to override judicial economy and warrant proceeding with a case which is moot. As the Supreme Court noted in Borowski: "*It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved."*

> ***Borowski*, at 361.**

38. Similarly, "public importance" alone is not enough to warrant spending judicial resources on a dispute: "*Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient… There must, therefore, be the additional ingredient of*

social cost in leaving the matter undecided."

***Borowski*, at 362.**

39. The third factor emphasizes that the Court should not overstep its role as adjudicator and trespass on the law making functions of the legislative branch:

> *The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.*
>
> ***Borowski*, at 362.**

40. The factors set out above do not support an exercise of the Court's discretion to proceed with the case despite its mootness.

41. Moreover, the test articulated in *Criminal Lawyers Association*, reviewed below, makes it clear that the question of whether or not a *Charter* right of access to documents in the hands of government depends entirely on the facts of the dispute between the parties – can the Applicant establish that without access he is unable to make meaningful expression on a matter of public importance? The Court should be particularly reluctant in this context to exercise its discretion to proceed without a live controversy.

42. For these reasons, the University submits that this Application should be dismissed for mootness.

Standard of Review

43. The University agrees that the appropriate standard of review for a tribunal's interpretation and application of the *Charter* is correctness. The University submits that the Adjudicator's interpretation and application of the *Charter* was correct.

The Framework in *Criminal Lawyers Association*

44. It is essential to correctly define the *Charter* issue in dispute. The Applicant in his Factum, at paragraphs 17 and 18 , sets out his interpretation of the *Oakes* framework for assessing

the constitutional validity of a statute. This confuses the real *Charter* issue before this Court, which is straightforward.

45. By emphasizing the *Oakes* test, and the question of whether a law which violates *Charter* protected rights can nonetheless be justified under s. 1, the Applicant avoids the real issue. Properly defined, the real *Charter* issue in this case is simple: *Does the Applicant's inability to access the Records through a request under the* Act *engage his* Charter *rights?*

46. For the Applicant's *Charter* rights to be violated, a *Charter* right must be engaged. For the reasons detailed below, the Applicant's arguments for a *Charter* right to privacy have no merit. The only *Charter* right which could possibly be engaged in the circumstances is the s. 2(b) guarantee of freedom of expression. Section 2(b) of the *Charter* provides that:

> *2. Everyone has the following fundamental freedoms:*
> *...*
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
>
> ***Charter*, s. 2(b).**

47. Section 2(b) does not provide an explicit right of access to documents in the hands of a government institution. However, the Supreme Court of Canada has held that such a right may arise in some circumstances.

> ***Criminal Lawyers' Association*, at Para. 30.**

48. The relevant framework in this case is therefore not the *Oakes* test, but that in the Supreme Court's decision in *Criminal Lawyers' Association*. The Adjudicator correctly applied this framework and found that access to the Records did not engage the Applicant's s. 2(b) rights in this case, and the Applicant therefore could not establish that his *Charter* rights had been violated.

The Decision in Criminal Lawyers Association

49. The documents at issue in *Criminal Lawyers' Association* were a report and two documents containing legal advice in relation to an investigation into alleged police misconduct. The

Criminal Lawyers' Association filed a request under the *Act* for the documents. The Minister refused on the basis of the exemption in s. 19 of the *Act* for solicitor-client privilege, and the exemption in s. 14 of the *Act* for law enforcement records.

***Criminal Lawyers' Association,* at paras 12-13.**

***FIPPA*, ss. 14 and 19.**

50. Section 23 of the *Act* provides for a further review by the institution of exempt records, applicable to only some exemptions (not including s. 14 or s. 19). Section 23 requires that the institution determine whether release of the records is in the public interest, notwithstanding the fact that they would otherwise be exempt from disclosure. On appeal to the IPC and through the lower courts, the Criminal Lawyers' Association argued that the exclusion of s. 14 and s. 19 from the scope of the public interest provision in s. 23 was unconstitutional.

***FIPPA*, s. 23.**

51. On appeal to the Supreme Court of Canada, the Court was asked to determine whether s. 23 of the *Act* was unconstitutional. The Court held that it was not, but confirmed that in limited cases, the freedom of expression guaranteed by s. 2(b) of the *Charter* can provide a protected derivative right to access to government information:

> *For the reasons that follow, we conclude that s. 2(b) does not guarantee access to all documents in government hands. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.*

This was a new right, and a deviation from past case law interpreting s. 2(b).

***Criminal Lawyers Association,* at para. 30.**

52. The *Charter* does not explicitly provide a constitutional right of access to government information. In fact, such a right was considered and explicitly rejected by the framers of the *Charter*. Similarly, jurisprudence prior to *Criminal Lawyers* had recognized that s. 2(b) did not provide "a general constitutional right of access to all information under the control of government."

> **Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 43 (January 22, 1981), at 101 (Mr. McGrath), 101, 105-106, 116 (General Debate), ("Minutes of the Special Joint Committee on the Constitution.**
>
> ***Ontario (Attorney General) v. Fineberg*, (1994) 19 O.R. (3d) 197, at 204, as quoted in *Criminal Lawyers Association*, at para. 35.**

53. In its previous jurisprudence on s. 2(b), the Supreme Court had stressed that s. 2(b) provides "negative" freedoms from state interference, rather than "positive" rights to some government action, most recently, the Court in *Baier v. Alberta* held that in order to demonstrate that s. 2(b) required some positive government action, a party must show:

> *1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime;*
>
> *2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and*
>
> 3) *that the government is responsible for the inability to exercise the fundamental freedom.*
>
> ***Baier v. Alberta*, [2007] S.C.J. No. 31 ("*Baier*"), at para. 30.**

54. Although the Court in *Criminal Lawyers Association* noted that it had been urged to apply the *Baier* test, it elected to apply a different analysis. The Court held that the real issue was whether s. 2(b) was engaged at all:

> *The main question in this case is whether s. 2(b) is engaged at all. We conclude that the scope of the s. 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.*
>
> ***Criminal Lawyers Association*, at paras. 30 and 31.**

55. The Court articulated the following test for whether the new right is engaged in a particular case:

> *(1) Is access necessary to permit meaningful discussion on a matter of public importance?*
>
> *(2) If (1) is satisfied, is section 2(b) protection nevertheless removed because requiring access to the documents would impair a privilege or the functioning of the affected government institution?*
>
> *(3) If (1) and (2) are satisfied, section 2(b) is engaged. However, section 2(b) is only breached if it can be shown that the state has infringed that protection.*
>
> ***Criminal Lawyers Association*, at para. 33.**

56. The Court may not have applied the *Baier* test, but it was still clearly informed by the principle that s. 2(b) should require positive government action only in extremely limited circumstances. Arguably, the test from *Criminal Lawyers* is in fact narrower than the test in *Baier*, as it imposes a test of necessity, rather than substantial interference with expression.

57. The *Criminal Lawyers Association* right to documents is not freestanding. It is a derivative right, arising from an individual's s. 2(b) freedom of expression only where the appellant can demonstrate the existence of specific preconditions. If s. 2(b) is not engaged, then the *Charter* has no application, and the *FIPPA* simply applies as usual.

58. The Adjudicator correctly applied this test, and determined that the Applicant could not show that his s. 2(b) rights were engaged in this case, and therefore that he could not show that s. 65(6) violated his *Charter* rights.

The Statutory Context

59. The Applicant is correct that the statutory context is important. However, throughout his Factum, the Applicant paints s. 65(6)3 as an unusual and outrageous exclusion of information from the *Act*. This is not accurate.

60. Section 65(6)3 reads as follows:

> *65 (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:*
> *…*
> *3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.*

Section 65(6) includes other exclusions of a similar nature, but they were not relied on by the University and are not in issue before this Court.

***FIPPA*, s. 65(6)3.**

61. Section 65(6)3 remains subject to s. 65(6)7, which preserves the application of the *Act* to a range of categories of documents:

> *(7) This Act applies to the following records:*
>
> *1. An agreement between an institution and a trade union.*
> *2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.*
> *3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.*
> *4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.*

FIPPA, s. 65(7).

62. It is also clear from other sections of the *Act* that s. 65(6)3 is not intended to exclude all information about employees of a public institution. For example, "personal information" is defined in s. 2(1) to include "employment history." Moreover, s. 21, which governs the disclosure of personal information in response to a request under the *Act*, includes specific provisions for employment history, the disclosure of which is presumed to be an unjustified invasion of privacy, and information which "discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister," the disclosure of which is expressly stated not to be an unjustified invasion of privacy.

***FIPPA*, s. 2(1), 21(3)(d), and 21(4)(a).**

63. Section 65(6) was also enacted with a specific purpose in mind, and has over the years been subject to reasonable limits established by the Courts. This history is thoroughly canvassed in the recent decision of this Court in *Ontario (Ministry of Community and Social Services) v. Doe.*

> ***Ontario (Ministry of Community and Social Services) v. Doe*** **(2014), 2014 ONSC 239, 120 O.R. (3d) 451 ("MCSS").**

64. In enacting s. 65(6), the Legislature sought to "ensure the confidentiality of labour relations information."

> **Ontario, Legislative Assembly,** ***Official Report of Debates (Hansard)*****, 36th Leg., 1st Sess. (October 4, 1995), (Hon. David Johnson), quoted in** ***MCSS*****,** ***supra*** **note 3 at para. 37.**

65. This was subsequently explained in response to a question as to whether labour relations documents would be excluded from the Act under s. 65(6):

> *Yes. This change brings us in line with the private sector. Previously, orders under the Act made some internal labour relations information available (e.g. grievance information, confidential information about labour relations strategy, and other sensitive information) which could impact negatively on relationships with bargaining agents. That meant that unions had access to some employer labour relations information while the employer had no similar access to union information…*
>
> **Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (November 10, 1995), quoted in** ***MCSS*****, at para 37.**

66. The Legislature's move to protect the confidentiality of labour relations information recognizes that the role of a public institution as an employer, and its relationship with its employees is essentially a matter of private rather than public importance.

67. The scope of s. 65(6) has been interpreted by the Courts in a manner which preserves the distinction between the protected, essentially private interests of an institution as an employer, and the public interest of transparency in the operation of a public institution. Most recently, the Divisional Court in *MCSS* held that this balance is preserved, and the purpose of the *Act* is fulfilled by limiting the application of s. 65(6)3 to records "the subject

matter [of which] must be a labour relations or employment-related matter." The Court noted that:

> *…a purposive reading of the Act dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate qua employer, the s. 65(6)3 exclusion does not apply. Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act…*
>
> ***MCSS*, at para. 29.**

68. Nor is the fact that s. 65(6)3 is an exclusion, rather than an exemption remarkable. Exclusions are a common feature of access to information legislation. The Federal *Access to Information Act* has several, including specific and broad exclusions for various records under the control of the CBC, and Atomic Energy of Canada Limited, as well as for confidences of the Queen's Privy Council.

> ***Access to Information Act*, R.S.C., 1985, c. A-1, s. 68.1, 68.2 and 69.**

69. The *Freedom of Information and Protection of Privacy Acts* of British Columbia and Alberta each contain a lengthy list of categories of records to which the Act does not apply.

> **Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 3(1)(a-k).**
>
> **Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, s. 4(1)(a-u).**

70. The interpretation and application of exclusions, including s. 65(6)3, remains subject to the supervision of the IPC. Where an appeal is filed in respect of records which an institution claims are excluded from the *Act*, the IPC can and does require the production of records in order to permit it to determine on the basis of the records in question whether or not the exclusion in fact applies.

> ***Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII512 (Ont. C.A.).**

71. The exclusion of certain records relating to meetings, consultations, discussions or communications about labour relations or employment related matters from the scope of

FIPPA in Ontario is a reasoned and reasonable policy choice made by the Legislature. The application of s. 65(6)3 remains subject to the supervision of the IPC and ultimately the Courts, and it has been constrained by decisions from both. In that respect there is little difference between s. 65(6) and any other exclusion or exemption under the *Act*.

72. The nature of the exclusion in s. 65(6)3 does not warrant any more stringent *Charter* scrutiny than any other section of the *Act*. The test in *Criminal Lawyers' Association* applies in the same manner to the Applicant's alleged breaches of s. 65(6)3 as to any other section of the *Act*.

Applicant's Issue 1: Alleged Charter Rights to Privacy

73. The Applicant asserts that there is a freestanding *Charter* privacy right of general application which guarantees him the protection of the specific statutory privacy regime established in *FIPPA*. He asserts that s. 65(6)3's exclusion of records related to meetings, communications, consultations or discussions about labour or employment related matters breaches this right.

74. Like the Applicant's claim to the benefit of s. 2(b), this argument fails because the Applicant cannot identify a right which is engaged, let alone identify a breach in the circumstances of this case.

75. There is no basis at law for a finding that the *Charter* requires that the Applicant be provided with access to the statutory privacy protections set out in the *Act* in respect of the Records in question. Neither s. 7 nor s. 8 provides a freestanding right to inclusion under a particular statutory privacy scheme. This right is not apparent on the language of either section:

> *7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> *8. Everyone has the right to be secure against unreasonable search or seizure.*

Furthermore, no court has interpreted either s. 7 or s. 8 to include this right.

> ***Charter*, s. 7 and 8.**

76. Most of the jurisprudence on which the Applicant relies arises from criminal proceedings, where there is an active and direct state intrusion on the explicit rights set out above, and where the claimant's liberty is literally at stake. Nothing about this case is analogous to the criminal law context. Furthermore, none of the decisions cited by the Applicant suggest that either s. 7 or s. 8 requires the state to accord an individual with access to a particular statutory privacy scheme.

77. The Applicant relies at para. 28 of his Factum on the decision of the Ontario Court of Appeal in *Cash Converters Canada Inc. v. Oshawa (City)*, arguing that it holds that "privacy protection rights" are "enshrined" in s. 7 and 8 of the *Charter*. That case dealt with a municipal bylaw which required pawn brokers to collect and remit personal information about vendors to the police. The Court found that this was inconsistent with the *Municipal Freedom of Information and Protection of Privacy Act*, and accordingly of no force and effect. This is not a case about inclusion in a statutory privacy scheme. It is a case about the scope of legislative authority of a municipality. It does not assist the Applicant.

***Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502 (CanLII).**

***Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990 c M.56.**

78. The Applicant also asserts a "right of access to personal information in the hands of government (independent of access for the purpose of expression)", relying on the Federal Court of Appeal decision in *Ruby v. Canada (Solicitor General)*. That decision involved appeals from a request under the Federal *Privacy Act* for access to information collected by law enforcement agencies including the RCMP and CSIS in the course of an investigation. The Federal Court of Appeal accepted in principle that legislation which permits the collection of information without permitting access may engage an individual's rights under s. 7. The Court of Appeal ultimately found however that s. 7 was not engaged on the facts before it.

***Ruby v. Canada (Solicitor General)*, 2000 CanLII 17145 (FCA) at para. 169-170.**

79. The comments of the Federal Court of Appeal are inseparable from their context – a request for information collected about an individual in the course of investigations by law

enforcement authorities, which investigations directly engage the liberty interests underlying s. 7 of the *Charter*. Nothing in the decision stands for the proposition that s. 7 provides a right to participate in any particular statutory scheme of privacy and access, or that exclusion from such a scheme would breach an individual's *Charter* rights.

80. On appeal to the Supreme Court, the decision of the Federal Court of Appeal was overturned in part. The Supreme Court agreed that s. 7 was not engaged on the facts, and noted that "it is unnecessary to the disposition of this case to decide whether a right to privacy comprising a corollary right of access to personal information triggers the application of s. 7 of the *Charter*." The Supreme Court's comments make it clear that the Federal Court of Appeal's comments are not a definitive statement of the law.

***Ruby v. Canada (Solicitor General)*, 2002 SCC 75, at para. 33.**

81. The Applicant asserts at para. 27 of his Factum that the Adjudicator was "silent on the *Charter* jurisprudence of informational privacy, and on the *Charter* jurisprudence on the meaning of "reasonable search and seizure". In fact, the Adjudicator specifically held that there was no search and seizure in the case before him, and rejected the Applicant's argument that s. 8 of the *Charter* created any constitutionally-protected privacy rights of general application.

Applicant's Factum at para. 27.

***PO-3686*, at para. 123.**

82. The Applicant also suggests that his "*evidence about his Charter privacy rights being infringed is uncontested… Nor did the Adjudicator make any finding that the Appellant's evidence was in doubt.*" In fact, the Adjudicator addressed this point at the outset of his reasons:

> *[14] In his representations, the appellant sometimes mentions the university's failure to contest some of the points or evidence he raises, as though that means they are established and cannot be questioned. This is not the case. It is my responsibility to weigh the evidence and arguments that have been presented. I am not compelled to accept evidence that is not credible, or arguments that are lacking in cogency or inconsistent with case law, simply because they have not been the subject of comment by the other party.*
>
> *[15] In conducting this inquiry, I have reviewed the voluminous material*

> *provided by the parties, and weighed all of the evidence and argument they have submitted. In the interest of keeping this order to a reasonable length, and focused on the issues before me, I will refer only to evidence and argument that are relevant to those issues. I have also limited my references to the representations of the parties, in some instances, for reasons of confidentiality.*
>
> **Applicant's Factum at para. 25.**
>
> ***PO-3686*, at para. 123.**

83. The Applicant cannot establish that he has a *Charter* right under s. 7 or s. 8 to inclusion in any particular scheme of privacy regulation, and therefore cannot establish that the exclusion in s. 65(6)3 engages, let alone breaches those rights.

"Quasi-Constitutional" Status Does not Make Privacy a Charter Right

84. The Applicant relies on cases affirming the "quasi-constitutional" status of privacy legislation to assert a *Charter* right to the privacy protections of *FIPPA*. While courts have accepted in several decisions that both privacy and freedom of information legislation has "quasi-constitutional status" they have held that this is not a basis for the legislation to be struck down or judicially rewritten.

> **Applicant's Factum, para. 50.**

85. This was acknowledged in a passage which the Applicant quoted in part at para. 50(a) of his Factum. The Supreme Court in *Lavigne v. Canada (Office of the Commissioner of Official Languages)* stated: "*The only effect of this Court's use of the expression "quasi-constitutional" to describe these two Acts is to recognize their special purpose.*" [emphasis added]

> ***Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, at para. 25.**

86. Similarly, as stated by the Supreme Court in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*: "*The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.*"

> ***Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, at para. 40.**

87. The adjudicator correctly rejected the Applicant's argument on this basis:

> *[122] As part of this discussion, the appellant refers to jurisprudence describing the federal Privacy Act as having a quasi-constitutional mission. Even if this means that the Act is quasi-constitutional, however, this does not alter the general principles of statutory interpretation. Nor does this create a more general constitutionally-mandated right of privacy. Accordingly, I do not accept the appellant's argument that section 65(6) is unconstitutional because privacy is a constitutionally protected value, and section 65(6) precludes privacy protection of excluded materials such as the report.*
>
> ***PO-3686*, at para. 122**.

88. The Applicant cannot establish that either s. 7 or s. 8 of the *Charter*, or an alleged unwritten *Charter* privacy right arising from the "quasi-constitutional status" of privacy legislation is engaged by the exclusion in s. 65(6)3 of records relating to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

Applicant's Issue 2: The IPC Correctly Applied the *Criminal Lawyers Association* Test

89. The Applicant alleges that the IPC Adjudicator applied the wrong analysis to the issues before him, relying on the methodology set out in the Supreme Court's decision in *Doré*. This is not accurate. The IPC reviewed the Supreme Court's decision in *Doré* but ultimately applied the *Criminal Lawyers' Association* test. The IPC then, in three short paragraphs, simply confirmed that his conclusion with respect to the *Criminal Lawyers' Association* test was also consistent with the Court's decision in *Doré*.

> ***Doré v. Barreau du Québec*, 2012 SCC 12.**
>
> ***PO-3686*, at paras. 101-103.**

90. The Adjudicator's decision represents a straightforward application of the clear test articulated in *Criminal Lawyers' Association*. The fact that he viewed that test and his application thereof to be consistent with *Doré* has no impact on the correctness of his decision.

91. The Adjudicator correctly applied the *Criminal Lawyers' Association* test, and found that

the Applicant did not require access to the Records as a necessary precondition of meaningful expression. As he could not pass first step of the test in *Criminal Lawyers Association*, his s. 2(b) rights were not engaged in the circumstances of this case and he could not establish that s. 65(6)3 had the effect of breaching his *Charter* rights.

92. Even if the Adjudicator was not correct in this decision, which is denied, the Applicant has since received a full copy of the Report which is at the core of his Request, which is not hindered by the restrictions in the Confidentiality Order. This Application is moot, as set out above. In the alternative, it is even clearer now that he is free to make meaningful expression on a matter of public interest, and so cannot succeed on the test set out in *Criminal Lawyers' Association.*

Applicant's Issue 3: The Adjudicator Correctly Found No Violation of the Applicant's Charter Rights, so *Oakes* Framework is not engaged

93. At issue 3 the Applicant argues that the *Act* does not survive the *Oakes* test. As set out above, the *Oakes* test with respect to the application of s. 1 of the *Charter* has no application in this case. As the Adjudicator found, the Applicant could not establish that his s. 2(b) rights were engaged in this case, let alone that they had been violated. Section 1 of the *Charter* simply does not arise as there has been no breach of the Applicant's rights.

Applicant's Issue 4: The Applicant's "Freestanding" Challenge to s. 65(6) Must be Rejected

94. The only basis for challenging the constitutionality of s. 65(6)3 is the test in *Criminal Lawyers Association*. For the reasons set out above, the *Criminal Lawyers' Association* test cannot be applied on the basis of whether s. 65(6)3 may hypothetically lead to an infringement of s. 2(b). The Appellant must demonstrate that in his specific circumstances, s. 2(b) is engaged, and that the application of s. 65(6)3 has resulted in an infringement of his s. 2(b) rights.

95. The Adjudicator was required to and did determine whether the Applicant's *Charter* rights were engaged on the facts before him.

96. The Applicant relies at para. 57 of his Factum on the decision of the Supreme Court in *R. v. Mills* to assert that s. 65(6) can be struck down if it is "unconstitutional in general effect." *R. v. Mills* has nothing to do with the circumstances of this case. *R. v. Mills* deals with *Criminal Code* provisions concerning Crown production of records relating to the complainant in sexual offence proceedings, and the impact of those provisions on the right of an accused to full answer and defence.

***R. v. Mills*, 1999 3 S.C.R. 668.**

97. There is voluminous jurisprudence on the application of *Charter* rights to the conduct of criminal prosecutions and the rights of the accused, which is very different from the narrow application of the *Charter* to freedom of information laws pursuant to the decision in *Criminal Lawyers.*

98. The Applicant's argument to strike the law down on the basis of hypothetical circumstances, or that it is "unconstitutional in general effect" would mean eliminating the first step in the *Criminal Lawyers* test for a *Charter* right of access to documents. It would grant the Applicant a *Charter* right to documents where he has not established that they are a "necessary precondition for his freedom of expression on a matter of public interest".

99. In effect the Applicant's argument that s. 65(6) can be struck down as "unconstitutional in general effect" would create a *Charter* right of general application to documents in the hands of government, which was rejected by the drafters of the *Charter* and which the Supreme Court in *Criminal Lawyers Association* refused to accept. This argument must be dismissed.

***Criminal Lawyers' Association*, at para. 5.**

[170]

PART III – CONCLUSION AND ORDER SOUGHT

100. The only *Charter* basis for a challenge to any provision of *FIPPA* is that set out in *Criminal Lawyers Association*, which requires that the Applicant first demonstrate that without access to a particular document, he is unable to engage in meaningful expression on a matter of public interest. The Applicant failed to do so before the Adjudicator, and he has failed to do so before this Court.

101. For the reasons set out above, the Respondent respectfully submits that this Court should dismiss the Application on the basis that it is moot, or in the alternative, should uphold the Decision of the Adjudicator as correct and dismiss the Application on that basis.

102. The Respondent seeks its costs on a substantial indemnity basis, plus disbursements and HST.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2017.

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Barristers and Solicitors
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Ottawa, ON K1S 3V1

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Lawyers for the Respondent,
University of Ottawa

[171]

SCHEDULE "A"

List of Authorities Referred To

TAB	DESCRIPTION
A.	*Ontario (Public Safety) v. Criminal Lawyers' Association*, 2010 SCC 23
B.	*University of Ottawa and Association of Professors of the University of Ottawa*, unreported, January 27, 2014 (CH Foisy)
C.	*University of Ottawa and Association of Professors of the University of Ottawa*, 2011 CanLII 98078
D.	*Criminal Lawyers' Association*
E.	*Ontario (Attorney General) v. Fineberg*, (1994) 19 O.R. (3d) 197
F.	*Baier v. Alberta*, [2007] S.C.J. No. 31
G.	*Ontario (Ministry of Community and Social Services) v. Doe* (2014), 2014 ONSC 239, 120 O.R. (3d) 451
H.	*Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII512 (Ont. C.A.)
I.	*Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502
J.	*Ruby v. Canada (Solicitor General)*, 2000 CanLII 17145 (FCA
K.	*Ruby v. Canada (Solicitor General)*, 2002 SCC 75
L.	*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53
M.	*Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25
N.	*Doré v. Barreau du Québec*, 2012 SCC 12
O.	*R. v. Mills*, 1999 3 S.C.R. 668
P.	*Borowski v. Canada (Solicitor General)*, [1989] 1 S.C.R. 342
Q.	*Stewart v. IPD*, 2013 ONSC 7907
R.	*Mental Health Penetanguishene*, 2010 ONCA 197

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SCHEDULE "B"

List of Statutes and Regulations

TAB	DESCRIPTION
S.	*Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)
T.	*Charter* s. 2(b), s. 7, s. 8
U.	*FIPPA*, ss. 14 and 23
V.	Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 43 (January 22, 1981)
W.	Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Leg., 1st Sess. (October 4, 1995), (Hon. David Johnson)
X.	Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (November 10, 1995)
Y.	*Access to Information Act*, R.S.C., 1985, c. A-1, s. 68.1, 68.2 and 69
Z.	*Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 4(1)
AA.	*Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990 c M.56

DENIS RANCOURT
Applicant

-and-

UNIVERSITY OF OTTAWA
Respondent

Court File No. **17-DC-2279**

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF THE RESPONDENT UNIVERSITY OF OTTAWA

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Lawyers for the Respondent, University of Ottawa

Court File no. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

-and-

UNIVERSITY OF OTTAWA

Respondent

-and-

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Intervenor

APPLICATION RECORD OF THE RESPONDENT, UNIVERSITY OF OTTAWA

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Court File No. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N

DENIS RANCOURT

Applicant

and

UNIVERSITY OF OTTAWA and INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Respondents

AFFIDAVIT OF MICHELLE GROUNDWATER

I, Michelle Groundwater, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with the law firm of EMOND HARNDEN LLP, the lawyers for the Respondent, University of Ottawa, and, as such, have knowledge of the matters contained in this affidavit.

2. I am informed and believe that Mr. Porter Heffernan, Counsel to the University of Ottawa, on the instructions of the University, has provided the Applicant with a copy of the Report of Dr. Morissette by electronic correspondence. A true copy of the electronic correspondence from Mr. Heffernan and the covering letter attached to that electronic correspondence is attached hereto as Exhibit "A" to this my Affidavit. A copy of the Report is not included with my Affidavit for reasons of confidentiality.

3. I swear this Affidavit for the purpose of the above Application and for no other improper purpose.

SWORN BEFORE ME at the City of Ottawa, in the Province of Ontario on Friday October 20, 2017.

Commissioner for Taking Affidavits

Michelle Groundwater

[178]

Michelle Groundwater

From: Porter Heffernan
Sent: Friday, October 20, 2017 9:52 AM
To: Denis Rancourt
Cc: Michelle Groundwater
Subject: Private and Confidential - 17-DC-2279
Attachments: Letter dated Oct 20, 2017 re. release of report (00784959xCEEB7).pdf; Morisette Report (00784952xCEEB7).pdf

Dr. Rancourt,

Please see attached our correspondence of today's date.

Regards,

EMOND HARNDEN LLP/srl per/par:
PORTER HEFFERNAN
Lawyer | Avocat
707 rue Bank St, Ottawa, ON K1S 3V1
613-940-2764
EMOND HARNDEN 613-563-8001

This is Exhibit A referred to in the affidavit of Michelle Groundwater. sworn before me, this 20th day of October 2017.

A COMMISSIONER FOR TAKING AFFIDAVITS

[179]

EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

PORTER HEFFERNAN
pheffernan@ehlaw.ca 613 940-2764

October 20, 2017

VIA E-MAIL

Denis Rancourt
[redacted]
Ottawa, ON [redacted]

Dear Mr. Rancourt,

Re: Denis Rancourt v. University of Ottawa et al.
Divisional Court File #: 17-DC-2279

The University has instructed us to provide you with a fresh copy of the Report, which will not be subject to the provisions of the Interim Confidentiality Award by Arbitrator Foisy. The Report is contained in the encrypted PDF attached to this e-mail, and the undersigned will provide the password by separate correspondence.

In our view this makes the Application moot. Please confirm that you will withdraw the Application. If you fail to do so, the University will seek costs on a substantial indemnity basis.

Yours Truly,
EMOND HARNDEN LLP

Porter Heffernan

cc: Client

[180]

DENIS RANCOURT
Applicant
(Appellant)

-and-

UNIVERSITY OF OTTAWA et al.
Respondents
(Respondents in Appeal)

Court File No. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
OTTAWA

AFFIDAVIT OF MICHELLE GROUNDWATER
SWORN OCTOBER 20, 2017

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University of Ottawa

DENIS RANCOURT
Applicant

-and-

UNIVERSITY OF OTTAWA
Respondent

Court File No. **17-DC-2279**

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
OTTAWA

APPLICATION RECORD OF THE RESPONDENT UNIVERSITY OF OTTAWA

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Court File No. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

- and -

UNIVERSITY OF OTTAWA

Respondent

- and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Respondent

FACTUM OF THE RESPONDENT INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

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Counsel for the Respondent Information and Privacy Commissioner of Ontario

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TABLE OF CONTENTS

PART I – THE FACTS

A. Overview

1. This is an application for judicial review of Order PO-3686 made by Adjudicator John Higgins ("Adjudicator") of the Information and Privacy Commissioner of Ontario ("IPC"), under the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*")[1]. In this decision, the Adjudicator found that a report concerning the Applicant, Denis Rancourt (the "Applicant"), prepared by a psychiatrist for the University of Ottawa (the "University"), as well as related records, were excluded from the right of access under s. 65(6) of *FIPPA*. Further, the Adjudicator found that s. 65(6) did not infringe the Applicant's freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedom* ("*Charter*"), or breach his privacy rights under the *Charter*, either generally or in its application to the records at issue in this case.

2. The Adjudicator correctly applied the test established by the Supreme Court of Canada for determining whether a provision of *FIPPA* breaches the derivative right of access to government-held records under s. s. 2(b) of the *Charter*. He found that the University's denial of access to the records at issue pursuant to the exclusion at s. 65(6) of *FIPPA* did not impair the Applicant's ability to engage in meaningful public expression on a matter of public importance.

3. Further, the Adjudicator correctly rejected the Applicant's claim that s. 8 of the *Charter* creates a free-standing right of privacy and that s. 65(6) breaches that right by excluding the statutory privacy protections under *FIPPA*.

4. In support of his application to this Court, the Applicant advances the same arguments made to the Adjudicator, that s. 65(6) of *FIPPA* breaches his rights of freedom of expression and privacy under the *Charter* and is therefore unconstitutional or constitutionally inapplicable. This application must fail for the reasons set out in the Adjudicator's decision.

---

[1] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended ("*FIPPA*").

B. The Adjudicator's position with respect to the Applicant's statement of facts

5. The Adjudicator accepts the facts stated at paragraphs 6 to 13 of the Applicant's factum, except to the extent that these statements are incomplete or argumentative.

6. The Adjudicator does not accept the facts stated at paragraphs 2 to 5 of the Applicant's factum setting out details concerning the content and preparation of the records at issue.

C. Additional facts relied upon by the Adjudicator

(i) The access request and the appeal

7. The Applicant made a request under *FIPPA* for access to a medical report (the "report") containing his personal information that was prepared for the University by a psychiatrist, together with any related records.[2]

8. The records at issue were generated in the process leading to the termination of the Applicant's employment by the University. During the arbitration concerning the Applicant's termination, the University provided the records to the Applicant's union, subject to a confidentiality undertaking imposed by order of the arbitrator. Because the records were not entered into evidence, they remained subject to the confidentiality undertaking at the conclusion of the arbitration hearing.

9. The University initially denied the request for access on the basis that it was "frivolous or vexatious" under s. 10(1)(b) of the *Act*. The IPC allowed the Applicant's appeal from this decision and directed the University to provide the Applicant with an access decision.

10. The University issued a new decision denying access to the records on the basis that they are subject to the employment or labour relations exclusion at s. 65(6) of *FIPPA*. That provision reads:

---

[2] Order PO-3686, Applicant's Application Record, Tab 2, at para. 4, p. 19.

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

11. The Applicant appealed this decision to the IPC, submitting that: (1) s. 65(6) does not apply to the records; (2) if s. 65(6) does apply, that provision is unconstitutional; and (3) additional records responsive to his request ought to exist.[3]

12. The Applicant served a Notice of Constitutional Question (NCQ) asserting that s. 65(6) violates the Applicant's right to freedom of expression under s. 2(b) of the *Charter*. The NCQ stated that access to the records is a necessary precondition for meaningful expression about the University's practices affecting its employees and students, and the public at large.[4]

(ii) The Adjudicator's decision

13. The Adjudicator found that the records at issue are covered by the exclusion at s. 65(6), and thus are not accessible under *FIPPA*.[5] This finding is not challenged by the Applicant in this application.

14. In addition to making arguments based on s. 2(b) of the *Charter*, the Applicant submitted that the University violated his privacy rights under *FIPPA* in the preparation of the report and that s. 65(6) is unconstitutional because it abrogates those rights in breach of s. 8 of the *Charter*.

15. The Adjudicator observed that the matter before him was an access appeal, not a privacy complaint. Nonetheless, he proceeded to dispose of the Applicant's privacy-based *Charter* arguments, as follows:

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[3] Order PO-3686, Applicant's Application Record, Tab 2, at para. 6, p. 19.
[4] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 7-8, p. 19.
[5] Order PO-3686, Applicant's Application Record, Tab 2, at para. 75, p. 33.

(i) There are no freestanding constitutionally-mandated rights of privacy or access to one's own personal information as a facet of the right of privacy.

(ii) The right at s. 8 of the *Charter* to be secure from unreasonable search and seizure does not create a general constitutionally-protected right of privacy.

(iii) Further, no search and seizure had occurred in this case.

(iv) The privacy rights in *FIPPA* have not been found to be constitutionally-mandated.

(v) The quasi-constitutional nature of access and privacy legislation does not alter this result.[6]

16. The Applicant also submitted that s. 65(6) is unconstitutional because it violates the fundamental principle of the rule of law by barring him from access to justice and, further, that s. 65(6) is arbitrary and contrary to the purposes of *FIPPA*.

17. The Adjudicator rejected these arguments. He stated that the Applicant is not barred from pursuing other actions at law if he has a cause of action, or from requiring the production and introduction of the report in evidence if it is relevant in proceedings to which he is a party.

18. Further, the Adjudicator observed that: (1) the Legislature considered s. 65(6) to be consistent with the economic and labour relations objectives of the legislation that introduced this provision; and (2) rather than contravening the purpose of *FIPPA*, s. 65(6) is to be interpreted in light of that purpose. He cited *Ontario (Ministry of Correctional Services) v. Goodis* where this Court explained the legislative history of s. 65(6) of *FIPPA*:

> . . . Subsection 65(6) was added to the Act by the *Labour Relations and Employment Statute Law Amendment Act*, S.O. 1995, c. 1, s. 82. In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a "package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations" (Ontario, Legislative Assembly, Official

[6] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 117-125, pp. 44-46.

> Report of Debates (Hansard) (4 October 1995)). The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were "to ensure the confidentiality of labour relations information" (ibid.).
>
> Moreover, s. 65(6) should be interpreted in light of the purpose of the Act, which is found in s. 1. . . .[7]

19. The Adjudicator also addressed the Applicant's arguments based on Canada's obligations under the *International Covenant on Civil and Political Rights* ("*Covenant*").[8] He observed that:

(i) section 2(b) of the *Charter*, as interpreted in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* ("*CLA*"), conforms with the freedom of expression protected at Article 19(2) of the *Covenant*; and

(ii) even if the s. 65(6) exclusion of records from the privacy provisions of *FIPPA* did not conform with Article 17(2) of the *Covenant* (a conclusion he did not accept), he could not, in effect, amend *FIPPA* to conform with the *Covenant*.[9]

20. Turning to the Applicant's argument based on freedom of expression, the Adjudicator accepted that the Applicant is constrained from publicly discussing the contents of the report already in his possession due to the confidentiality undertaking, and that this constraint would not apply if access was granted under *FIPPA*.[10]

21. The Adjudicator applied the test set out in *CLA*, where the Supreme Court of Canada recognized that s. 2(b) of the *Charter* may encompass a derivative right of access to government-held information in certain limited circumstances.[11] To establish a breach of this right, a claimant must satisfy each of the following three requirements:

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[7] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 169-172, pp. 56-57.
[8] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 129-139, pp. 46-49.
[9] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 135, 138, p. 49.
[10] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 153, 175-176, pp. 52, 58.
[11] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815 ("*Criminal Lawyer's Association*"), at paras. 30, 34-40.

(i) that access to the information at issue is necessary for the meaningful exercise of free expression on a matter of public or political interest;

(ii) that there are no countervailing considerations inconsistent with production, such as legal privileges or impairment of the proper functioning of the institution; and

(iii) that government action infringes the protection.[12]

22. The Adjudicator observed that the facts before him were analogous to those in *CLA*. In that case, access had been denied to records generated in an investigation into misconduct by the police and the Crown Attorney after charges against persons accused of murder were stayed. A great deal of information concerning the grounds for staying the charges was contained in the court's judgment and already in the public domain. The Supreme Court of Canada found that the CLA had not established that access was necessary for meaningful public discussion of problems in the administration of justice leading to the stay, and therefore dismissed the s. 2(b) claim.[13]

23. The Adjudicator examined whether the requirements set out in *CLA* to establish a breach of s. 2(b) were satisfied in this case.[14] He observed that the Applicant's grievance process resulted in an arbitration award, that was in the public domain, outlining the University's reasons for dismissing the Applicant and his reasons for objecting to the dismissal.[15]

24. The Adjudicator referred to various media articles and a television interview in which the Applicant discussed his situation, as well as websites the Applicant maintained which were dedicated to discussing and questioning the University's approach to his employment and dismissal. This included an active website containing:

- commentary on the arbitration process and the progress of a judicial review of the arbitration award;

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[12] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 101-103, pp. 39-41.
[13] Order PO-3686, Applicant's Application Record, Tab 2, at para. 201, pp. 62-63.
[14] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 143-150, 159-167, 179-182, pp. 50-56, 58-59.
[15] Order PO-3686, Applicant's Application Record, Tab 2, at para. 179, 201, 207, pp. 58-59, 62-64.

- commentary on the disclosure process within the arbitration;
- commentary on his dismissal and the legal proceedings that followed it;
- links to media stories about the grievance arbitration;
- video links to commentary by the Applicant and others concerning his suspension, dismissal and treatment by the University; and
- critical references to the University's tactics in connection with his dismissal.[16]

25. Based on the evidence, the Adjudicator found that the Applicant had the opportunity to engage in a very detailed and public expression of opinion about his relationship with the University, the termination of his employment, the grievance proceedings, and the University's relationship with its employees. Further, the Adjudicator observed that the records at issue relate to only one aspect of the University's process in dismissing him.[17] He concluded that access under *FIPPA* was not necessary for the Applicant to engage in meaningful discussion concerning any of these matters. Consequently, the Applicant failed to establish any basis for his claim that s. 65(6)3 is unconstitutional or constitutionally inapplicable under s. 2(b).[18]

26. In light of these findings, the Adjudicator did not go on to consider the second component of the first requirement of the *CLA* test - whether the expression in which the Applicant wishes to engage concerns a matter of public or political interest.[19]

27. Although his finding related to the first requirement of the *CLA* test was sufficient to dispose of the s. 2(b) claim, the Adjudicator went on to consider the second requirement of the test. The Adjudicator found the confidentiality undertaking to be akin to a privilege that was inconsistent with production, and thus amounted to a countervailing consideration which would

[16] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 147, 149, pp. 51-52.
[17] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 149, 201, 204, pp. 52, 62-63.
[18] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 203-204, 207, 209, pp. 63-64.
[19] Order PO-3686, Applicant's Application Record, Tab 2, at para. 208, p. 64.

negate any *Charter* breach had the meaningful expression threshold been satisfied.[20]

28. The Adjudicator concluded his discussion of the *Charter* issues by assessing the effect of his decision, that the records are excluded under s. 65(6)3, on the expression in which the Applicant wishes to engage.

29. The Adjudicator observed that, in *Doré v. Barreau du Québec*, the Supreme Court of Canada described its approach to the *Charter* analysis in *CLA* as an example of the "administrative law analysis." That approach "recognize[s] that an adjudicated administrative decision is not like a law which can [ ] be justified by the state" under s. 1 of the *Charter* applying the *Oakes* test. Rather, the tribunal engages in a proportionality exercise by balancing any limitation on a *Charter* right against the objectives of the statute.[21]

30. The Adjudicator cited the following passage from *Doré* stressing the equivalence of the administrative law analysis with the *Oakes* test:

> I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis...
>
> In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. *In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.*
>
> . . . In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the

[20] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 212-213, 216, pp. 65-66.
[21] *Doré v. Barreau du Québec*, [2012] 1 SCR 395, at paras. 5-7 ("*Doré*").

> guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.[22] (Adjudicator's emphasis)

31. Having found no breach of the Applicant's *Charter* rights, it was unnecessary for the Adjudicator to engage in either an *Oakes* analysis under s. 1 or a proportionality analysis under the administrative law approach. For sake of completeness, he nonetheless observed that his decision struck a reasonable balance between the Applicant's s. 2(b) rights and the statutory objectives of the exclusion:

> ... [M]y finding that section 2(b) has not been breached is consistent with the analysis advocated in *Doré*. As noted in *Ontario (Ministry of Correctional Services v. Goodis)*, the legislative history of section 65(6) shows that its purpose was "to ensure the confidentiality of labour relations information." Given the wording of the section, this purpose must also include protecting the confidentiality of information about relations with employees. In this case, even without access under the *Act*, the appellant has had the opportunity to engage in a very detailed and meaningful public expression of opinion concerning his relationship with the university, including his dismissal and the grievance proceedings that followed it. He is not constrained from meaningful public discussion of the university's relationship with its employees. This respects the appellant's section 2(b) rights while also honouring the statutory purpose of section 65(6).[23]

32. Finally, the Adjudicator dismissed the Applicant's appeal on the reasonableness of the University's search for additional responsive records. He found that any additional records would be excluded from the application of *FIPPA* for the same reasons that the report and the other related records were excluded under s. 65(6)3.[24]

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[22] Order PO-3686, Applicant's Application Record, Tab 2, at para. 88, p. 35.
[23] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 217-218, pp. 66-67.
[24] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 239-242, p. 71.

PART II - ISSUES AND ARGUMENT

33. The Applicant makes four principal submissions in support of his application:

(i) The Adjudicator erred in deciding that the Applicant's privacy rights under ss. 7 and 8 of the *Charter* were not infringed;

(ii) The Adjudicator erred in finding that the Applicant's freedom of expression under s. 2(b) was not infringed;

(iii) Section 65(6)3 of *FIPPA* is unconstitutional and does not survive the Oakes test; and

(iv) The Adjudicator erred in failing to find that s. 65(6)3 is unconstitutional in its general effect irrespective of the particular circumstances in this case.

34. The Commissioner's position with respect to the issues raised by this application:

(a) The applicable standard of review in this case is reasonableness; and

(b) The Commissioner's decision is both reasonable and correct.

A. The Standard of Review

35. The IPC is an administrative tribunal with explicit or implied jurisdiction to decide questions of law. As such, the IPC has the authority to consider and apply the *Charter* and grant remedies under s. 24(1) of the *Charter* which are otherwise within its jurisdiction. Further, by virtue of s. 52(1) of the *Constitution Act, 1982*, the IPC may determine in a given case that a provision of its enabling statute is invalid pursuant to the *Charter*. However, the IPC cannot make a general declaration of invalidity binding on future decision-makers.[25]

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[25] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504 ("*Martin*"), at paras. 30-31; *R. v. Conway*, [2010] 1 SCR 765, at paras. 81-82; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 SCR 257, at para. 44.

36. The jurisprudence generally holds that the decisions of administrative tribunals based on the *Charter* are subject to judicial review on a correctness standard of review.[26]

37. In *Doré v. Barreau du Québec*, the Supreme Court of Canada held that its determination of whether the decision of an administrative tribunal infringes a claimant's s. 2(b) freedom of expression examines whether the tribunal reasonably balanced the claimant's expressive interests against the objectives of the tribunal's enabling statute. The Court held that the tribunal's decision in that case was subject to a reasonableness standard of review under the administrative law analysis.[27] The Court stated:

> The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.[28]

38. The Court in *Doré* cited its judgment in *CLA*, where it reviewed the IPC's decision applying s. 2(b) of the *Charter*, as an example of the "administrative law" approach to judicial review.[29] In the decision under review in *CLA*, the IPC held that s. 23 of *FIPPA* did not breach the right to freedom of expression under s. 2(b) on the facts of that case.[30]

39. As in *CLA*, the issues raised by the Applicant in this case called for the Adjudicator to: (1) assess the alleged necessity of access to the records to permit the Applicant to engage in meaningful expression on a matter of public interest; and (2) balance the Applicant's expressive interests against the objectives of s. 65(6)3 of *FIPPA*.

40. The IPC has judicially recognized expertise in balancing the right of access to records and the privacy and confidentiality interests protected under its enabling legislation, and deals with such

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[26] *Martin*, supra note 25, at para. 31.
[27] *Doré*, supra note 21, at paras. 56-57.
[28] *Doré*, supra note 21, at para. 5.
[29] *Doré*, supra note 21, at para. 32.
[30] *Criminal Lawyers' Association*, supra note 11, at paras. 15, 70.

issues on a daily basis.[31] Balancing the *Charter* interests at issue in this case involves essentially the same exercise. Under the administrative law approach set out in *Doré*, reasonableness is the appropriate standard of review.

41. Nonetheless, the Adjudicator's decision also stands up to a correctness standard of review.

B. The Adjudicator did not err in finding that the Applicant's privacy rights under the *Charter* were not infringed

42. The Applicant submits that s. 65(6)3 infringes his s. 7 and s. 8 *Charter* rights by depriving him of the privacy protections at Part III of *FIPPA* governing the collection and use of his personal information. He claims that the Adjudicator did not deal with his *Charter* rights to privacy and/or erred in finding that those rights were not infringed.

43. This Court should not embark on a determination of the constitutionality of s. 65(6)3 based on an alleged breach of the Applicant's statutory privacy rights, because the Applicant failed to establish an adequate factual foundation. Issues concerning a breach of the Applicant's privacy rights under *FIPPA* were not properly raised in the appeal before the Adjudicator, and were therefore not determined by the Adjudicator.

44. Nevertheless, as recognized by the Adjudicator, the *Charter* does not create a general right of privacy that would constrain the legislature from limiting statutory privacy rights.

(i) The issues before the Adjudicator in the appeal

45. The Applicant's NCQ in the appeal alleged that s. 65(6) of *FIPPA* is unconstitutional because the exclusion of his right of access to the records violates the freedom of expression under s. 2(b) of the *Charter*. This NCQ did not raise any issue relating to the alleged breach of the Applicant's rights of privacy under the *Charter*.[32]

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[31] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), at paras. 28-32; leave to appeal denied [2005] S.C.C.A. No. 95.

[32] Notice of Constitutional Question, Applicant's Application Record, Tab 36C.

46. After initially raising s. 2(b) *Charter* arguments, the Applicant submitted during the Adjudicator's inquiry that s. 65(6)3 breaches his rights of privacy under s. 8 of the *Charter* because it abrogates the statutory privacy protections under *FIPPA*.

47. As the Adjudicator stated, the matter before him was not a privacy complaint investigation, but an appeal relating to the Applicant's right of access.[33] The Adjudicator's jurisdiction in this matter was thus limited to determining the Applicant's access claim.[34]

(ii) The access and privacy regime under *FIPPA*

48. The IPC's adjudicative role on appeal from the decision of an institution denying access to a record is distinct from the IPC's supervisory role in relation to privacy complaints under *FIPPA*.

49. Part II of *FIPPA* gives every person a right of access to a record in the custody or under the control of an institution, subject to specific exemptions, and sets out the processes by which that right can be exercised. Part III of *FIPPA* provides individuals with a right of access to their own personal information, subject to exemptions which largely parallel those found in Part II, and incorporates the same processes. Part IV of *FIPPA* provides that a person who has made a request for access under Part II or Part III may appeal "any decision of the head under the Act to the Commissioner." After conducting an inquiry under Part IV and receiving all the evidence, the IPC "shall make an order disposing of the issues raised by the appeal."[35]

50. The IPC's jurisdiction in an access appeal is thus limited to deciding issues raised by the appeal. That jurisdiction does not extend to the investigation of privacy complaints.

51. Part III of FIPPA also sets out rules governing the collection, use, retention and disclosure of personal information by an institution outside the context of an access request. The appeal processes under Part IV of *FIPPA* are not available where an individual claims that an institution has breached

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[33] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 162-163, 167-168, 170-172, pp. 54-57.
[34] *FIPPA*, supra note 1, s. 54(1).
[35] *FIPPA*, supra note 1, ss. 10, 12-23, 47, 49, 54, 65.

his or her privacy rights under Part III of *FIPPA*. Part V of FIPPA sets out powers and duties of the IPC in relation to Part III, including the authority under s. 59(b), after hearing the head of an institution, to order the institution to cease collection practices and destroy collections of personal information that contravene *FIPPA*.[36]

52. In *Cash Converters Canada Inc. v. Oshawa (City)*, the Court of Appeal recognized the IPC's separate adjudicative role supervising compliance with rules governing the collection of personal information at Part II of the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*"), and by extension at Part III of *FIPPA*.[37] The Court observed that the IPC has the authority to investigate privacy complaints to determine whether a collection of personal information contravenes *MFIPPA*, and to make appropriate orders.[38]

(iii) The Applicant's claim to a *Charter* right of informational privacy is unfounded

53. Despite the distinction between an access appeal and a privacy complaint, the Adjudicator reviewed the Applicant's arguments claiming a general *Charter* right of privacy. He did not accept that judicial recognition of the quasi-constitutional nature of privacy legislation creates a general constitutionally-mandated right of privacy that would render s. 65(6) unconstitutional.[39]

54. Further, the Adjudicator rejected the Applicant's argument that s. 65(6) breached his right to be secure against unreasonable search and seizure under s. 8 of the *Charter*. Citing the judgment of the Supreme Court of Canada in *R. v. Jarvis*, he observed that s. 8 requires the prospect of an actual search or seizure and most often comes into play when an individual is under investigation for a possible offence.

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[36] *FIPPA*, supra note 1, ss. 37-49, 50-54.
[37] *FIPPA*, supra note 1, s. 59(b), *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 46(b).
[38] *Cash Converters Canada Inc. v. Oshawa (City)*, (2007) 86 O.R. (3d) 401 (C.A.), at para. 28 ("*Cash Converters*").
[39] Order PO-3686, Applicant's Application Record, Tab 2, at para. 121, p. 45.

55. The Adjudicator observed that the case before him did not involve a search or seizure and that "it is clear from its wording and interpretation that s. 8 does not create constitutionally-protected privacy rights of more general application." He further observed that the privacy rights created by *FIPPA* had not been found to be constitutionally required and that s. 65(6)3 simply provided that those statutory rights do not apply in some instances.[40]

56. The Applicant advances similar arguments before this Court. He claims that s. 65(6)3 infringes his rights of privacy under s. 7 and s. 8 of the *Charter* by depriving him of statutory privacy protection and access to his personal information. He again relies on judicial statements recognizing the quasi-constitutional status of privacy legislation, criminal law decisions dealing with state intrusions on the privacy interests of accused persons, and a case concerning the disclosure of information necessary to make a full answer and defence. [41]

57. None of the authorities relied on by the Applicant have interpreted ss. 7 or 8 of the *Charter* as providing a general constitutionally mandated right of informational privacy, a positive right to be covered by a statutory regime for the protection of privacy, or a right of access to the individual's own personal information.

58. The Applicant relies on the judgment of the Court of Appeal in *Cash Converters Canada Inc. v. Oshawa (City)* and the authorities cited therein. In those cases, the courts referred to the quasi-constitutional nature of statutory privacy rights in holding that statutory exceptions to those rights should be interpreted narrowly, with the burden resting on the person asserting the exception.[42] None of those authorities recognize a free-standing right to informational privacy under the *Charter*.

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[40] Order PO-3686, Applicant's Application Record, Tab 2, at para. 123, p. 45-46.
[41] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 123; See, for example: *R v Mills*, [1999] 3 SCR 668, at paras. 87, 89.
[42] *Cash Converters*, supra note 38, at para. 29, citing: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773 at paras. 30-31, *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 at paras. 65-66, 71, and *H.J. Heinz of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 SCR 441, at para. 26.

59. Most of the remaining authorities to which the Applicant refers involved direct intrusions by the state on the reasonable expectation of privacy of an accused person in the context of a criminal investigation; for example, the warrantless entry into a home, the warrantless seizure of bodily fluids, or the warrantless check of a third party's computer records.[43] Each of these cases involved penal consequences where the liberty of the accused person was at stake.

60. The Applicant submits that the authorities referred to at paragraph 41 of his factum establish "a positive right of preventive protection against violations of s. 8 privacy." Those cases address the requirement of prior authorization for a search or seizure.[44] They do not recognize a positive right of protection under a statutory privacy regime.

61. The Applicant relies on *Ruby v. Canada (Solicitor General)* for the proposition that liberty and security rights under s. 7 of the *Charter* confer a constitutional right of access to personal information. No such right has been recognized by the courts.

62. In *Ruby*, the Federal Court of Appeal opined that, if an individual's personal information in a Canadian Security Intelligence Service file were to be used or disclosed in a manner that implicated s. 7 liberty and security interests, there may be a corollary right of access to that information under s. 7 of the Charter.[45] The Supreme Court of Canada and the Federal Court of Appeal both found that the impugned provisions of the federal *Privacy Act,* barring the claimant from access to his personal information file, did not engage s. 7 *Charter* interests and that the claimant's constitutional challenge must therefore fail.[46]

63. There is no information on the record before this Court to show that the Applicant's liberty or security interests, as interpreted by the courts, have been affected. Consequently, there

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[43] *R. v. MacDonald*, [2014] 1 SCR 37; *R. v. Dyment*, [1988] 2 SCR 417 ("*Dyment*"); *R. v. Plant*, [1993] 3. SCR 281.
[44] *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145; *Dyment*, supra note 55.
[45] *Ruby v. Canada (Solicitor General)*, [2000] 3 FC 589 (C.A.), at para. 167-168 ("*Ruby*").
[46] *Ruby v. Canada (Solicitor General)*, [2002] 4 SCR 3, at para. 33; *Ruby*, supra note 45.

is no demonstrable risk that the records would be used or disclosed in a manner that implicates the Applicant's s. 7 rights.[47]

64. Even if there were an actual or potential interference with the Applicant's liberty or security interests, there is no basis for finding that any denial of such interests would not be in accordance with principles of fundamental justice.

65. It is clear from the record that the Applicant was given access to the report to address any issues associated with the termination of his employment in the grievance arbitration process, and was at liberty to introduce it into evidence in that context. Further, as noted by the Adjudicator, the Applicant is not barred from requiring production and introduction of the report in evidence, if it is relevant in any other proceedings to which he is a party.[48]

C. The Adjudicator correctly applied the s. 2(b) test

66. As found by the Adjudicator, the Applicant's claim to a constitutional right of access to the report falls to be determined under s. 2(b) of the *Charter* and, specifically, by the question whether access is necessary to his ability to engage in meaningful expression.

(i) The derivative right of access in *Criminal Lawyers Association*

67. The Adjudicator accepts the University's statements at paragraphs 44 to 59 of its factum under the heading "The Framework in *Criminal Lawyers Association.*"

68. In *CLA*, the Supreme Court of Canada stated that s. 2(b) of the *Charter* guarantees freedom of expression, not access to all documents in government hands. Rather, access to information is a derivative right that may arise where it is a necessary precondition of meaningful expression on the functioning of government.[49]

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[47] *Ruby*, supra note 45, at paras. 169, 171, 173.
[48] Order PO-3686, Applicant's Application Record, Tab 2, at para. 169, p. 56.
[49] *Criminal Lawyers' Association*, supra note 11, at para. 30.

69. Where the expressive issue concerns access to government-held documents, the Court held that the scope of the protection afforded by s. 2(b) is determined by the following three-part inquiry:

(i) Is access necessary for the meaningful exercise of free expression on matters of public or political interest?

(ii) Are there countervailing considerations inconsistent with disclosure, such as privileges, and/or would disclosure impair the proper functioning of the government?

(iii) Does the state action infringe a protected activity, either in purpose or effect?

70. The onus is on the claimant to establish that access is necessary for meaningful expression and, further, to show that there are no countervailing considerations inconsistent with production.[50]

71. Turning to the facts in *CLA*, the Court observed that much was already known about the subject matter of the report at issue in that case – the mishandling of an investigation and prosecution of murder charges. Further, the court record in question was already in the public domain. Based on this evidence, the Court found that the CLA had not demonstrated that meaningful public discussion of problems in the administration of justice could not take place without access to the report. [51]

72. The Court observed that, even if necessity were established, the applicant would face the further challenge of demonstrating that access would not impinge on privileges or impair the proper functioning of relevant government institutions. Given that the records sought in *CLA* were subject to exemptions designed to protect solicitor-client privilege and law enforcement interests, the Court held that those requirements could not be satisfied.[52]

(ii) The Adjudicator correctly applied the test in *Criminal Lawyers' Association*

73. The Adjudicator correctly applied the test in *CLA*. He found that the evidence showed the

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[50] *Criminal Lawyers' Association*, supra note 11, at paras. 36-40.
[51] *Criminal Lawyers' Association*, supra note 11, at para. 59.
[52] *Criminal Lawyers' Association*, supra note 11, at paras. 60-61.

Applicant was able to engage in a detailed public expression of opinion about his relationship with the University, the termination of his employment, and the grievance proceedings subject to arbitration. Further, the Applicant was unable to demonstrate that access to the report or related records was necessary to engage in meaningful discussion on these or any other topics on which he wished to speak.[53]

74. Even if the Applicant's ability to engage in meaningful expression were impeded in some way, the Adjudicator considered the confidentiality undertaking to which the Applicant was bound to be analogous to a form of privilege and, consequently, a countervailing consideration inconsistent with production.[54]

(iii) ***Association for Reformed Political Action Canada v. Ontario***

75. The recent judgment of the Superior Court of Justice in *Ass'n for Reformed Political Action Canada v. Ontario* ("*ARPA*")[55] is the only judicial decision to hold that a provision of *FIPPA* unjustifiably infringed the derivative right of access to information under s. 2(b) of the *Charter*. The circumstances in that case stand in contrast to the case at bar.

76. In *ARPA*, the Court held that the exclusion at s. 65(5.7) of *FIPPA* for "records relating to the provision of abortion services" breached the applicants' derivative right of access under s. 2(b) and could not be justified under s. 1 of the *Charter*. The Court found that s. 65(5.7) precluded meaningful discussion on a matter of public importance – the provision of abortion services – and further, that there were no countervailing considerations inconsistent with production.[56]

77. The applicants in *ARPA* sought access under *FIPPA* to non-identifying statistical information about abortion services in Ontario – i.e., records that did not include identifying

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[53] Order PO-3686, Applicant's Application Record, Tab 2, at para. 149, p. 52.
[54] *Juman v. Doucette*, [2008] 1 SCR 157, at paras. 23, 26, 32, 36.
[55] *Ass'n for Reformed Political Action Canada v. Ontario*, [2017] O.J. No. 2969 ("*ARPA*").
[56] *ARPA*, supra note 56, at paras. 45, 52-53.

information of specific individuals or facilities – which had previously been accessible under *FIPPA* prior to an amendment in 2010 introducing the s. 65(5.7) exclusion.[57]

78. Throughout its reasons in *ARPA*, the Court emphasized that its decision on the first two elements of the *CLA* test – necessity for meaningful discussion and the absence of countervailing considerations – rested primarily on its finding that there was insufficient reliable statistical data in the public domain for meaningful public debate on abortion.[58] As the Court stated:

> One could simplify the main question as being: does having less than 50% of some of the statistical information on a matter of important public interest allow for a meaningful public discussion? For the reasons which follow and given the place the abortion debate takes in the Canadian political and social environment, I think the answer to the question is "no."[59]

79. But for the exclusion of the very type of information necessary for meaningful discussion on abortion, it is by no means clear that the Court would have found a s. 2(b) breach.

80. The Court in *ARPA* listed several reasons for concluding that s. 65(5.7) of *FIPPA* substantially impeded meaningful public discussion about the provision abortion services:

(i) the exclusion of all records related to abortion services is a broad brushed exclusion which leaves no room for discretion, even when dealing with non-identifiable general statistical information;

(ii) there is no evidence of any parliamentary debate on the adoption of a broad exclusion from *FIPPA*. The Court is left to speculate as to why the government created such a broad exclusion in the first place;

(iii) the reliance on voluntary disclosure by hospitals or clinics or the Ministry does not constitute an identifiable and reliable path to access the information...;

(iv) there is insufficient reliable statistical data to allow for meaningful debate on abortion ... the interested parties are forced to rely on dated historical data...;

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[57] The applicants had previously sought judicial review a decision of the Commissioner denying access to similar records on the basis of s. 65(5.7) of *FIPPA*, but that application was rendered moot when Ontario offered to provide the requested information outside the *FIPPA* framework: *ARPA*, supra note 56, at paras. 9, 10, 14, 37.

[58] *ARPA*, supra note 56, at paras. 6, 37, 42, 43, 44(i), (iv), (v), (vi), (vii), 52.

[59] *ARPA*, supra note 56, at para. 6.

(v) while ... there are examples of public debate on abortion issues, the issue is if this debate is meaningful based on the nature of the information available to interested parties. I believe that it is not...;

(vi) the issue of what information should be made available to the public is an exercise that does not seem to have been fully undertaken by Ontario... There is no evidence that consideration was given to the need for an exemption of records of a general statistical nature; and

(vii) ... It is not for this Court to enter into the debate of what information will allow for meaningful public debate... However, I am able to conclude that the information provided to date is clearly insufficient.[60]

81. The Court agreed with the applicants that there were no apparent countervailing considerations inconsistent with the disclosure of non-identifying statistical information.[61]

82. The Court relied on essentially the same reasons in holding that the test of justification under s. 1 of the *Charter* was not met in that case.[62]

(iv) The Applicant's claim is not comparable to the claim in *ARPA*

83. The circumstances in the decision under review by this Court differ significantly from the circumstances present in *ARPA*.

84. Unlike the record before the Court in *ARPA*, the record before this Court demonstrates that the Legislature considered and debated the purpose for the exclusion at s. 65(6) of *FIPPA*. The purpose of s. 65(6), and the need identified by the Legislature for such an exclusion, are set out in the legislative history and reflected in several judgments of the Ontario courts.

85. The Legislature added the s. 65(6) exclusion to *FIPPA* as part of the *Labour Relations and Employment Statute Law Amendment Act*.[63] In introducing the bill, the Honourable Elizabeth Witmer, then Minister of Labour, described the proposed legislation as a "package of labour law

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[60] *ARPA*, supra note 56, at para. 44.
[61] *ARPA*, supra note 56, at paras. 52-53.
[62] *ARPA*, supra note 56, at paras. 44, 52.
[63] *Ministry of Correctional Services v. Goodis*, (2008) 89 O.R. (3d) 457, at para. 25 ("*Goodis*").

reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations."[64]

86. The Legislature considered the exclusion of labour relations and employment-related records from *FIPPA* and *MFIPPA* to be necessary to achieve the objective of aligning public sector labour and employment relations with those of the private sector. The Honourable David Johnson, then Chair of the Management Board of Cabinet, stated that the amendments to *FIPPA* and *MFIPPA* were designed "to ensure the confidentiality of labour relations information."[65]

87. On proclamation of the amendments, Management Board of Cabinet released the following comments in answer to the question whether labour relations documents will be exempt from disclosure under the changes to *FIPPA* and *MFIPPA*:

> Yes. This change brings us in line with the private sector. Previously, orders under the Act made some internal labour relations information available (e.g. grievance information, confidential information about labour relations strategy, and other sensitive information) which could impact negatively on relationships with bargaining agents. That meant that unions had access to some employer labour relations information while the employer had no similar access to union information."[66]

88. In contrast to the broad exclusion of all "records related to the provision of abortion services," s. 65(6) does not exclude all labour relations and employment related records. Rather, it is limited to specific types of records necessary to meet the objectives identified by the Legislature, including records relating to:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a

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[64] Ontario, Legislative Assembly, Official Report of Debates (Hansard) (4 October 1995) ("*Hansard*").
[65] *Hansard*, supra note 64.
[66] Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (10 November 1995) ("*Management Board Secretariat*").

person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest."

89. Moreover, s. 65(7) of *FIPPA* sets out several exceptions to the exclusion for: an agreement between an institution and a trade union; an agreement between an institution and one or more employees ending labour relations or employment-related proceedings or resulting from negotiations about employment related matters; and expenses submitted for reimbursement.

90. Further, Ontario courts have consistently interpreted s. 65(6)3 in a manner which respects its purpose and wording, while appropriately limiting its application to ensure that the public accountability objectives of *FIPPA* are not frustrated.

91. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, the Court of Appeal interpreted the words in s. 65(6)3 "in which the institution has an interest" to mean "more than mere curiosity or concern"[67] and restricted the categories of excluded records to those relating to the institution's own workforce.[68]

92. In rejecting a temporal limitation in s. 65(6)3, the Court of Appeal observed that the interpretation of this provision must make "practical sense for the purposes of administration of [*FIPPA*]." The Court emphasized the need for certainty in the exclusion's application, stating that "one would not expect that institutions are required to continually review their records on an ongoing basis to assess the applicability of [*FIPPA*]."[69]

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[67] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2001] O.J. No. 3223, at para. 34 ("Solicitor General").
[68] *Solicitor General*, supra note 67, at para. 35.
[69] *Solicitor General*, supra note 67, at paras. 38-39.

93. In *Ministry of Correctional Services v. Goodis*, this Court held that the wording of s. 65(6)3 makes it clear that records are excluded only if they are "about" labour relations or employment-related matters, as distinct from other matters related to employees' actions.[70]

94. In *Ontario (Ministry of Community and Social Services) v John Doe* (*MCSS*), this Court further refined the scope of s. 65(6)3. The Court explained that, for the exclusion to apply, the record must "do more than have some connection to or some relationship with a labour relations matter." Applying the dictionary definition of "about," the Court said: "This means that to qualify for the exclusion, the subject matter of the record must be a labour relations or employment-related matter." [71] (emphasis added)

95. In *MCSS*, the Court also explained that s. 65(6) does not apply "if the records arise in the context of a provincial institution's operational mandate" or "in the course of discharging public responsibilities." Rather, it only applies "in the context of the institution discharging its mandate *qua* employer." This limitation ensures that the exclusion does not have "the effect of shielding government officials from public accountability ... contrary to the purposes of [*FIPPA*]."[72]

96. In the case at bar, the alleged constraints on the Applicant's ability to engage in meaningful expression are simply not comparable to the constraints identified by the court in *ARPA*. Section 65(5.7) excluded the very statistical information sought by the applicants, which the Court agreed was vitally necessary for meaningful expression about the provision of abortion services.

97. In contrast, the Adjudicator found that access to the report was not necessary for the Applicant to engage in meaningful expression on the issues he wished to discuss. [73]

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[70] *Goodis*, supra note 63, at para. 23.
[71] *Ontario (Ministry of Community and Social Services) v John Doe*, [2014] O.J. No. 2362, at para. 29 ("*MCSS*").
[72] *MCSS*, supra note 71, at para. 39.
[73] Order PO-3686, Applicant's Application Record, Tab 2, at para. 218, p. 67.

D. If s. 65(6)3 infringes s. 2(b), the infringement would be justified under s. 1 of the *Charter*

98. The Adjudicator found that the Applicant did not establish a breach of his s. 2(b) rights. Nonetheless, he went on to engage in the proportional balancing exercise under the administrative law approach, which the Court in *Doré* equated with the strong *Charter* protection of the *Oakes* analysis.

99. The Adjudicator considered this balance and determined that the outcome of his decision respected the applicant's s. 2(b) rights while honouring the statutory purpose of section 65(6).[74] Should this Court find that s. 65(6) breaches the Applicant's *Charter* rights, that provision would be saved under s. 1 of the *Charter* for essentially the same reasons.

100. Under the *Oakes* test, the Court considers whether the impugned provision has a pressing and substantial objective, whether the provision as enacted is rationally connected to that objective, whether it minimally impairs the right in question and whether the salutary benefits of the provision outweigh the deleterious effects.[75]

101. The pressing and substantial objective identified by the Legislature in enacting s. 65(6) was to "revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations," to harmonize public sector labour and employment relations with those of the private sector by bringing the treatment of labour and employment-related records in line with the private sector,[76] and "to ensure the confidentiality of labour relations information."[77]

102. The legislative history demonstrates that the exclusion is rationally connected to those objectives. Section 65(6) ensures that, as with the private sector, specified categories of public

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[74] Order PO-3686, Applicant's Application Record, Tab 2, at paras. 217-218, pp. 66-67.
[75] *R. v. Oakes*, [1986] 1 SCR 103, at paras. 69-71.
[76] *Management Board Secretariat*, supra note 66; Explanatory note: Bill 7, *An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations*, 1st sess, 36th Leg, Ontario, 1995, explanatory note (first reading 4 October 1995).
[77] *Hansard*, supra note 64.

sector labour relations and employment-related records will not be accessible under *FIPPA*.[78]

103. The scheme of s. 65(6) as judicially interpreted indicates that any infringement of a derivative right of access under s. 2(b) of the *Charter* - or any infringement of a *Charter* right of privacy, if one is found – would be minimal. The scope of the exclusion is limited in several ways set out above:

(i) Section 65(6) excludes only records relating to certain types of proceedings and negotiations, or communications about labour relations and employment-related matters in which the institution has an interest.[79]

(ii) Section 65(7) preserves the application of *FIPPA* to listed categories of records.[80]

(iii) To be excluded, the record at issue must be "about" labour relations and employment-related matters, and not merely related to such matters.[81]

(iv) The institution must have more than a curiosity or concern about the subject matter.[82]

(v) The record must relate to the institution's own workforce.[83]

(vi) The exclusion only applies to the institution *qua* employer and not in the context of its operational mandate or the discharge of its public responsibilities.[84]

104. These limitations ensure that any impairment of *Charter* rights is no more than necessary to achieve the objective of the exclusion - to bring the public sector in line with the private sector by ensuring the confidentiality of labour relations and employment-related records.

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[78] *Management Board Secretariat*, supra note 66.
[79] *FIPPA*, supra note 1, s. 65(6).
[80] *FIPPA*, supra note 1, s. 65(7).
[81] *MCSS*, supra note 71, at para. 39.
[82] *Solicitor General*, supra note 67, at para. 34.
[83] *Solicitor General*, supra note 67, at para. 35.
[84] *MCSS*, supra note 71, at para. 39.

105. If the exclusion were to limit the Applicant's *Charter* rights, it would do so proportionately – i.e., its specific and general benefits outweigh its deleterious effects.

106. The salutary benefits of the exclusion include supporting the Legislature's economic and labour relations objectives of restoring balance in labour and employment relations in line with the private sector. In this case, the application of the exclusion ensures the integrity of the grievance arbitration process,[85] identified in the legislative history as being of particular concern,[86] and the confidentiality undertaking ordered by the arbitrator pursuant to that process.

107. The deleterious effects are minimal. The Applicant already has access to the record though the grievance process and can require its production and use it in any proceedings in which it may be relevant. Further, as the Adjudicator found:

> [E]ven without access under the *Act*, the appellant has had the opportunity to engage in a very detailed and meaningful public expression of opinion concerning his relationship with the university, including his dismissal and the grievance proceedings that followed it.[87]

108. Labour and employment relations are highly regulated spheres of activity within which a myriad of tribunals and regulatory agencies, in addition to the courts, have their own mechanisms for the production of relevant information, the protection of individual privacy, and making records accessible to the public.[88] The introduction of a general *Charter* right of access to records covered by s. 65(6) would arguably add little to expressive freedom and potentially be disruptive of the important interests these bodies are designed to advance and protect.

E. There is no basis for this Court to make a general declaration of invalidity

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[85] Order PO-3686, Applicant's Application Record, Tab 2, at para. 213, p. 66.
[86] *Management Board Secretariat*, supra note 66.
[87] Order PO-3686, Applicant's Application Record, Tab 2, at para. 218, p. 51.
[88] Examples include labour relations boards, arbitration boards, human rights tribunals, employment standards referees, workers' compensation boards.

109. The Applicant is unable to demonstrate that his right to freedom of expression under s. 2(b) is breached in the circumstances of this case, but nonetheless asks that s. 65(6)3 be struck down because it is unconstitutional in its general effect.

110. The Applicant advanced arguments concerning his own circumstances as the basis for claiming that s. 65(6)3 of FIPPA conflicts with s. 2(b) of the Charter, but he did not advance a credible basis on which this Court might find that s. 65(6)3 would generally infringe s. 2(b) rights in other circumstances. Further, he is unable to demonstrate that other circumstances would not entail countervailing considerations inconsistent with production.

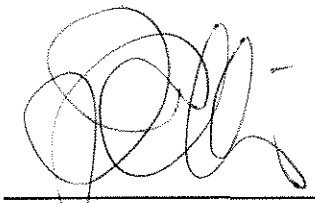
111. The Applicant's request for a declaration that s. 65(6) is unconstitutional in its general effect asks this Court to ignore the requirements of the *CLA* test and grant him a *Charter* right of access to the records despite his inability to satisfy those requirements. The Court should reject this submission.

PART IV – ORDER REQUESTED

112. The Commissioner respectfully requests that the Court dismiss this application with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 14, 2017



William S. Challis

Counsel for the Respondent
Information and Privacy Commissioner of Ontario

TAB A

SCHEDULE OF AUTHORITIES

SCHEDULE "A" – AUTHORITIES

1. *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815

2. *Doré v. Barreau du Québec*, [2012] 1 SCR 395

3. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504

4. *R. v. Conway*, [2010] 1 SCR 765

5. *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 SCR 257

6. *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.); leave to appeal denied [2005] S.C.C.A. No. 95

7. *Cash Converters Canada Inc. v. Oshawa (City)*, (2007) 86 O.R. (3d) 401 (C.A.)

8. *R. v. Mills*, [1999] 3 SCR 668

9. *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773

10. *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403

11. *H.J. Heinz of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 SCR 441

12. *R. v. MacDonald*, [2014] 1 SCR 37

13. *R. v. Dyment*, [1988] 2 SCR 417

14. *R. v. Plant* [1993] 3. SCR 281

15. *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145

16. *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (C.A.)

17. *Ruby v. Canada (Solicitor General)*, [2002] 4 SCR 3

18. *Juman v. Doucette*, [2008] 1 SCR 157

19. *Ass'n for Reformed Political Action Canada v. Ontario*, [2017] O.J. No. 2969

20. *Ministry of Correctional Services v. Goodis*, (2008) 89 O.R. (3d) 457

21. *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2001] O.J. No. 3223

22. *Ontario (Ministry of Community and Social Services) v John Doe*, [2014] O.J. No. 2362

23. *R. v. Oakes*, [1986] 1 SCR 103

Secondary Sources

24. Ontario, Legislative Assembly, Official Report of Debates (Hansard) (4 October 1995)

25. Ontario, Management Board Secretariat, Bill 7 Information Package, Employee Questions and Answers, (10 November 1995)

26. Explanatory note: Bill 7, *An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations*, 1st sess, 36th Leg, Ontario, 1995, explanatory note (first reading 4 October 1995)

TAB B

SCHEDULE OF STATUTES

SCHEDULE "B" – STATUTES

1. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 10, 12-23, 47, 37-49, 50-54, 54(1), 59(b), 65

2. *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 46(b)

TAB 1

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Français

Freedom of Information and Protection of Privacy Act

R.S.O. 1990, CHAPTER F.31

Consolidation Period: From January 1, 2017 to the e-Laws currency date.

Last amendment: 2016, c. 37, Sched. 18, s. 8.

Legislative History: 1992, c. 14, s. 1; 1992, c. 32, s. 13; 1993, c. 38, s. 65; 1994, c. 11, s. 388; 1994, c. 12, s. 49; 1995, c. 1, s. 82; 1996, c. 1, Sched. K, s. 1-12; 1996, c. 2, s. 66; 1996, c. 6, s. 2, 3; 1996, c. 25, s. 6; 1997, c. 41, s. 118; 1998, c. 26, s. 103; 2002, c. 2, s. 15, 19 (4-7); 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. K, s. 1-11; 2002, c. 34, Sched. B, s. 2, 3; 2004, c. 3, Sched. A, s. 81; 2004, c. 17, s. 32; 2005, c. 25, s. 34; 2005, c. 28, Sched. F; 2006, c. 19, Sched. N, s. 1; 2006, c. 21, Sched. C, s. 110; 2006, c. 34, Sched. C, s. 1-12; 2006, c. 34, Sched. F, s. 1; 2006, c. 35, Sched. C, s. 47; 2007, c. 6, s. 61; 2007, c. 13, s. 43; 2008, c. 15, s. 86; 2010, c. 25, s. 24; 2011, c. 9, Sched. 15; 2014, c. 13, Sched. 4, s. 8; 2014, c. 13, Sched. 6, s. 1, 2; 2015, c. 20, Sched. 13; 2016, c. 5, Sched. 10; 2016, c. 23, s. 49; 2016, c. 37, Sched. 18, s. 8.

CONTENTS

Purposes

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. F.31, s. 1.

Limited application re Assembly

1.1 (1) This Act applies to the Assembly, but only in respect of records of reviewable expenses of the Opposition leaders and the persons employed in their offices and in respect of the personal information contained in those records. 2002, c. 34, Sched. B, s. 2.

Same

(2) Sections 11, 31, 32, 33, 34, 36, 44, 45 and 46 do not apply with respect to the Assembly. 2002, c. 34, Sched. B, s. 2.

Definitions

(3) In this section,

"Opposition leader" has the same meaning as in section 1 of the *Cabinet Ministers' and Opposition Leaders' Expenses Review and Accountability Act, 2002*; ("chef d'un parti de l'opposition")

"reviewable expense" means a reviewable expense as described in section 3 of the *Cabinet Ministers' and Opposition Leaders' Expenses Review and Accountability Act, 2002*. ("dépense sujette à examen") 2002, c. 34, Sched. B, s. 2.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is repealed and the following substituted: (See: 2014, c. 13, Sched. 4, ss. 8, 9)

Definitions

(3) In this section,

"Opposition leader" has the same meaning as in section 1 of the *Politicians' Expenses Review Act, 2002*; ("chef d'un parti de l'opposition")

"reviewable expense" means a reviewable expense as described in section 3 of the *Politicians' Expenses Review Act, 2002*. ("dépense sujette à examen") 2014, c. 13, Sched. 4, s. 8.

Section Amendments with date in force (d/m/y)

2002, c. 34, Sched. B, s. 2 - 1/01/2003

2014, c. 13, Sched. 4, s. 8 - not in force

Definitions

2. (1) In this Act,

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, including by adoption; ("proche parent")

"ecclesiastical records" means the operational, administrative and theological records, including records relating to the practice of faith, of a church or other religious organization; ("documents ecclésiastiques")

"educational institution" means an institution that is a college of applied arts and technology or a university; ("établissement d'enseignement")

"head", in respect of an institution, means,

(0.a) in the case of the Assembly, the Speaker,

(a) in the case of a ministry, the minister of the Crown who presides over the ministry,

(a.1) in the case of a public hospital, the chair of the board of the hospital,

(a.2) in the case of a private hospital, the superintendent,

(a.3) in the case of the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa, the Chair of the board, and

(b) in the case of any other institution, the person designated as head of that institution in the regulations; ("personne responsable")

"hospital" means,

(a) a public hospital,

(b) a private hospital, and

(c) the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa; ("hôpital")

"Information and Privacy Commissioner" and "Commissioner" mean the Commissioner appointed under subsection 4 (1); ("commissaire à l'information et à la protection de la vie privée", "commissaire")

"institution" means,

(0.a) the Assembly,

(a) a ministry of the Government of Ontario,

(a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*,

(a.2) a hospital, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution")

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b); ("exécution de la loi")

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) 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,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution 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,

(g) the views or opinions of another individual about the individual, and

(h) 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; ("renseignements personnels")

"personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name or an identifying number or particular assigned to the individual; ("banque de renseignements personnels")

"private hospital" means a private hospital within the meaning of the *Private Hospitals Act*; ("hôpital privé")

"public hospital" means a hospital within the meaning of the *Public Hospitals Act*; ("hôpital public")

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

"regulations" means the regulations made under this Act; ("règlements")

"responsible minister" means the minister of the Crown who is designated by order of the Lieutenant Governor in Council under section 3; ("ministre responsable")

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. ("conjoint") R.S.O. 1990, c. F.31, s. 2 (1); 2002, c. 34, Sched. B, s. 3; 2005, c. 28, Sched. F, s. 1 (1, 3); 2006, c. 19, Sched. N, s. 1 (1); 2006, c. 34, Sched. C, s. 1; 2006, c. 34, Sched. F, s. 1 (1); 2010, c. 25, s. 24 (1-5); 2016, c. 23, s. 49 (1).

Personal information

(2) Personal information does not include information about an individual who has been dead for more than thirty years. R.S.O. 1990, c. F.31, s. 2 (2).

Business identity information, etc.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. 2006, c. 34, Sched. C, s. 2.

Same

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling. 2006, c. 34, Sched. C, s. 2.

Section Amendments with date in force (d/m/y)

2002, c. 34, Sched. B, s. 3 (1, 2) - 1/01/2003

2005, c. 28, Sched. F, s. 1 (1) - 10/06/2006; 2005, c. 28, Sched. F, s. 1 (3) - 22/06/2006

2006, c. 19, Sched. N, s. 1 (1) - 22/06/2006; 2006, c. 34, Sched. C, s. 1 (1, 2), 2 - 1/04/2007; 2006, c. 34, Sched. F, s. 1 (1) - 1/04/2007

2010, c. 25, s. 24 (1-5) - 1/01/2012

2016, c. 23, s. 49 (1) - 01/01/2017

PART I
ADMINISTRATION

Responsible minister

3. The Lieutenant Governor in Council may by order designate a minister of the Crown to be the responsible minister for the purposes of this Act. R.S.O. 1990, c. F.31, s. 3.

Information and Privacy Commissioner

4. (1) There shall be appointed, as an officer of the Legislature, an Information and Privacy Commissioner to exercise the powers and perform the duties prescribed by this or any other Act. R.S.O. 1990, c. F.31, s. 4 (1).

Appointment

(2) The Commissioner shall be appointed by the Lieutenant Governor in Council on the address of the Assembly. R.S.O. 1990, c. F.31, s. 4 (2).

Term and removal from office

(3) The Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms, but is removable at any time for cause by the Lieutenant Governor in Council on the address of the Assembly. R.S.O. 1990, c. F.31, s. 4 (3).

Assistant Commissioners

(4) From the officers of the Commissioner's staff, the Commissioner shall appoint one or two Assistant Commissioners and may appoint an Assistant Commissioner for Personal Health Information. 2004, c. 3, Sched. A, s. 81 (1).

Section Amendments with date in force (d/m/y)

2004, c. 3, Sched. A, s. 81 (1) - 1/11/2004

Nature of employment

5. (1) The Commissioner shall work exclusively as Commissioner and shall not hold any other office under the Crown or engage in any other employment. R.S.O. 1990, c. F.31, s. 5 (1).

Not a public servant

(2) The Commissioner is not a public servant within the meaning of the *Public Service of Ontario Act, 2006*. 2006, c. 35, Sched. C, s. 47 (1).

Section Amendments with date in force (d/m/y)

1996, c. 6, s. 2 - 25/04/1996

2006, c. 35, Sched. C, s. 47 (1) - 20/08/2007

Salary

6. (1) The Commissioner shall be paid a salary to be fixed by the Lieutenant Governor in Council. R.S.O. 1990, c. F.31, s. 6 (1).

Idem

(2) The salary of the Commissioner shall not be reduced except on the address of the Assembly. R.S.O. 1990, c. F.31, s. 6 (2).

Expenses

(3) The Commissioner is entitled to be paid reasonable travelling and living expenses while absent from his or her ordinary place of residence in the exercise of any functions under this Act. R.S.O. 1990, c. F.31, s. 6 (3).

Pension

(4) The Commissioner is a member of the Public Service Pension Plan. 1996, c. 6, s. 3.

Section Amendments with date in force (d/m/y)

1996, c. 6, s. 3 - 25/04/1996

Temporary Commissioner

7. If, while the Legislature is not in session, the Commissioner dies, resigns or is unable or neglects to perform the functions of the office of Commissioner, the Lieutenant Governor in Council may appoint a Temporary Commissioner to hold office for a term of not more than six months who shall, while in such office, have the powers and duties of the Commissioner and shall be paid such salary or other remuneration and expenses as the Lieutenant Governor in Council may fix. R.S.O. 1990, c. F.31, s. 7.

Staff

8. (1) Subject to the approval of the Lieutenant Governor in Council, the Commissioner may employ mediators and any other officers and employees the Commissioner considers necessary for the efficient operation of the office and may determine their salary and remuneration and terms and conditions of employment. R.S.O. 1990, c. F.31, s. 8 (1).

Benefits

(2) The benefits determined under Part III of the *Public Service of Ontario Act, 2006* with respect to the following matters for public servants employed under that Part to work in a ministry, other than in a minister's office, who are not within a bargaining unit apply to the employees of the office of the Commissioner:

1. Cumulative vacation and sick leave credits for regular attendance and payments in respect of such credits.
2. Plans for group life insurance, medical-surgical insurance or long-term income protection.
3. The granting of leaves of absence. 2006, c. 35, Sched. C, s. 47 (2).

Same

(2.1) For the purposes of subsection (2), if a benefit applicable to an employee of the office of the Commissioner is contingent on the exercise of a discretionary power or the performance of a discretionary function, the power may be exercised or the function may be performed by the Commissioner or any person authorized in writing by the Commissioner. 2006, c. 35, Sched. C, s. 47 (2).

Public Service Pension Plan

(3) The Commissioner shall be deemed to have been designated by the Lieutenant Governor in Council under the *Public Service Pension Act* as a commission whose permanent and probationary staff are required to be members of the Public Service Pension Plan. R.S.O. 1990, c. F.31, s. 8 (3).

Section Amendments with date in force (d/m/y)

2006, c. 35, Sched. C, s. 47 (2) - 20/08/2007

Financial

Premises and supplies

9. (1) The Commissioner may lease any premises and acquire any equipment and supplies necessary for the efficient operation of the office of the Commissioner. R.S.O. 1990, c. F.31, s. 9 (1).

Audit

(2) The accounts and financial transactions of the office of the Commissioner shall be audited annually by the Auditor General. R.S.O. 1990, c. F.31, s. 9 (2); 2004, c. 17, s. 32.

Section Amendments with date in force (d/m/y)

2004, c. 17, s. 32 - 30/11/2004

PART II
FREEDOM OF INFORMATION

ACCESS TO RECORDS

Right of access

10. (1) Subject to subsection 69 (2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. 1996, c. 1, Sched. K, s. 1; 2010, c. 25, s. 24 (6).

Severability of record

(2) If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. 1996, c. 1, Sched. K, s. 1.

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 1 - 30/01/1996

2010, c. 25, s. 24 (6) - 1/01/2012

Measures to ensure preservation of records

10.1 Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution. 2014, c. 13, Sched. 6, s. 1.

Section Amendments with date in force (d/m/y)

2014, c. 13, Sched. 6, s. 1 - 1/01/2016

Obligation to disclose

11. (1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public. R.S.O. 1990, c. F.31, s. 11 (1).

Notice

(2) Before disclosing a record under subsection (1), the head shall cause notice to be given to any person to whom the information in the record relates, if it is practicable to do so. R.S.O. 1990, c. F.31, s. 11 (2).

Contents of notice

(3) The notice shall contain,

(a) a statement that the head intends to release a record or a part of a record that may affect the interests of the person;

(b) a description of the contents of the record or part that relate to the person; and

(c) a statement that if the person makes representations forthwith to the head as to why the record or part thereof should not be disclosed, those representations will be considered by the head. R.S.O. 1990, c. F.31, s. 11 (3).

Representations

(4) A person who is given notice under subsection (2) may make representations forthwith to the head concerning why the record or part should not be disclosed. R.S.O. 1990, c. F.31, s. 11 (4).

EXEMPTIONS

Cabinet records

12. (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations. R.S.O. 1990, c. F.31, s. 12 (1).

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given. R.S.O. 1990, c. F.31, s. 12 (2).

Advice to government

13. (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution. R.S.O. 1990, c. F.31, s. 13 (1).

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(d) an environmental impact statement or similar record;

(e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling. R.S.O. 1990, c. F.31, s. 13 (2).

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy. R.S.O. 1990, c. F.31, s. 13 (3); 2016, c. 5, Sched. 10, s. 1.

Section Amendments with date in force (d/m/y)

2016, c. 5, Sched. 10, s. 1 - 19/04/2016

Law enforcement

14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime. R.S.O. 1990, c. F.31, s. 14 (1); 2002, c. 18, Sched. K, s. 1 (1).

Idem

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority. R.S.O. 1990, c. F.31, s. 14 (2); 2002, c. 18, Sched. K, s. 1 (2).

Refusal to confirm or deny existence of record

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply. R.S.O. 1990, c. F.31, s. 14 (3).

Exception

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario. R.S.O. 1990, c. F.31, s. 14 (4).

Idem

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections. R.S.O. 1990, c. F.31, s. 14 (5).

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. K, s. 1 (1) - 26/11/2002

Civil Remedies Act, 2001

14.1 A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the *Civil Remedies Act, 2001*, conduct a proceeding under that Act or enforce an order made under that Act. 2001, c. 28, s. 22 (1); 2002, c. 18, Sched. K, s. 2; 2007, c. 13, s. 43 (1).

Section Amendments with date in force (d/m/y)

2001, c. 28, s. 22 (1) - 12/04/2002

2002, c. 18, Sched. K, s. 2 - 26/11/2002

2007, c. 13, s. 43 (1) - 4/06/2007

Prohibiting Profiting from Recounting Crimes Act, 2002

14.2 A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the *Prohibiting Profiting from Recounting Crimes Act, 2002*, conduct a proceeding under that Act or enforce an order made under that Act. 2002, c. 2, ss. 15 (1), 19 (4); 2002, c. 18, Sched. K, s. 3.

Section Amendments with date in force (d/m/y)

2002, c. 2, s. 15 (1) - 1/07/2003; 2002, c. 18, Sched. K, s. 3 - 26/11/2002

Relations with other governments

15. A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution; or

(c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council. R.S.O. 1990, c. F.31, s. 15; 2002, c. 18, Sched. K, s. 4.

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. K, s. 4 - 26/11/2002

Defence

16. A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council. R.S.O. 1990, c. F.31, s. 16; 2002, c. 18, Sched. K, s. 5.

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. K, s. 5 - 26/11/2002

Third party information

17. (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute. R.S.O. 1990, c. F.31, s. 17 (1); 2002, c. 18, Sched. K, s. 6.

Tax information

(2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax. R.S.O. 1990, c. F.31, s. 17 (2).

Consent to disclosure

(3) A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure. R.S.O. 1990, c. F.31, s. 17 (3).

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. K, s. 6 - 26/11/2002

Economic and other interests of Ontario

18. (1) A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

(b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

(h) information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques;

(i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party municipality or other body before the matter is resolved;

(j) information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services. R.S.O. 1990, c. F.31, s. 18 (1); 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. K, s. 7; 2005, c. 28, Sched. F, s. 2; 2011, c. 9, Sched. 15, s. 1.

Exception

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or

(b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing. R.S.O. 1990, c. F.31, s. 18 (2).

Section Amendments with date in force (d/m/y)

2002, c. 17, Sched. F, Table - 1/01/2003; 2002, c. 18, Sched. K, s. 7 (1-4) - 26/11/2002

2005, c. 28, Sched. F, s. 2 - 10/06/2006

2011, c. 9, Sched. 15, s. 1 - 1/01/2012

Information with respect to closed meetings

18.1 (1) A head may refuse to disclose a record that reveals the substance of deliberations of a meeting of the governing body or a committee of the governing body of an educational institution or a hospital if a statute authorizes holding the meeting in the absence of the public and the subject-matter of the meeting,

(a) is a draft of a by-law, resolution or legislation; or

(b) is litigation or possible litigation. 2005, c. 28, Sched. F, s. 3; 2010, c. 25, s. 24 (7).

Exception

(2) Despite subsection (1), the head shall not refuse to disclose a record under subsection (1) if,

(a) the information is not held confidentially;

(b) the subject-matter of the deliberations has been considered in a meeting open to the public; or

(c) the record is more than 20 years old. 2005, c. 28, Sched. F, s. 3.

Application of Act

(3) The exemption in subsection (1) is in addition to any other exemptions in this Act. 2005, c. 28, Sched. F, s. 3.

Section Amendments with date in force (d/m/y)

2005, c. 28, Sched. F, s. 3 - 10/06/2006

2010, c. 25, s. 24 (7) - 1/01/2012

Solicitor-client privilege

19. A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation. 2005, c. 28, Sched. F, s. 4; 2010, c. 25, s. 24 (8).

Section Amendments with date in force (d/m/y)

2005, c. 28, Sched. F, s. 4 - 10/06/2006

2010, c. 25, s. 24 (8) - 1/01/2012

Danger to safety or health

20. A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. R.S.O. 1990, c. F.31, s. 20; 2002, c. 18, Sched. K, s. 8.

Section Amendments with date in force (d/m/y)

2002, c. 18, Sched. K, s. 8 - 26/11/2002

Personal privacy

21. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy. R.S.O. 1990, c. F.31, s. 21 (1).

Criteria re invasion of privacy

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record. R.S.O. 1990, c. F.31, s. 21 (2).

Presumed invasion of privacy

(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;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations. R.S.O. 1990, c. F.31, s. 21 (3).

Limitation

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

(b) discloses financial or other details of a contract for personal services between an individual and an institution;

(c) discloses details of a licence or permit or a similar discretionary financial benefit conferred on an individual by an institution or a head under circumstances where,

(i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and

(ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario; or

(d) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons. R.S.O. 1990, c. F.31, s. 21 (4); 2006, c. 19, Sched. N, s. 1 (2).

Refusal to confirm or deny existence of record

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy. R.S.O. 1990, c. F.31, s. 21 (5).

Section Amendments with date in force (d/m/y)

2006, c. 19, Sched. N, s. 1 (2) - 22/06/2006

Species at risk

21.1 A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to,

(a) killing, harming, harassing, capturing or taking a living member of a species, contrary to clause 9 (1) (a) of the *Endangered Species Act, 2007*;

(b) possessing, transporting, collecting, buying, selling, leasing, trading or offering to buy, sell, lease or trade a living or dead member of a species, any part of a living or dead member of a species, or anything derived from a living or dead member of a species, contrary to clause 9 (1) (b) of the *Endangered Species Act, 2007*; or

(c) damaging or destroying the habitat of a species, contrary to clause 10 (1) (a) or (b) of the *Endangered Species Act, 2007*. 2007, c. 6, s. 61.

Section Amendments with date in force (d/m/y)

1997, c. 41, s. 118 (1) - 1/01/1999

2002, c. 18, Sched. K, s. 9 - 26/11/2002

2007, c. 6, s. 61 - 30/06/2008

Information soon to be published

22. A head may refuse to disclose a record where,

(a) the record or the information contained in the record has been published or is currently available to the public; or

(b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it. R.S.O. 1990, c. F.31, s. 22.

Exemptions not to apply

23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. R.S.O. 1990, c. F.31, s. 23; 1997, c. 41, s. 118 (2).

Section Amendments with date in force (d/m/y)

1997, c. 41, s. 118 (2) - 1/01/1999

ACCESS PROCEDURE

Request

24. (1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

(c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 2.

Frivolous request

(1.1) If the head of the institution is of the opinion on reasonable grounds that the request is frivolous or vexatious, subsections (2) to (5) do not apply to the request. 1996, c. 1, Sched. K, s. 2.

Sufficiency of detail

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1). R.S.O. 1990, c. F.31, s. 24 (2).

Request for continuing access to record

(3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years. R.S.O. 1990, c. F.31, s. 24 (3).

Institution to provide schedule

(4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,

(a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and

(b) a statement that the applicant may ask the Commissioner to review the schedule. R.S.O. 1990, c. F.31, s. 24 (4).

Act applies as if new requests were being made

(5) This Act applies as if a new request were being made on each of the dates shown in the schedule. R.S.O. 1990, c. F.31, s. 24 (5).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 2 - 30/01/1996

Request to be forwarded

25. (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution. R.S.O. 1990, c. F.31, s. 25 (1).

Transfer of request

(2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request. R.S.O. 1990, c. F.31, s. 25 (2).

Greater interest

(3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,

(a) the record was originally produced in or for the other institution; or

(b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof. R.S.O. 1990, c. F.31, s. 25 (3).

When transferred request deemed made

(4) Where a request is forwarded or transferred under subsection (1) or (2), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it. R.S.O. 1990, c. F.31, s. 25 (4).

Institution

(5) In this section,

"institution" includes an institution as defined in section 2 of the *Municipal Freedom of Information and Protection of Privacy Act*. R.S.O. 1990, c. F.31, s. 25 (5).

Notice by head

26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced. R.S.O. 1990, c. F.31, s. 26; 1996, c. 1, Sched. K, s. 3.

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 3 - 30/01/1996

Extension of time

27. (1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

(b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit. R.S.O. 1990, c. F.31, s. 27 (1).

Notice of extension

(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

(a) the length of the extension;

(b) the reason for the extension; and

(c) that the person who made the request may ask the Commissioner to review the extension. R.S.O. 1990, c. F.31, s. 27 (2).

Frivolous request

27.1 (1) A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 26,

(a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;

(b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and

(c) that the person who made the request may appeal to the Commissioner under subsection 50 (1) for a review of the decision. 1996, c. 1, Sched. K, s. 4.

Non-application

(2) Sections 28 and 29 do not apply to a head who gives a notice for the purpose of subsection (1). 1996, c. 1, Sched. K, s. 4.

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 4 - 30/01/1996

Notice to affected person

28. (1) Before a head grants a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest of a person other than the person requesting information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates. R.S.O. 1990, c. F.31, s. 28 (1).

Contents of notice

(2) The notice shall contain,

(a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;

(b) a description of the contents of the record or part thereof that relate to the person; and

(c) a statement that the person may, subject to subsection (5.1), within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed. R.S.O. 1990, c. F.31, s. 28 (2); 2016, c. 5, Sched. 10, s. 2 (1).

Description

(2.1) If the request covers more than one record, the description mentioned in clause (2) (b) may consist of a summary of the categories of the records requested if it provides sufficient detail to identify them. 1996, c. 1, Sched. K, s. 5.

Time for notice

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where there has been an extension of a time limit under subsection 27 (1), within that extended time limit. R.S.O. 1990, c. F.31, s. 28 (3).

Notice of delay

(4) Where a head gives notice to a person under subsection (1), the head shall also give the person who made the request written notice of delay, setting out,

(a) that the record or part thereof may affect the interests of another party;

(b) that the other party is being given an opportunity to make representations concerning disclosure; and

(c) that the head will, within 10 days after the expiry of the time period for making representations under subsection (5), decide whether or not to disclose the record. R.S.O. 1990, c. F.31, s. 28 (4); 2016, c. 5, Sched. 10, s. 2 (2).

Representation re disclosure

(5) Where a notice is given under subsection (1), the person to whom the information relates may, subject to subsection (5.1), within twenty days after the notice is given, make representations to the head as to why the record or the part thereof should not be disclosed. R.S.O. 1990, c. F.31, s. 28 (5); 2016, c. 5, Sched. 10, s. 2 (3).

Extension of time

(5.1) If the time limit specified in subsection (5) presents a barrier, as defined in the *Accessibility for Ontarians with Disabilities Act, 2005*, to the person, the head may extend the time limit for a period of time that is reasonably required in the circumstances to accommodate the person for the purpose of making representations under that subsection. 2016, c. 5, Sched. 10, s. 2 (4).

Representation in writing

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally. R.S.O. 1990, c. F.31, s. 28 (6).

Decision re disclosure

(7) The head shall decide whether or not to disclose the record or part and give written notice of the decision to the person to whom the information relates and the person who made the request within 10 days after the expiry of the time period for making representations under subsection (5). 2016, c. 5, Sched. 10, s. 2 (5).

Notice of head's decision to disclose

(8) A head who decides to disclose a record or part under subsection (7) shall state in the notice that,

(a) the person to whom the information relates may appeal the decision to the Commissioner within 30 days after the notice of decision is given, subject to subsection (8.1); and

(b) the person who made the request will be given access to the record or part unless an appeal of the decision is commenced within the time period specified in clause (a). 2016, c. 5, Sched. 10, s. 2 (5).

Extension of time

(8.1) If the time limit specified in clause (8) (a) presents a barrier, as defined in the *Accessibility for Ontarians with Disabilities Act, 2005*, to the person, the head may extend the time limit for a period of time that is reasonably required in the circumstances to accommodate the person for the purpose of appealing the decision under that clause. 2016, c. 5, Sched. 10, s. 2 (5).

Access to be given unless affected person appeals

(9) Where, under subsection (7), the head decides to disclose the record or a part thereof, the head shall give the person who made the request access to the record or part thereof within thirty days after notice is given under subsection (7), unless the person to whom the information relates appeals the decision to the Commissioner in accordance with clause (8) (a). R.S.O. 1990, c. F.31, s. 28 (9); 2016, c. 5, Sched. 10, s. 2 (6).

Personal information about deceased

(10) In the case of a request by the spouse or a close relative of a deceased individual for disclosure of personal information about the deceased individual, the person making the request shall give the head all information that the person has regarding whether the deceased individual has a personal representative and how to contact the personal representative. 2006, c. 19, Sched. N, s. 1 (3).

Deemed references

(11) If, under subsection (10), the head is informed that the deceased individual has a personal representative and is given sufficient information as to how to contact the personal representative, and if the head has reason to believe that disclosure of personal information about the deceased individual might constitute an unjustified invasion of personal privacy unless, in the circumstances, the disclosure is desirable for compassionate reasons, subsections (1) to (9) apply with the following modifications:

1. The expression "the person to whom the information relates" in subsections (1), (5), (7), (8) and (9) shall be deemed to be the expression "the personal representative".
2. The expression "the person" in clauses (2) (a) and (b) shall be deemed to be the expression "the deceased individual" and the expression "the person" in clause (2) (c) shall be deemed to be the expression "the personal representative". 2006, c. 19, Sched. N, s. 1 (3).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 5 - 30/01/1996

2006, c. 19, Sched. N, s. 1 (3) - 22/06/2006

2016, c. 5, Sched. 10, s. 2 (1-6) - 19/04/2016

Contents of notice of refusal

29. (1) Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

(a) where there is no such record,

(i) that there is no such record, and

(ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or

(b) where there is such a record,

(i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision. R.S.O. 1990, c. F.31, s. 29 (1).

Same

(2) Where a head refuses to confirm or deny the existence of a record as provided in subsection 14 (3) (law enforcement), section 14.1 (*Civil Remedies Act, 2001*), section 14.2 (*Prohibiting Profiting from Recounting Crimes Act, 2002*) or subsection 21 (5) (unjustified invasion of personal privacy), the head shall state in the notice given under section 26,

(a) that the head refuses to confirm or deny the existence of the record;

(b) the provision of this Act on which the refusal is based;

(c) the name and office of the person responsible for making the decision; and

(d) that the person who made the request may appeal to the Commissioner for a review of the decision. R.S.O. 1990, c. F.31, s. 29 (2); 2001, c. 28, s. 22 (2); 2002, c. 2, ss. 15 (2), 19 (5); 2007, c. 13, s. 43 (2).

Idem

(3) Where a head refuses to disclose a record or part thereof under subsection 28 (7), the head shall state in the notice given under subsection 28 (7),

(a) the specific provision of this Act under which access is refused;

(b) the reason the provision named in clause (a) applies to the record;

(c) the name and office of the person responsible for making the decision to refuse access; and

(d) that the person who made the request may appeal to the Commissioner for a review of the decision. R.S.O. 1990, c. F.31, s. 29 (3).

Description

(3.1) If a request for access covers more than one record, the statement in a notice under this section of a reason mentioned in subclause (1) (b) (ii) or clause (3) (b) may refer to a summary of the categories of the records requested if it provides sufficient detail to identify them. 1996, c. 1, Sched. K, s. 6.

Deemed refusal

(4) A head who fails to give the notice required under section 26 or subsection 28 (7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given. R.S.O. 1990, c. F.31, s. 29 (4).

Section Amendments with date in force (d/m/y)

1996, c. 1, s. 1 (1), Sched. K, s. 6 - 30/01/1996

2001, c. 28, s. 22 (2) - 12/04/2002

2002, c. 2, s. 15 (2) - 1/07/2003; 2002, c. 2, s. 19 (5) - 1/07/2003

2007, c. 13, s. 43 (2) - 4/06/2007

Copy of record

30. (1) Subject to subsection (2), a person who is given access to a record or a part thereof under this Act shall be given a copy thereof unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations. R.S.O. 1990, c. F.31, s. 30 (1).

Access to original record

(2) Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations. R.S.O. 1990, c. F.31, s. 30 (2).

Copy of part

(3) Where a person examines a record or a part thereof and wishes to have portions of it copied, the person shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature. R.S.O. 1990, c. F.31, s. 30 (3).

INFORMATION TO BE PUBLISHED OR AVAILABLE

Publication of information re institutions

31. The responsible minister shall cause to be published annually a compilation listing all institutions and, in respect of each institution, setting out,

(a) where a request for a record should be made;

(b) the name and office of the head of the institution;

(c) where the material referred to in sections 32, 33, 34 and 45 has been made available; and

(d) whether the institution has a library or reading room which is available for public use, and if so, its address. R.S.O. 1990, c. F.31, s. 31.

Operation of institutions

32. The responsible minister shall cause to be published annually an indexed compilation containing,

(a) a description of the organization and responsibilities of each institution including details of the programs and functions of each division or branch of each institution;

(b) a list of the general classes or types of records prepared by or in the custody or control of each institution;

(c) the title, business telephone number and business address of the head of each institution; and

(d) any amendment of information referred to in clause (a), (b) or (c) that has been made available in accordance with this section. R.S.O. 1990, c. F.31, s. 32.

Institution documents

33. (1) A head shall make available, in the manner described in section 35,

(a) manuals, directives or guidelines prepared by the institution, issued to its officers and containing interpretations of the provisions of any enactment or scheme administered by the institution where the interpretations are to be applied by, or are to be guidelines for, any officer who determines,

(i) an application by a person for a right, privilege or benefit which is conferred by the enactment or scheme,

(ii) whether to suspend, revoke or impose new conditions on a right, privilege or benefit already granted to a person under the enactment or scheme, or

(iii) whether to impose an obligation or liability on a person under the enactment or scheme; or

(b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public. R.S.O. 1990, c. F.31, s. 33 (1).

Deletions

(2) A head may delete from a document made available under subsection (1) any record or part of a record which the head would be entitled to refuse to disclose where the head includes in the document,

(a) a statement of the fact that a deletion has been made;

(b) a brief statement of the nature of the record which has been deleted; and

(c) a reference to the provision of this Act or the *Personal Health Information Protection Act, 2004* on which the head relies. R.S.O. 1990, c. F.31, s. 33 (2); 2004, c. 3, Sched. A, s. 81 (2).

Section Amendments with date in force (d/m/y)

2004, c. 3, Sched. A, s. 81 (2) - 1/11/2004

Annual report of head

34. (1) A head shall make an annual report, in accordance with this section, to the Commissioner. 2006, c. 19, Sched. N, s. 1 (4).

Contents of report

(2) A report made under subsection (1) shall specify,

(a) the number of requests under this Act or the *Personal Health Information Protection Act, 2004* for access to records made to the institution or to a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution;

(b) the number of refusals by the head to disclose a record under this Act, the provisions of this Act under which disclosure was refused and the number of occasions on which each provision was invoked;

(c) the number of refusals under the *Personal Health Information Protection Act, 2004* by a health information custodian, within the meaning of that Act, that is the institution or that is acting as part of the institution, of a request for access to a record, the provisions of that Act under which disclosure was refused and the number of occasions on which each provision was invoked;

(d) the number of uses or purposes for which personal information is disclosed where the use or purpose is not included in the statements of uses and purposes set forth under clauses 45 (d) and (e) of this Act or in any written public statement provided under subsection 16 (1) of the *Personal Health Information Protection Act, 2004* by the institution or a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution;

(e) the amount of fees collected under section 57 of this Act by the institution and under subsection 54 (10) of the *Personal Health Information Protection Act, 2004* by the institution or a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution; and

(f) any other information indicating an effort by the institution or by a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution to put into practice the purposes of this Act or the purposes of the *Personal Health Information Protection Act, 2004*. 2006, c. 19, Sched. N, s. 1 (4).

Separate information

(3) The information required by each of clauses (2) (a), (d), (e) and (f) shall be provided separately for,

(a) each separate health information custodian that is the institution or that is acting as part of the institution; and

(b) the institution other than in its capacity as a health information custodian and other than in its capacity as an institution containing a health information custodian. 2006, c. 19, Sched. N, s. 1 (4).

Same

(4) The information required by clause (2) (c) shall be provided separately for each separate health information custodian that is the institution or that is acting as part of the institution. 2006, c. 19, Sched. N, s. 1 (4).

Section Amendments with date in force (d/m/y)

2004, c. 3, Sched. A, s. 81 (3) - 1/11/2004

2006, c. 19, Sched. N, s. 1 (4) - 22/06/2006

Documents made available

35. (1) The responsible minister shall cause the materials described in sections 31, 32 and 45 to be made generally available for inspection and copying by the public and shall cause them to be made available to the public on the Internet or in the reading room, library or office designated by each institution for this purpose. 2006, c. 34, Sched. C, s. 3.

Same

(2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public on the Internet or in the reading room, library or office designated by each institution for this purpose. 2006, c. 34, Sched. C, s. 3.

Section Amendments with date in force (d/m/y)

2006, c. 34, Sched. C, s. 3 - 1/04/2007

Information from heads

36. (1) Every head shall provide to the responsible minister the information needed by the responsible minister to prepare the materials described in sections 31, 32 and 45. 2006, c. 34, Sched. C, s. 4.

Annual review

(2) Every head shall conduct an annual review to ensure that all the information the head is required to provide under subsection (1) is provided and that all such information is accurate, complete and up to date. 2006, c. 34, Sched. C, s. 4.

Section Amendments with date in force (d/m/y)

2006, c. 34, Sched. C, s. 4 - 1/04/2007

PART III
PROTECTION OF INDIVIDUAL PRIVACY

COLLECTION AND RETENTION OF PERSONAL INFORMATION

Application of Part

37. This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public. R.S.O. 1990, c. F.31, s. 37.

Personal information

38. (1) In this section and in section 39,

"personal information" includes information that is not recorded and that is otherwise defined as "personal information" under this Act. R.S.O. 1990, c. F.31, s. 38 (1).

Collection of personal information

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. R.S.O. 1990, c. F.31, s. 38 (2).

Manner of collection

39. (1) Personal information shall only be collected by an institution directly from the individual to whom the information relates unless,

(a) the individual authorizes another manner of collection;

(b) the personal information may be disclosed to the institution concerned under section 42 or under section 32 of the *Municipal Freedom of Information and Protection of Privacy Act*;

(c) the Commissioner has authorized the manner of collection under clause 59 (c);

(d) the information is in a report from a reporting agency in accordance with the *Consumer Reporting Act*;

(e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or tribunal;

(g) the information is collected for the purpose of law enforcement; or

(h) another manner of collection is authorized by or under a statute. R.S.O. 1990, c. F.31, s. 39 (1).

Notice to individual

(2) Where personal information is collected on behalf of an institution, the head shall, unless notice is waived by the responsible minister, inform the individual to whom the information relates of,

(a) the legal authority for the collection;

(b) the principal purpose or purposes for which the personal information is intended to be used; and

(c) the title, business address and business telephone number of a public official who can answer the individual's questions about the collection. R.S.O. 1990, c. F.31, s. 39 (2).

Exception

(3) Subsection (2) does not apply where the head may refuse to disclose the personal information under subsection 14 (1) or (2) (law enforcement), section 14.1 (*Civil Remedies Act, 2001*) or section 14.2 (*Prohibiting Profiting from Recounting Crimes Act, 2002*). 2002, c. 2, s. 19 (6); 2007, c. 13, s. 43 (3).

Section Amendments with date in force (d/m/y)

2002, c. 2, s. 19 (6) - 1/07/2003

2007, c. 13, s. 43 (3) - 4/06/2007

Retention of personal information

40. (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information. R.S.O. 1990, c. F.31, s. 40 (1).

Standard of accuracy

(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date. R.S.O. 1990, c. F.31, s. 40 (2).

Exception

(3) Subsection (2) does not apply to personal information collected for law enforcement purposes. R.S.O. 1990, c. F.31, s. 40 (3).

Disposal of personal information

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations. R.S.O. 1990, c. F.31, s. 40 (4).

USE AND DISCLOSURE OF PERSONAL INFORMATION

Use of personal information

41. (1) An institution shall not use personal information in its custody or under its control except,

(a) where the person to whom the information relates has identified that information in particular and consented to its use;

(b) for the purpose for which it was obtained or compiled or for a consistent purpose;

(c) for a purpose for which the information may be disclosed to the institution under section 42 or under section 32 of the *Municipal Freedom of Information and Protection of Privacy Act*; or

(d) subject to subsection (2), an educational institution may use personal information in its alumni records and a hospital may use personal information in its records for the purpose of its own fundraising activities, if the personal information is reasonably necessary for the fundraising activities. R.S.O. 1990, c. F.31, s. 41; 2005, c. 28, Sched. F, s. 5 (1); 2010, c. 25, s. 24 (9).

Notice on using personal information for fundraising

(2) In order for an educational institution to use personal information in its alumni records or for a hospital to use personal information in its records, either for its own fundraising activities or for the fundraising activities of an associated foundation, the educational institution or hospital shall,

(a) give notice to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be used for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, give notice to the individual to whom the personal information relates of his or her right to request that the information cease to be used for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, publish a notice of the individual's right to request that the individual's personal information cease to be used for fundraising purposes. 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (10).

Discontinuing use of personal information

(3) An educational institution or a hospital shall, when requested to do so by an individual, cease to use the individual's personal information under clause (1) (d). 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (11).

Section Amendments with date in force (d/m/y)

2005, c. 28, Sched. F, s. 5 (1, 2) - 10/06/2006

2010, c. 25, s. 24 (9-11) - 1/01/2012

Where disclosure permitted

42. (1) An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part II;

(b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;

(c) for the purpose for which it was obtained or compiled or for a consistent purpose;

(d) where disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and where disclosure is necessary and proper in the discharge of the institution's functions;

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;

(f) where disclosure is by a law enforcement institution,

(i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or

(ii) to another law enforcement agency in Canada;

(g) where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(i) in compassionate circumstances, to facilitate contact with the spouse, a close relative or a friend of an individual who is injured, ill or deceased;

(j) to a member of the Legislative Assembly who has been authorized by a constituent to whom the information relates to make an inquiry on the constituent's behalf or, where the constituent is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the constituent;

(k) to a member of the bargaining agent who has been authorized by an employee to whom the information relates to make an inquiry on the employee's behalf or, where the employee is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the employee;

(l) to the responsible minister;

(m) to the Information and Privacy Commissioner;

(n) to the Government of Canada in order to facilitate the auditing of shared cost programs; or

(o) subject to subsection (2), an educational institution may disclose personal information in its alumni records, and a hospital may disclose personal information in its records, for the purpose of its own fundraising activities or the fundraising activities of an associated foundation if,

(i) the educational institution and the person to whom the information is disclosed, or the hospital and the person to whom the information is disclosed, have entered into a written agreement that satisfies the requirements of subsection (3), and

(ii) the personal information is reasonably necessary for the fundraising activities. R.S.O. 1990, c. F.31, s. 42; 2005, c. 28, Sched. F, s. 6 (1); 2006, c. 19, Sched. N, s. 1 (5-7); 2006, c. 34, Sched. C, s. 5; 2010, c. 25, s. 24 (12).

Notice on disclosing personal information for fundraising

(2) In order for an educational institution to disclose personal information in its alumni records or for a hospital to disclose personal information in its records, either for the purpose of its own fundraising activities or the fundraising activities of an associated foundation, the educational institution or hospital shall ensure that,

(a) notice is given to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be disclosed for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, notice is given to the individual to whom the personal information relates of his or her right to request that the information cease to be disclosed for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, notice is published in respect of the individual's right to request that the individual's personal information cease to be disclosed for fundraising purposes. 2005, c. 28, Sched. F, s. 6 (2); 2010, c. 25, s. 24 (13).

Fundraising agreement

(3) An agreement between an educational institution and another person for the disclosure of personal information in the educational institution's alumni records for fundraising activities, or an agreement between a hospital and another person for the disclosure of personal information in the hospital's records for fundraising activities, must,

(a) require that the notice requirements in subsection (2) are met;

(b) require that the personal information disclosed under clause (1) (o) be disclosed to the individual to whom the information relates upon his or her request; and

(c) require that the person to whom the information is disclosed shall cease to use the personal information of any individual who requests that the information not be used. 2005, c. 28, Sched. F, s. 6 (2); 2010, c. 25, s. 24 (14).

Section Amendments with date in force (d/m/y)

2005, c. 28, Sched. F, s. 6 (1, 2) - 10/06/2006

2006, c. 19, Sched. N, s. 1 (5-7) - 22/06/2006; 2006, c. 34, Sched. C, s. 5 (1, 2) - 1/04/2007

2010, c. 25, s. 24 (12-14) - 1/01/2012

Consistent purpose

43. Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information is a consistent purpose under clauses 41 (1) (b) and 42 (1) (c) only if the individual might reasonably have expected such a use or disclosure. R.S.O. 1990, c. F.31, s. 43; 2006, c. 34, Sched. C, s. 6.

Section Amendments with date in force (d/m/y)

2006, c. 34, Sched. C, s. 6 - 1/04/2007

PERSONAL INFORMATION BANKS

Personal information banks

44. A head shall cause to be included in a personal information bank all personal information under the control of the institution that is organized or intended to be retrieved by the individual's name or by an identifying number, symbol or other particular assigned to the individual. R.S.O. 1990, c. F.31, s. 44.

Personal information bank index

45. The responsible minister shall publish at least once each year an index of all personal information banks setting forth, in respect of each personal information bank,

(a) its name and location;

(b) the legal authority for its establishment;

(c) the types of personal information maintained in it;

(d) how the personal information is used on a regular basis;

(e) to whom the personal information is disclosed on a regular basis;

(f) the categories of individuals about whom personal information is maintained; and

(g) the policies and practices applicable to the retention and disposal of the personal information. R.S.O. 1990, c. F.31, s. 45.

Inconsistent use or disclosure

46. (1) A head shall attach or link to personal information in a personal information bank,

(a) a record of any use of that personal information for a purpose other than a purpose described in clause 45 (d); and

(b) a record of any disclosure of that personal information to a person other than a person described in clause 45 (e). R.S.O. 1990, c. F.31, s. 46 (1).

Record of use part of personal information

(2) A record retained under subsection (1) forms part of the personal information to which it is attached or linked. R.S.O. 1990, c. F.31, s. 46 (2).

Notice and publication

(3) Where the personal information in a personal information bank under the control of an institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not one of the uses included under clauses 45 (d) and (e), the head shall,

(a) forthwith notify the responsible minister of the use or disclosure; and

(b) ensure that the use is included in the index. R.S.O. 1990, c. F.31, s. 46 (3).

RIGHT OF INDIVIDUAL TO WHOM PERSONAL INFORMATION RELATES TO ACCESS AND CORRECTION

Rights of access and correction

Right of access to personal information

47. (1) Every individual has a right of access to,

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution. R.S.O. 1990, c. F.31, s. 47 (1).

Right of correction

(2) Every individual who is given access under subsection (1) to personal information is entitled to,

(a) request correction of the personal information where the individual believes there is an error or omission therein;

(b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and

(c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement. R.S.O. 1990, c. F.31, s. 47 (2).

Requests and manner of access

Request

48. (1) An individual seeking access to personal information about the individual shall,

(a) make a request in writing to the institution that the individual believes has custody or control of the personal information;

(b) identify the personal information bank or otherwise identify the location of the personal information; and

(c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 7.

Access procedures

(2) Subsections 10 (2), 24 (1.1) and (2) and sections 25, 26, 27, 27.1, 28 and 29 apply with necessary modifications to a request made under subsection (1). 1996, c. 1, Sched. K, s. 7.

Manner of access

(3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

(a) permit the individual to examine the personal information; or

(b) provide the individual with a copy thereof. R.S.O. 1990, c. F.31, s. 48 (3).

Comprehensible form

(4) Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general terms and conditions under which the personal information is stored and used. R.S.O. 1990, c. F.31, s. 48 (4).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 7 - 30/01/1996

Exemptions

49. A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

(c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

(c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,

(i) assessing the teaching materials or research of an employee of an educational institution or a hospital or of a person associated with an educational institution or a hospital,

(ii) determining suitability, eligibility or qualifications for admission to an academic program of an educational institution or a hospital, or

(iii) determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;

(e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or

(f) that is a research or statistical record. R.S.O. 1990, c. F.31, s. 49; 2001, c. 28, s. 22 (4); 2002, c. 2, ss. 15 (4), 19 (7); 2002, c. 18, Sched. K, s. 10; 2005, c. 28, Sched. F, s. 7; 2010, c. 25, s. 24 (15).

Section Amendments with date in force (d/m/y)

2002, c. 2, s. 19 (7) - 1/07/2003; 2002, c. 18, Sched. K, s. 10 (1, 2) - 26/11/2002

2005, c. 28, Sched. F, s. 7 - 10/06/2006

2010, c. 25, s. 24 (15) - 1/01/2012

PART IV
APPEAL

Right to appeal

50. (1) A person who has made a request for,

(a) access to a record under subsection 24 (1);

(b) access to personal information under subsection 48 (1); or

(c) correction of personal information under subsection 47 (2),

or a person who is given notice of a request under subsection 28 (1) may appeal any decision of a head under this Act to the Commissioner. R.S.O. 1990, c. F.31, s. 50 (1).

Fee

(1.1) A person who appeals under subsection (1) shall pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 8.

Time for application

(2) Subject to subsection (2.0.1), an appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal. R.S.O. 1990, c. F.31, s. 50 (2); 2016, c. 5, Sched. 10, s. 3 (1).

Extension of time

(2.0.1) If the time limit specified in subsection (2) presents a barrier, as defined in the *Accessibility for Ontarians with Disabilities Act, 2005*, to the person, the Commissioner may extend the time limit for a period of time that is reasonably required in the circumstances to accommodate the person for the purpose of making the appeal. 2016, c. 5, Sched. 10, s. 3 (2).

Immediate dismissal

(2.1) The Commissioner may dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the record or the personal information to which the notice relates exists. 1996, c. 1, Sched. K, s. 8.

Non-application

(2.2) If the Commissioner dismisses an appeal under subsection (2.1), subsection (3) and sections 51 and 52 do not apply to the Commissioner. 1996, c. 1, Sched. K, s. 8.

Notice of application for appeal

(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an interest in the appeal, including an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*, of the notice of appeal. 2006, c. 34, Sched. C, s. 7.

***Ombudsman Act* not to apply**

(4) The *Ombudsman Act* does not apply in respect of a complaint for which an appeal is provided under this Act or the *Municipal Freedom of Information and Protection of Privacy Act* or to the Commissioner or the Commissioner's delegate acting under this Act or the *Municipal Freedom of Information and Protection of Privacy Act*. R.S.O. 1990, c. F.31, s. 50 (4).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 8 - 30/01/1996

2006, c. 34, Sched. C, s. 7 - 1/04/2007

2016, c. 5, Sched. 10, s. 3 (1, 2) - 19/04/2016

Mediator to try to effect settlement

51. The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal. R.S.O. 1990, c. F.31, s. 51.

Inquiry

52. (1) The Commissioner may conduct an inquiry to review the head's decision if,

(a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or

(b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected. 1996, c. 1, Sched. K, s. 9.

Procedure

(2) The *Statutory Powers Procedure Act* does not apply to an inquiry under subsection (1). R.S.O. 1990, c. F.31, s. 52 (2).

Inquiry in private

(3) The inquiry may be conducted in private. R.S.O. 1990, c. F.31, s. 52 (3).

Powers of Commissioner

(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation. R.S.O. 1990, c. F.31, s. 52 (4).

Record not retained by Commissioner

(5) The Commissioner shall not retain any information obtained from a record under subsection (4). R.S.O. 1990, c. F.31, s. 52 (5).

Examination on site

(6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site. R.S.O. 1990, c. F.31, s. 52 (6).

Notice of entry

(7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose. R.S.O. 1990, c. F.31, s. 52 (7).

Examination under oath

(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath. R.S.O. 1990, c. F.31, s. 52 (8).

Evidence privileged

(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court. R.S.O. 1990, c. F.31, s. 52 (9).

Protection

(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person. R.S.O. 1990, c. F.31, s. 52 (10).

Protection under Federal Act

(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*. R.S.O. 1990, c. F.31, s. 52 (11).

Prosecution

(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section. R.S.O. 1990, c. F.31, s. 52 (12).

Representations

(13) The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50 (3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made. 2006, c. 34, Sched. C, s. 8 (1).

Right to representation

(14) Each of the following may be represented by a person authorized under the *Law Society Act* to represent them:

1. The person who requested access to the record.
2. The head of the institution concerned.

3. Any other institution or person informed of the notice of appeal under subsection 50 (3). 2006, c. 34, Sched. C, s. 8 (5).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 9 - 30/01/1996

2006, c. 21, Sched. C, s. 110 - 1/05/2007; 2006, c. 34, Sched. C, s. 8 (1, 2) - 1/04/2007; 2006, c. 34, Sched. C, s. 8 (5) - 1/05/2007

Burden of proof

53. Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head. R.S.O. 1990, c. F.31, s. 53.

Order

54. (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal. R.S.O. 1990, c. F.31, s. 54 (1).

Idem

(2) Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part. R.S.O. 1990, c. F.31, s. 54 (2).

Terms and conditions

(3) Subject to this Act, the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate. R.S.O. 1990, c. F.31, s. 54 (3); 1996, c. 1, Sched. K, s. 10.

Notice of order

(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 50 (3) written notice of the order. R.S.O. 1990, c. F.31, s. 54 (4).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 10 - 30/01/1996

Confidentiality

55. (1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (1).

Not compellable witness

(2) The Commissioner or any person acting on behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (2).

Proceedings privileged

(3) No proceeding lies against the Commissioner or against any person acting on behalf or under the direction of the Commissioner for anything done, reported or said in good faith in the course of the exercise or performance or intended exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (3).

Delegation by Commissioner

56. (1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation. R.S.O. 1990, c. F.31, s. 56 (1).

Exception re records under s. 12 or 14

(2) The Commissioner shall not delegate to a person other than an Assistant Commissioner his or her power to require a record referred to in section 12 or 14 to be produced and examined. R.S.O. 1990, c. F.31, s. 56 (2).

PART V
GENERAL

Fees

57. (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

(a) the costs of every hour of manual search required to locate a record;

(b) the costs of preparing the record for disclosure;

(c) computer and other costs incurred in locating, retrieving, processing and copying a record;

(d) shipping costs; and

(e) any other costs incurred in responding to a request for access to a record. 1996, c. 1, Sched. K, s. 11 (1).

(2) REPEALED: 1996, c. 1, Sched. K, s. 11 (1).

Estimate of costs

(3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over $25. R.S.O. 1990, c. F.31, s. 57 (3).

Waiver of payment

(4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed in the regulations. R.S.O. 1990, c. F.31, s. 57 (4); 1996, c. 1, Sched. K, s. 11 (2).

Review

(5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee. R.S.O. 1990, c. F.31, s. 57 (5); 1996, c. 1, Sched. K, s. 11 (3).

Disposition of fees

(6) The fees provided in this section shall be paid and distributed in the manner and at the times prescribed in the regulations. 1996, c. 1, Sched. K, s. 11 (4).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 11 (1-4) - 30/01/1996

Annual report of Commissioner

58. (1) The Commissioner shall make an annual report to the Speaker of the Assembly in accordance with subsections (2) and (3). 2004, c. 3, Sched. A, s. 81 (4).

Contents of report

(2) A report made under subsection (1) shall provide a comprehensive review of the effectiveness of this Act and the *Municipal Freedom of Information and Protection of Privacy Act* in providing access to information and protection of personal privacy including,

(a) a summary of the nature and ultimate resolutions of appeals carried out under subsection 50 (1) of this Act and under subsection 39 (1) of the *Municipal Freedom of Information and Protection of Privacy Act*;

(b) an assessment of the extent to which institutions are complying with this Act and the *Municipal Freedom of Information and Protection of Privacy Act*; and

(c) the Commissioner's recommendations with respect to the practices of particular institutions and with respect to proposed revisions to this Act, the *Municipal Freedom of Information and Protection of Privacy Act* and the regulations under them. R.S.O. 1990, c. F.31, s. 58 (2).

Same, personal health information

(3) If the Commissioner has delegated powers or duties under the *Personal Health Information Protection Act, 2004* to the Assistant Commissioner for Personal Health Information, a report made under subsection (1) shall include a report prepared in consultation with the Assistant Commissioner on the exercise of the Commissioner's powers and duties under that Act, including,

(a) information related to the number and nature of complaints received by the Commissioner under section 56 of that Act and the disposition of them;

(b) information related to the number and nature of reviews conducted by the Commissioner under section 58 of that Act and the disposition of them;

(c) information related to the number of times the Commissioner has made a determination under subsection 60 (13) of that Act and general information about the Commissioner's grounds for the determination;

(d) all other information prescribed by the regulations made under that Act; and

(e) all other matters that the Commissioner considers appropriate. 2004, c. 3, Sched. A, s. 81 (5).

Tabling

(4) The Speaker shall cause the annual report to be laid before the Assembly if it is in session or shall deposit the report with the Clerk of the Assembly if the Assembly is not in session. 2004, c. 3, Sched. A, s. 81 (5).

Section Amendments with date in force (d/m/y)

2004, c. 3, Sched. A, s. 81 (4, 5) - 1/11/2004

Powers and duties of Commissioner

59. The Commissioner may,

(a) offer comment on the privacy protection implications of proposed legislative schemes or government programs;

(b) after hearing the head, order an institution to,

(i) cease collection practices, and

(ii) destroy collections of personal information,

that contravene this Act;

(c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;

(d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and

(f) receive representations from the public concerning the operation of this Act. R.S.O. 1990, c. F.31, s. 59.

Regulations

60. (1) The Lieutenant Governor in Council may make regulations,

(0.a) prescribing standards for determining what constitutes reasonable grounds for a head to conclude that a request for access to a record is frivolous or vexatious;

(a) respecting the procedures for access to original records under section 30;

(b) respecting the procedures for access to personal information under subsection 48 (3);

(b.1) requiring the head of an institution to assist persons with disabilities in making requests for access under subsection 24 (1) or 48 (1);

(c) prescribing the circumstances under which records capable of being produced from machine readable records are not included in the definition of "record" for the purposes of this Act;

(d) setting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records and personal information under the control of institutions;

(d.1) providing for procedures to be followed by an institution if personal information is disclosed in contravention of this Act;

(e) setting standards for the accuracy and completeness of personal information that is under the control of an institution;

(f) prescribing time periods for the purposes of subsection 40 (1);

(f.1) respecting the disposal of personal information under subsection 40 (4), including providing for different procedures for the disposal of personal information based on the sensitivity of the personal information;

(g) prescribing the amount, the manner of payment and the manner of allocation of fees described in clause 24 (1) (c) or 48 (1) (c), subsection 50 (1.1) or section 57 and the times at which they are required to be paid;

(h) prescribing matters to be considered in determining whether to waive all or part of the costs required under section 57;

(i) designating any agency, board, commission, corporation or other body as an institution and designating a head for each such institution;

(j) prescribing conditions relating to the security and confidentiality of records used for a research purpose;

(j.1) exempting one or more private hospitals from the application of this Act;

(k) prescribing forms and providing for their use;

(l) respecting any matter the Lieutenant Governor in Council considers necessary to carry out effectively the purposes of this Act. R.S.O. 1990, c. F.31, s. 60; 1996, c. 1, Sched. K, s. 12 (1, 2); 2010, c. 25, s. 24 (16); 2006, c. 34, Sched. C, s. 9.

Categories of fees

(2) A regulation made under clause (1) (g) may prescribe a different amount, manner of payment, manner of allocation or time of payment of fees for different categories of records or persons requesting access to a record. 1996, c. 1, Sched. K, s. 12 (3).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. K, s. 12 (1-3) - 30/01/1996

2006, c. 34, Sched. C, s. 9 - 31/12/2016

2010, c. 25, s. 24 (16) - 1/01/2012

Offences

61. (1) No person shall,

(a) wilfully disclose personal information in contravention of this Act;

(b) wilfully maintain a personal information bank that contravenes this Act;

(c) make a request under this Act for access to or correction of personal information under false pretenses;

(c.1) alter, conceal or destroy a record, or cause any other person to do so, with the intention of denying a right under this Act to access the record or the information contained in the record;

(d) wilfully obstruct the Commissioner in the performance of his or her functions under this Act;

(e) wilfully make a false statement to, mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act; or

(f) wilfully fail to comply with an order of the Commissioner. R.S.O. 1990, c. F.31, s. 61 (1); 2014, c. 13, Sched. 6, s. 2 (1).

Penalty

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine not exceeding $5,000. R.S.O. 1990, c. F.31, s. 61 (2).

Consent of Attorney General

(3) A prosecution shall not be commenced under clause (1) (c.1), (d), (e) or (f) without the consent of the Attorney General. R.S.O. 1990, c. F.31, s. 61 (3); 2014, c. 13, Sched. 6, s. 2 (2).

Extended limitation for prosecution

(4) A prosecution for an offence under clause (1) (c.1) shall not be commenced more than two years after the day evidence of the offence was discovered. 2014, c. 13, Sched. 6, s. 2 (3).

Protection of information

(5) In a prosecution for an offence under this section, the court may take precautions to avoid the disclosure by the court or any person of any of the following information, including, where appropriate, conducting hearings or parts of hearings in private or sealing all or part of the court files:

1. Information that may be subject to an exemption from disclosure under sections 12 to 21.1.
2. Information to which this Act may not apply under section 65.
3. Information that may be subject to a confidentiality provision in any other Act. 2014, c. 13, Sched. 6, s. 2 (4).

Section Amendments with date in force (d/m/y)

2014, c. 13, Sched. 6, s. 2 (1-4) - 1/01/2016

Delegation, civil proceedings

Delegation of head's powers

62. (1) A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation. R.S.O. 1990, c. F.31, s. 62 (1); 2006, c. 34, Sched. C, s. 10.

Protection from civil proceeding

(2) No action or other proceeding lies against a head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this Act, or from the failure to give a notice required under this Act if reasonable care is taken to give the required notice. R.S.O. 1990, c. F.31, s. 62 (2).

Vicarious liability of Crown preserved

(3) Subsection (2) does not by reason of subsections 5 (2) and (4) of the *Proceedings Against the Crown Act* relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject, and the Crown is liable under that Act for any such tort in a like manner as if subsection (2) had not been enacted. R.S.O. 1990, c. F.31, s. 62 (3).

Vicarious liability of certain institutions preserved

(4) Subsection (2) does not relieve an institution of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject and the institution is liable for any such tort in a like manner as if subsection (2) had not been enacted. R.S.O. 1990, c. F.31, s. 62 (4).

Section Amendments with date in force (d/m/y)

2006, c. 34, Sched. C, s. 10 - 1/04/2007

Informal access

Oral requests

63. (1) Where a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request. R.S.O. 1990, c. F.31, s. 63 (1).

Pre-existing access preserved

(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force. R.S.O. 1990, c. F.31, s. 63 (2).

Information otherwise available

64. (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation. R.S.O. 1990, c. F.31, s. 64 (1).

Powers of courts and tribunals

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document. R.S.O. 1990, c. F.31, s. 64 (2).

Application of Act

65. (1) This Act does not apply to records placed in the archives of an educational institution or the Archives of Ontario by or on behalf of a person or organization other than,

(a) an institution as defined in this Act or in the *Municipal Freedom of Information and Protection of Privacy Act*; or

(b) a health information custodian as defined in the *Personal Health Information Protection Act, 2004.* 2005, c. 28, Sched. F, s. 8 (1).

(2) REPEALED: 2004, c. 3, Sched. A, s. 81 (7).

Idem

(3) This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding. R.S.O. 1990, c. F.31, s. 65 (3).

Same

(4) This Act does not apply to anything contained in a judge's performance evaluation under section 51.11 of the *Courts of Justice Act* or to any information collected in connection with the evaluation. 1994, c. 12, s. 49.

Same

(5) This Act does not apply to a record of the Ontario Judicial Council, whether in the possession of the Judicial Council or of the Attorney General, if any of the following conditions apply:

1. The Judicial Council or its subcommittee has ordered that the record or information in the record not be disclosed or made public.
2. The Judicial Council has otherwise determined that the record is confidential.
3. The record was prepared in connection with a meeting or hearing of the Judicial Council that was not open to the public. 1994, c. 12, s. 49.

Same

(5.1) This Act does not apply to a record of a committee investigating a complaint against a case management master under section 86.2 of the *Courts of Justice Act*, whether in the possession of the committee, the Chief Justice of the Superior Court of Justice, the Attorney General or any other person, if any of the following conditions apply:

1. The committee has ordered that the record or information in the record not be disclosed or made public.
2. The record was prepared in connection with the committee's investigation of the complaint and the complaint was not dealt with in a manner that was open to the public. 1996, c. 25, s. 6; 2002, c. 18, Sched. K, s. 11.

Same

(5.2) This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed. 2006, c. 34, Sched. C, s. 11.

Same

(5.3) This Act does not apply to the ecclesiastical records of a church or religious organization that is affiliated with an educational institution or a hospital. 2010, c. 25, s. 24 (17).

Same

(5.4) This Act does not apply to records that relate to the operations of a hospital foundation. 2010, c. 25, s. 24 (17).

Same

(5.5) This Act does not apply to the administrative records of a member of a health profession listed in Schedule 1 to the *Regulated Health Professions Act, 1991* that relate to the member's personal practice. 2010, c. 25, s. 24 (17).

Same

(5.6) This Act does not apply to records relating to charitable donations made to a hospital. 2010, c. 25, s. 24 (17).

Same

(5.7) This Act does not apply to records relating to the provision of abortion services. 2010, c. 25, s. 24 (17).

Same

(6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
4. Meetings, consultations, discussions or communications about the appointment or placement of any individual by a church or religious organization within an institution, or within the church or religious organization.

5. Meetings, consultations, discussions or communications about applications for hospital appointments, the appointments or privileges of persons who have hospital privileges, and anything that forms part of the personnel file of those persons. 1995, c. 1, s. 82; 2010, c. 25, s. 24 (18).

Exception

(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment. 1995, c. 1, s. 82.

Information relating to adoptions

(8) This Act does not apply with respect to the following:

1. Notices registered under section 48.3 of the *Vital Statistics Act* and notices and information registered under section 48.4 of that Act.
2. Notices, certified copies of orders and other information given to the Registrar General under sections 48.5 to 48.10 of that Act.
3. Notices and other information given to a designated custodian by the local director of a children's aid society under section 48.9 of that Act and information given to a birth parent or an adopted person under that section.
4. Information and records in files that are unsealed under section 48.11 of that Act. 2005, c. 25, s. 34; 2016, c. 23, s. 49 (2).

Exception

(8.1) This Act does not apply,

(a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution;

(b) to a record of teaching materials collected, prepared or maintained by an employee of an educational institution or by a person associated with an educational institution for use at the educational institution;

(c) to a record respecting or associated with research, including clinical trials, conducted or proposed by an employee of a hospital or by a person associated with a hospital; or

(d) to a record of teaching materials collected, prepared or maintained by an employee of a hospital or by a person associated with a hospital for use at the hospital. 2005, c. 28, Sched. F, s. 8 (2); 2010, c. 25, s. 24 (19).

Note: Subsection 65 (8.1) was enacted as subsection 65 (8) in source law, Statutes of Ontario, 2005, chapter 28, Schedule F, subsection 8 (2). The subsection is renumbered in this consolidation to distinguish it from existing subsection 65 (8), enacted by Statutes of Ontario, 2005, chapter 25, section 34.

Exception

(9) Despite subsection (8.1), the head of the educational institution or hospital shall disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection. 2005, c. 28, Sched. F, s. 8 (2); 2010, c. 25, s. 24 (20).

Application of Act

(10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49 (c.1) (i). 2005, c. 28, Sched. F, s. 8 (2).

Section Amendments with date in force (d/m/y)

1994, c. 12, s. 49 - 28/02/1995; 1995, c. 1, s. 82 - 10/11/1995; 1996, c. 25, s. 6 - 31/10/1996

2002, c. 18, Sched. K, s. 11 - 26/11/2002

2004, c. 3, Sched. A, s. 81 (6, 7) - 1/11/2004

2005, c. 25, s. 34 - 31/01/2007; 2005, c. 28, Sched. F, s. 8 (1, 2) - 10/06/2006

2006, c. 34, Sched. C, s. 11 - 1/04/2007

2010, c. 25, s. 24 (17-20) - 1/01/2012

2016, c. 23, s. 49 (2) - 01/01/2017

Service provider organizations

65.1 (1) This section applies with respect to a service provider organization as defined in section 17.1 of the *Ministry of Government Services Act*. 2006, c. 34, Sched. F, s. 1 (2).

Definitions

(2) In this section,

"customer service information" means, in relation to a service,

(a) the name, address and telephone number or other contact information of the individual to whom the service is to be provided and, if applicable, the person acting on behalf of that individual,

(b) the transaction or receipt number provided by the service provider organization in relation to the request for the service,

(c) information relating to the payment of any fee, and

(d) such other information as may be prescribed; ("renseignements liés au service à la clientèle")

"designated service" means a service designated by regulations made under subsection 17.1 (3) of the *Ministry of Government Services Act* as a service that the service provider organization may provide on behalf of the Government or a public body; ("service désigné")

"Government" means the Government as defined in the *Ministry of Government Services Act*; ("gouvernement")

"public body" means a public body as defined in section 17.1 of the *Ministry of Government Services Act*. ("organisme public") 2006, c. 34, Sched. F, s. 1 (2).

Authorization to collect personal information

(3) A service provider organization is authorized to collect personal information for the purposes of providing a designated service. 2006, c. 34, Sched. F, s. 1 (2).

Collection of customer service information

(4) Without limiting the generality of subsection (3), a service provider organization is authorized to collect customer service information, with the consent of the individual to whom the information relates, for the purposes of providing a designated service. 2006, c. 34, Sched. F, s. 1 (2).

Conveying information to the Government, etc.

(5) If required by the regulations, a service provider organization that collects personal information on behalf of the Government or a public body in the course of providing a designated service shall convey the personal information to that Government or public body in accordance with the regulations. 2006, c. 34, Sched. F, s. 1 (2).

Limitation after information conveyed

(6) After the service provider organization has conveyed personal information under subsection (5), the service provider organization shall not use or further disclose the personal information except as allowed by the regulations. 2006, c. 34, Sched. F, s. 1 (2).

Collection of personal information under arrangements

(7) A person who provides services on behalf of a service provider organization pursuant to an arrangement under subsection 17.1 (7) of the *Ministry of Government Services Act* may not collect personal information in connection with providing those services unless the service provider organization and the person have entered into an agreement that governs the collection, use and disclosure of such personal information and the agreement meets the prescribed requirements, if any. 2006, c. 34, Sched. F, s. 1 (2).

Audits by Commissioner

(8) The Commissioner may audit a service provider organization to check that there has been no unauthorized access to or modification of personal information in the custody of the organization and the organization shall co-operate with and assist the Commissioner in the conduct of the audit. 2006, c. 34, Sched. F, s. 1 (2).

Regulations

(9) The Lieutenant Governor in Council may make regulations,

(a) prescribing information for the purposes of clause (d) of the definition of "customer service information" in subsection (2);

(b) governing the collection, use and disclosure of personal information by a service provider organization;

(c) requiring the conveyance of personal information under subsection (5) to the extent and within the time period specified by the regulations;

(d) allowing the use and disclosure of personal information under subsection (6);

(e) prescribing requirements for agreements under subsection (7);

(f) prescribing information for the purposes of clause 65.2 (2) (e). 2006, c. 34, Sched. F, s. 1 (2).

Section Amendments with date in force (d/m/y)

2006, c. 34, Sched. F, s. 1 (2) - 1/04/2007

Public consultation before making regulations

65.2 (1) Subject to subsection (7), the Lieutenant Governor in Council shall not make any regulation under subsection 65.1 (9) unless,

(a) the Minister has published a notice of the proposed regulation in *The Ontario Gazette* and given notice of the proposed regulation by all other means that the Minister considers appropriate for the purpose of providing notice to the persons who may be affected by the proposed regulation;

(b) the notice complies with the requirements of this section;

(c) the time periods specified in the notice, during which members of the public may exercise a right described in clause (2) (b) or (c), have expired; and

(d) the Minister has considered whatever comments and submissions that members of the public have made on the proposed regulation in accordance with clause (2) (b) or (c) and has reported to the Lieutenant Governor in Council on what, if any, changes to the proposed regulation the Minister considers appropriate. 2006, c. 34, Sched. F, s. 1 (2).

Contents of notice

(2) The notice mentioned in clause (1) (a) shall contain,

(a) a description of the proposed regulation and the text of it;

(b) a statement of the time period during which members of the public may submit written comments on the proposed regulation to the Minister and the manner in which and the address to which the comments must be submitted;

(c) a description of whatever other rights, in addition to the right described in clause (b), that members of the public have to make submissions on the proposed regulation and the manner in which and the time period during which those rights must be exercised;

(d) a statement of where and when members of the public may review written information about the proposed regulation;

(e) all prescribed information; and

(f) all other information that the Minister considers appropriate. 2006, c. 34, Sched. F, s. 1 (2).

Time period for comments

(3) The time period mentioned in clauses (2) (b) and (c) shall be at least 60 days after the Minister gives the notice mentioned in clause (1) (a) unless the Minister shortens the time period in accordance with subsection (4). 2006, c. 34, Sched. F, s. 1 (2).

Shorter time period for comments

(4) The Minister may shorten the time period if, in the Minister's opinion,

(a) the urgency of the situation requires it; or

(b) the proposed regulation is of a minor or technical nature. 2006, c. 34, Sched. F, s. 1 (2).

Discretion to make regulations

(5) Upon receiving the Minister's report mentioned in clause (1) (d), the Lieutenant Governor in Council, without further notice under subsection (1), may make the proposed regulation with the changes that the Lieutenant Governor in Council considers appropriate, whether or not those changes are mentioned in the Minister's report. 2006, c. 34, Sched. F, s. 1 (2).

No public consultation

(6) The Minister may decide that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under subsection 65.1 (9) if, in the Minister's opinion,

(a) the urgency of the situation requires it; or

(b) the proposed regulation is of a minor or technical nature. 2006, c. 34, Sched. F, s. 1 (2).

Same

(7) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under subsection 65.1 (9),

(a) subsections (1) to (5) do not apply to the power of the Lieutenant Governor in Council to make the regulation; and

(b) the Minister shall give notice of the decision to the public and to the Commissioner as soon as is reasonably possible after making the decision. 2006, c. 34, Sched. F, s. 1 (2).

Contents of notice

(8) The notice mentioned in clause (7) (b) shall include a statement of the Minister's reasons for making the decision and all other information that the Minister considers appropriate. 2006, c. 34, Sched. F, s. 1 (2).

Publication of notice

(9) The Minister shall publish the notice mentioned in clause (7) (b) in *The Ontario Gazette* and give the notice by all other means that the Minister considers appropriate. 2006, c. 34, Sched. F, s. 1 (2).

Temporary regulation

(10) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under subsection 65.1 (9) because the Minister is of the opinion that the urgency of the situation requires it, the regulation shall,

(a) be identified as a temporary regulation in the text of the regulation; and

(b) unless it is revoked before its expiry, expire at a time specified in the regulation, which shall not be after the second anniversary of the day on which the regulation comes into force. 2006, c. 34, Sched. F, s. 1 (2).

No review

(11) Subject to subsection (12), neither a court, nor the Commissioner shall review any action, decision, failure to take action or failure to make a decision by the Lieutenant Governor in Council or the Minister under this section. 2006, c. 34, Sched. F, s. 1 (2).

Exception

(12) Any person resident in Ontario may make an application for judicial review under the *Judicial Review Procedure Act* on the grounds that the Minister has not taken a step required by this section. 2006, c. 34, Sched. F, s. 1 (2).

Time for application

(13) No person shall make an application under subsection (12) with respect to a regulation later than 21 days after the day on which,

(a) the Minister publishes a notice with respect to the regulation under clause (1) (a) or subsection (9), where applicable; or

(b) the regulation is filed, if it is a regulation described in subsection (10). 2006, c. 34, Sched. F, s. 1 (2).

Section Amendments with date in force (d/m/y)

2006, c. 34, Sched. F, s. 1 (2) - 1/04/2007

Non-application re: certain corporations

65.3 (1) REPEALED: 2016, c. 37, Sched. 18, s. 8.

Hydro One Inc.

(2) This Act does not apply to Hydro One Inc. and its subsidiaries on and after the date on which the *Building Ontario Up Act (Budget Measures), 2015* received Royal Assent. 2015, c. 20, Sched. 13, s. 1 (2).

Same

(3) The annual publication of information required by section 31 on or after the date described in subsection (2) must not include information about Hydro One Inc. and its subsidiaries. 2015, c. 20, Sched. 13, s. 1 (2).

Same, transition

(4) If a person has made a request under subsection 24 (3) for continuing access to a record of Hydro One Inc. or a subsidiary before the date described in subsection (2), and if the specified period for which access is requested expires after April 23, 2015, the specified period is deemed to have expired on April 23, 2015. 2015, c. 20, Sched. 13, s. 1 (2).

Same, transition

(5) Despite subsection (2), for a period of six months after the date described in that subsection,

(a) the Commissioner may continue to exercise all of his or her powers under section 52 (inquiry) and clause 59 (b) (certain orders) in relation to Hydro One Inc. and its subsidiaries with respect to matters that occurred and records that were created before that date; and

(b) Hydro One Inc. and its subsidiaries continue to have the duties of an institution under this Act in relation to the exercise of the Commissioner's powers mentioned in clause (a). 2015, c. 20, Sched. 13, s. 1 (2).

Continuing authority to issue orders, etc.

(6) The powers and duties of the Commissioner to issue orders under section 54 and clause 59 (b) with respect to matters mentioned in subsection (5) continue for an additional six months after the expiry of the six-month period described in that subsection. 2015, c. 20, Sched. 13, s. 1 (2).

Orders binding

(7) An order issued within the time described in subsection (6) is binding on Hydro One Inc. or its subsidiaries, as the case may be. 2015, c. 20, Sched. 13, s. 1 (2).

Repeal

(8) Subsections (4), (5), (6) and (7) and this subsection are repealed on a day to be named by proclamation of the Lieutenant Governor. 2015, c. 20, Sched. 13, s. 1 (2).

Section Amendments with date in force (d/m/y)

R.S.O. 1990, c. F.31, s. 65.3 (8) - see 2015, c. 20, Sched. 13, s. 1 (2) - not in force

2015, c. 20, Sched. 13, s. 1 (1) - 19/11/15; 2015, c. 20, Sched. 13, s. 1 (2) - 4/14/15

2016, c. 37, Sched. 18, s. 8 - 08/12/2016

Exercise of rights of deceased, etc., persons

66. Any right or power conferred on an individual by this Act may be exercised,

(a) where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

(b) by the individual's attorney under a continuing power of attorney, the individual's attorney under a power of attorney for personal care, the individual's guardian of the person, or the individual's guardian of property; and

(c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual. R.S.O. 1990, c. F.31, s. 66; 1992, c. 32, s. 13; 1996, c. 2, s. 66.

Section Amendments with date in force (d/m/y)

1992, c. 32, s. 13 - 3/04/1995; 1996, c. 2, s. 66 - 29/03/1996

Conflict with other Act

67. (1) This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise. R.S.O. 1990, c. F.31, s. 67 (1).

Idem

(2) The following confidentiality provisions prevail over this Act:

1. Subsection 53 (1) of the *Assessment Act.*
2. Subsections 45 (8), (9) and (10), 54 (4) and (5), 74 (5), 75 (6), 76 (11) and 116 (6) and section 165 of the *Child and Family Services Act.*
3. Section 68 of the *Colleges Collective Bargaining Act, 2008.*
4. Section 10 of the *Commodity Futures Act.*
5. REPEALED: 1993, c. 38, s. 65.

6. Subsection 137 (2) of the *Courts of Justice Act*.

7. Subsection 113 (1) of the *Labour Relations Act*.

7.0.1 Sections 89, 90 and 92 of the *Legal Aid Services Act, 1998*.

7.1 Section 40.1 of the *Occupational Health and Safety Act*.

8. Subsection 32 (4) of the *Pay Equity Act*.

8.1 REPEALED: 2006, c. 35, Sched. C, s. 47 (3).

9. Sections 16 and 17 of the *Securities Act*.

10. Subsection 4 (2) of the *Statistics Act*.

11. Subsection 28 (2) of the *Vital Statistics Act*. R.S.O. 1990, c. F.31, s. 67 (2); 1992, c. 14, s. 1; 1993, c. 38, s. 65; 1994, c. 11, s. 388; 1998, c. 26, s. 103; 2006, c. 35, Sched. C, s. 47 (3); 2008, c. 15, s. 86.

Section Amendments with date in force (d/m/y)

1992, c. 14, s. 1 - 25/06/1992; 1993, c. 38, s. 65 (1, 2) - 14/02/1994; 1994, c. 11, s. 388 - 11/07/1994; 1998, c. 26, s. 103 - 18/12/1998

2006, c. 35, Sched. C, s. 47 (3) - 20/08/2007

2008, c. 15, s. 86 - 8/10/2008

68. REPEALED: 2006, c. 34, Sched. C, s. 12.

Section Amendments with date in force (d/m/y)

2006, c. 34, Sched. C, s. 12 - 1/04/2007

Application

69. (1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force. R.S.O. 1990, c. F.31, s. 69.

Hospitals

(2) Despite subsection (1), this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007. 2010, c. 25, s. 24 (21).

Section Amendments with date in force (d/m/y)

2010, c. 25, s. 24 (21) - 1/01/2012

Crown bound

70. This Act binds the Crown. R.S.O. 1990, c. F.31, s. 70.

Français

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TAB 2

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 46(b)

Municipal Freedom of Information and Protection of Privacy Act

R.S.O. 1990, CHAPTER M.56

Powers and duties of Commissioner

46 The Commissioner may,

(b) after hearing the head, order an institution to,

(i) cease a collection practice that contravenes this Act, and

(ii) destroy collections of personal information that contravene this Act;

DENIS RANCOURT - and - **UNIVERSITY OF OTTAWA**

Applicant

Respondent

Court File No. 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at: Ottawa

FACTUM OF THE RESPONDENT INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

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Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DENIS RANCOURT

Applicant

– and –

UNIVERSITY OF OTTAWA

Respondent

– and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Intervener

APPLICANT'S SUPPLEMENTARY FACTUM RESPONDING TO THE ISSUE OF MOOTNESS

(FILED ON CONSENT)

Dated: January 15, 2018

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FACTUM

OVERVIEW

1. The University of Ottawa (the "University") brought a motion to strike out the application for mootness, to be decided as a preliminary matter in the hearing of the main application. The application is not moot. A present live controversy exists which affects the rights of the parties. The issue of unconstitutionality of s. 65(6)3 of the *Freedom of Information and Protection of Privacy Act* (the "*Act*") must be decided by this Honourable Court, both:
   (A) in its effect of denying the Applicant's *Charter* right of informational privacy protection for a "biographical core of personal information", and
   (B) in its general effect.
   In the alternative (which is denied), all the considerations of the mootness principle causing the court to exercise its discretion to hear the application are amply satisfied.

Part I: PARTIES TO THE PRELIMINARY ISSUE OF MOOTNESS

2. The instant supplementary factum is filed on consent. The Applicant, Dr. Denis Rancourt, responds to the issue of mootness newly raised as a preliminary matter by the respondent University in its October 20, 2017 factum on the main application.

3. The Information and Privacy Commissioner ("IPC") has intervener status by consent on the main application; limited to arguments allowed under common law for an administrative tribunal on judicial review of its own decision. The IPC did not make representations on the issue of mootness.

4. The main application is for an order to set aside IPC order PO-3686 of Adjudicator John Higgins (the "Adjudicator") dated January 12, 2017 (the "Order") in which the Adjudicator denied the *Charter* claims of the Applicant.

Part II: FACTS REDARDING MOOTNESS

A. ISSUES BEFORE THIS HONOURABLE COURT

5. The Applicant made a direct challenge to the constitutionality of the s. 65(6)3 exclusion provision of the *Act* itself, on the grounds that it causes his *Charter* rights of expression and privacy to be violated. ("ISSUE #1", "#2", and "#3", main application)

Notice of Application, Applicant's Application Record (Tab 1), paras. 13(d) to 13(g) and 13(i)

Factum of the Applicant (for the main application), paras. 24 to 54

Adjudicator's Order, Applicant's Application Record (Tab 2), paras. 78 and 79

And see: "ISSUE C: IS SECTION 65(6) OF THE ACT UNCONSTITUTIONAL?" and "ORDER REQUESTED" sections in the representations of the appellant (now the Applicant) dated 2015-04-14, paras. 48 to 131; Private Record - IPC, Tab 2, pp. 32-67

6. The Applicant's "ISSUE #4" is also before this Honourable Court: whether s. 65(6)3 of the *Act* is unconstitutional in its general effect, irrespective of achieving the threshold for *Charter* scrutiny in the particular circumstances of the instant case?

Notice of Application, Applicant's Application Record (Tab 1), paras. 13(h) to 13(i)

Factum of the Applicant (for the main application), paras. 55 to 60

Factum of the University, paras. 94 to 99

Factum of the IPC, paras. 109 to 111

B. LITIGATION HISTORY OF THE UNIVERSITY'S NEWLY RAISED ISSUE OF MOOTNESS

7. On February 13, 2017, the Applicant filed the Notice of Application for the instant judicial review of the IPC Adjudicator's Order.

8. On February 25, 2017, the Applicant wrote a letter to the University, with the IPC in cc, requesting that the Respondent consent to an Applicant's motion for a confidentiality order, and provided the grounds for excluding the main record in issue (the psychiatric report) from the public record.

9. On July 26, 2017, following welcome involvement in the confidentiality motion from the IPC as part of duly preparing the tribunal's record of proceeding, a sealing order on consent was issued by this Honourable Court, which protects the Applicant's privacy in the instant litigation.

Order of Justice L. Sheard, dated July 26, 2017, Entered at Ottawa, Document # O411, Registry No. 73-13, attached to the sealing envelope of the Private Record - IPC

10. On September 19, 2017, the Applicant delivered his factum on the main application, to the University, to the IPC, and to the Attorney General for Ontario.

11. On October 3, 2017, the IPC sought consent for a time extension to deliver a factum on the main application.

12. On October 4, 2017, the Applicant challenged the IPC's standing to deliver a factum on judicial review of its own decision. On the same day, the IPC undertook as follows: [1]

> … can advise that my submissions would fall within the limits set out in the *Leon's Furniture* case (at para. 29):
>
> A tribunal should not be allowed to supplement its reasons for decision, or to attempt to provide fresh justifications for the result... While the tribunal, like any other party, can offer interpretations of its reasons or conclusion, it cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record. A tribunal can, within those limits, attempt to rebut arguments about how it reasoned and what it decided.

13. On October 20, 2017, the University:

(a) provided the Applicant with a fresh copy of the main record in issue in the originating access request dated October 31, 2012,

(b) provided the Applicant with a letter asking the Applicant to abandon his application, and

[1] *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 (CanLII), http://canlii.ca/t/fkqkl (Joint book of authorities)

(c) delivered its factum in which it newly argued that the application for judicial review is moot.

Factum of the University, paras. 4, 29 to 42, and 101

14. On October 24, 2017, the Applicant responded to the University's letter of October 20, 2017, with the IPC in cc, that he would not abandon the application, and requested consent to file a supplementary factum on the mootness issue (the instant factum) one month after the IPC's factum on the main application is delivered. Consent was granted.

15. On December 14, 2017, the IPC delivered its factum on the main application. The IPC did not take any position or make any arguments on the issue of mootness.

Part III: NEWLY RAISED ISSUE OF MOOTNESS AND LAW

A. UNCONSTITUTIONALITY OF S. 65(6)3 IN ITS PRESENT EFFECT ON THE APPLICANT

APPLICATION IS NOT MOOT - LIVE CONTROVERSY TEST

Privacy protection is a present live controversy

16. Violation of privacy has continuously been an issue throughout the proceedings. The material facts giving rise to the constitutional question are primarily about privacy, as laid out in the Applicant's Notice of Constitutional Question:

> The following are the material facts giving rise to the constitutional question:
>
> 1. During 2007 and 2008, the University of Ottawa (institution, now respondent) managed a covert information gathering program -- using a hired student overseen by the university Legal Counsel, the dean of the faculty of science, and the VP-Academic -- to collect and create personal information about then tenured Full Professor of Physics Denis Rancourt (requester, now appellant).

> 2. The student agent used a false identity in her work, and made regular progress reports to the Legal Counsel and to the dean. As an example, one such (weekly or so) report reads […]
>
> 3. Public hearings of a labour arbitration, held in 2012 and 2013, about the 2009 dismissal of the appellant from the University of Ottawa, revealed details of the said covert information gathering program.
>
> 4. Much of the information thus gathered was then released by the institution to a hired consultant-psychiatrist, for the purpose of making a psychiatric report about the appellant, as is apparent from the text of the said psychiatric report. In addition, in a meeting, the dean conveyed hearsay information to the psychiatrist, about the appellant's childhood, allegedly obtained from past conversations between the dean and the appellant, according to the said psychiatric report.
>
> […]
>
> 8. The said denial of access is the subject of the instant (second) appeal with the IPC. One of the grounds for appeal is unconstitutionality of s. 65(6) of the *Act*.

Notice of Constitutional Question, Public Record of Proceedings of the IPC, Tabs 36-C and 36-D, pp. 245-251

17. An express main purpose for pursuing the constitutional challenge is protection of the Applicant's own privacy: "in that declared unconstitutionality of s. 65(6)3 would bring the excluded records under the privacy protection provisions of the *Act*."

Notice of Application, Applicant's Application Record (Tab 1), at para. 9(iii)

And see: Factum of the Applicant (for the main application), paras. 34(a) to 34(d) and 43(a) to 43(g)

18. Indeed, the Order sought by the Applicant in the main application includes:

> The Applicant requests that this Honourable Court:
> […]
> (c) provide the remedy that follows from unconstitutionality of s. 65(6)3 of the *Act* or remit the matter to a different IPC Adjudicator for a determination in accordance with the reasons of this Honourable Court;

Factum of the Applicant (for the main application), at para. 61

19. With all due respect to the University, by no conceivable logic has the present live issue of the Applicant's privacy protection disappeared or become academic by virtue of the University having provided the Applicant with a fresh copy of the psychiatric report. The University still has the psychiatric report and associated records and is not subject to any statutory restrictions or oversight regarding these records and their use.

Legal nexus of the privacy-protection controversy

20. The Supreme Court has continuously determined that there is a *Charter* right to informational privacy, and a (positive, pre-emptive) *Charter* right to prior protection of informational privacy, for a "biographical core of personal information".

Factum of the Applicant (for the main application), paras. 28 to 32 and 38 to 41 (and authorities cited therein)

21. The Applicant argues on judicial review that he made a direct challenge to the constitutionality of s. 65(6)3 of the *Act* itself, *inter alias*, on the grounds that it caused and continues to cause his *Charter* rights of privacy and privacy protection to be violated.

Factum of the Applicant (for the main application), paras. 24 to 43

22. Specifically, the legal nexus of the present live controversy is that s. 65(6)3 of the *Act* excludes the records in issue, all records associated to the records in issue and all future records associated to the records in issue from the privacy protections of the *Act* (ss. 37 to 49 of the *Act*), and from the right of appeal (ss. 50 to 56 of the *Act*), irrespective of whether the said records are part of the *Charter*-protected biographical core of personal information.

Factum of the Applicant (for the main application), paras. 34 to 36 and 43

23. In effect, s. 65(6)3 causes the IPC to lose jurisdiction pursuant to the *Act* for all records determined to be employment-related, without any time limitation. Section 65(6)3 of the

Act applies at the time the excluded record is collected, prepared, maintained or used, and it never ceases to apply at a later date.

***Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA), http://canlii.ca/t/1ffwz , see para. 38 (Joint book of authorities)**

24. In the words of the IPC (*Blueprint for Change* 2003 report; IPC annual reports are a requirement of the *Act*):

> Public-sector employees in Ontario are currently precluded from obtaining access to most employment-related records about themselves, and from filing a privacy complaint if they feel that their personal information has been improperly collected, used, disclosed or retained. This approach to employee information is inconsistent with many other privacy laws, including *PIPEDA*, which provides employees of federally regulated companies with a statutory right to access and correct personal information held by their employer, and to file a complaint with the federal privacy commissioner if they believe that their employer has inappropriately collected, used or disclosed their personal information.
>
> We urge the Ontario government to restore the access and privacy rights of public sector workers by repealing the Bill 7 provisions of the *Acts*.
>
> [Emphasis added]

***Privacy and Access: A Blueprint for Change*, Information and privacy Commissioner / Ontario, 2003 Annual Report, at pp. 6-7. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/ (Tab A-7)**

25. As such, unless the s. 65(6)3 exclusion is constitutionally inapplicable or is, *per se*, unconstitutional, the University can presently and in the future continue to violate the Applicant's privacy, free of any accountability. It can continue to have, use, store and share the psychiatric diagnosis and report:

(a) without any statutory obligation to inform the Applicant,

(b) without any statutory obligation to provide the Applicant with access to any thereby created records containing his own personal information, and

(c) without any statutory limits on its continued (internal and external) use.

26. For example, the university is not statutorily prevented today from continuing to have the psychiatric report and from providing it to a third party, and would not be bound to seek the Applicant's consent or to inform the Applicant of any such release.

All circumstances of the "live controversy" test are satisfied

27. The University's claim of mootness must fail, pursuant to the established "live controversy" test: A "present live controversy exists which affects the rights of the parties." There is a tangible and concrete dispute that has not disappeared and is required. In particular:
    (a) The state of the facts regarding privacy and privacy protection has not ceased to exist. The University continues to have the psychiatric report.
    (b) A decision on review (whether to invalidate the s. 65(6)3 exclusion) could have the immediate effect of providing privacy protection to the Applicant, pursuant to the *Act*.
    (c) The s. 65(6)3 exclusion provision has not been repealed prior to the hearing of the judicial review.
    (d) The impugned provision of the *Act* has not been struck down by a court prior to appellate review.
    (e) The University has not made an undertaking that it would apply the privacy protections of the *Act*, regarding the records in issue, despite ample opportunity to do so, nor has it retracted its reliance on s. 65(6)3.
    (f) The issue in contention — constitutionality of the s. 65(6)3 exclusion provision of the *Act* — is not of a short duration resulting in an absence of a live controversy by the time of appellate review.
    (g) Particular circumstances of the parties to the action do not eliminate the tangible nature of the dispute.
    (h) The Applicant has not ceased to seek privacy protection and access for all his own employment-related personal information held by the government institution.

***Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC), http://canlii.ca/t/1ft7d , at pp. 353-357 (Joint book of authorities)**

IN THE ALTERNATIVE: COURT'S DISCRETION - PRINCIPLE OF MOOTNESS

28. In the alternative, if the application is moot (which is denied), then this Honourabe Court should exercise its discretion to hear the case, pursuant to the principle of mootness.

29. The established considerations for the court to exercise its discretion to hear a moot case are the following:

(a) An adversarial context should persist. For example, arising from divergent interests in collateral consequences of the outcome. ("Consideration (a)", and so forth)

(b) The expenditure of judicial resources is desirable because:

i. a court's decision will have some practical effect on the rights of the parties, even though it will not have the effect of determining the underlying controversy itself, or

ii. the circumstances are likely to recur but be of brief duration, or

iii. important questions that might independently evade review would go unheard and undetermined by the court.

(c) The issues raised are of public importance and their resolution is in the public interest (because of the social cost of leaving the matter undecided).

***Mental Health Centre Penetanguishene v. Ontario*, 2010 ONCA 197 (CanLII), http://canlii.ca/t/28llt , at paras. 39, 41, and 42**

And see *Borowski*, at pp. 358 to 362

30. All the considerations of the principle of mootness for the court to exercise its discretion are amply satisfied, as follows.

"Consideration (a)"

31. The factums of the University and of the IPC amply demonstrate that an adversarial context persists. The divergent interests in the main and collateral consequences of the outcome are palpable.

"Consideration (b) i."

32. The review court's decision will have some practical effect on the rights of the parties. If s. 65(6)3 is determined to be unconstitutional, then the University will not be able to rely on it to bar the Applicant from accessing any of his employment-related personal information, and will be bound by the strict privacy protection and access provisions of the *Act* regarding all of the Applicant's information.

33. For example, as it stands, the Applicant can never really know how the psychiatric report about him was made and was/is used internally by the government institution. The IPC Adjudicator put it this way:

> [239] As noted above, under the heading "Order requested," in his representations, the appellant also refers to "*meeting notes* and *communications* about preparing or using the report." [Emphasis added.] In my view, such additional records, if they existed, would be excluded from the application of the Act under section 65(6)3, as the university submits, for essentially the reasons given above in my discussion of that provision.
> […]
> [241] It is also clear that, if they were responsive, any written and audio records used by the psychiatrist in preparing the report, as well as interview notes he would have created in the course of preparing it, would also be excluded under section 65(6)3 for these same reasons.
>
> [242] Accordingly, there is no basis to order the university to conduct further searches.[94] The appellant's appeal on the issue of reasonable search is therefore dismissed.
>
> [Footnote not included. Emphasis in the original]

Adjudicator's Order, Applicant's Application Record (Tab 2), paras. 239, 241 and 242

34. Requests for access to the Applicant's own personal information have been the subject of at least eight (8) prior IPC orders, in which the s. 65(6)3 exclusion for labour relations was applied to exclude responsive records from the rights and protections otherwise provided by the *Act*. [2]

[2] Affidavit of Denis Rancourt affirmed 2015-04-13, para. 10; **Private Record - IPC, Tab 3, pp. 72-202**

"Consideration (b) ii."

35. The circumstances are likely to recur but be of brief duration. There is an abundance of evidence on the record that the University refuses to be guided by the privacy protection provisions of the *Act* regarding employment-related personal information. [3] Each event of violation of privacy is of the duration of the event itself, which can be brief, and can if discovered give rise to a constitutional challenge of s. 65(6)3 of the *Act*.

36. Government institutions can provide access to records in issue, either in early stages of access litigation or at the final hour of an appeal proceeding (as was done by the University in the instant case). As such, a constitutional challenge of s. 65(6)3 based solely on the requester's access (not involving personal information) will often be of too short duration to be heard in first instance or on review.

37. The University argues that "the courts should ration scarce judicial resources" (its para. 36), yet waited nine (9) years, through two IPC appeals and lengthy initiation of judicial review, before unceremoniously providing access on the day its factum was due. This shows the ease with which government institutions can attempt to prevent a constitutional challenge of s. 65(6)3 at any time prior to a judicial review hearing.

"Consideration (b) iii."

38. Important questions that might independently evade review would go unheard and undetermined by the court. The constitutionality of s. 65(6)3 of the *Act* is an important and novel question, having societal consequences in Ontario beyond the interests of the parties to the instant review.

[3] Affidavit of Denis Rancourt affirmed 2015-04-13, para. 10, and paras. 38 to 56, and affidavit exhibits referred to; **Private Record - IPC, Tab 3, pp. 72-202**

39. For example, in a 2013 legal study that was made public, the Ontario Confederation of University Faculty Associations (OCUFA) put some of the implications of s. 65(6)3 of the *Act* this way:

> It may seem counter-intuitive that sensitive employment information—such as employee financial or health information, peer review assessments of faculty members, or student evaluations of teaching—is not subject to the protection of privacy provisions of the Act and therefore that there is no statutory restriction on the Employer's ability to disclose such information. Rightly or wrongly, however, that is the clear implication of court decisions to date.

***OCUFA Update on Freedom of Information and Protection of Privacy Issues*, Cathy Lace and Emma Phillips (Sack, Goldblatt, Mitchell), May, 2013, www.wlufa.ca/wp-content/uploads/2010/01/FIPPA-SGM-update-May-2013.doc , at p. 4 (Tab A-6)**

"Consideration (c)"

40. The issue of the constitutionality or constitutional applicability of s. 65(6)3 of the *Act* is of public importance and its resolution is in the public interest, for the following reasons.

41. In addition to the above cited IPC *Blueprint for Change* statement, and in addition to the *OCUFA Update* position, many more government reports also corroborate the public importance of the issue of s. 65(6)3 of the *Act*:

> New legislation and other steps taken by some government organizations are beginning to erode access and privacy rights in Ontario. [Sub-title]
>
> [...]
>
> One primary concern of the IPC is legislation or programs that exclude information or records from the scope of the Acts. When this happens, access and privacy rights are compromised, and the right of review by an independent body, the IPC, is lost.
>
> One piece of legislation that excludes records from the Acts is the Labour Relations Act, 1995 (Bill 7). Its stated purpose is to restore balance and stability to labour relations and to promote economic prosperity. However, very broadly drafted provisions in the new law exclude many employment-related records about public sector employees, including records that do not have any bearing on labour relations. As a result, public sector employees may be precluded from

obtaining access to employment-related records about themselves, and from making a privacy complaint if their personal information is improperly used or disclosed. These new provisions have been interpreted in a number of IPC orders, and records excluded from the Acts have been found to include the requester's personnel file, records relating to the requester's retirement, records about job competitions, and harassment investigation files, among others.

This approach to information about employees is not in keeping with world-wide trends favouring fair information practices, and in particular, the protection of personal privacy. Examples of this trend include the privacy directive of the European Union, the adoption of Fair Information Practice Codes by many private sector enterprises, the recently adopted information and privacy laws in other Canadian provinces such as Alberta and Manitoba, the extension of privacy protection legislation to the private sector in the Province of Quebec, and the recent introduction of Bill C-54, the Personal Information and Electronic Documents Act, by the federal government, extending the application of privacy laws to the privacy sector.

[Emphasis added]

***Annual Report 1998*, Information and privacy Commissioner / Ontario, at p. 10. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/ (Tab A-2)**

In 1995, the government enacted the *Labour Relations and Employment Statute Law Amendment Act* (Bill 7), which contained provisions that exclude a wide range of records about public-sector employees from the scope of the Acts. Since then, the Courts have interpreted these provisions broadly, and our agency has been directed by the Courts to uphold government decisions to deny access to records that were routinely made available to employees outside the Acts. Order PO-2224 is a good example, where an employee was denied access to his own personnel file, simply because the ministry in that case decided to apply the Bill 7 provisions.

[Emphasis added]

***Privacy and Access: A Blueprint for Change*, Information and privacy Commissioner / Ontario, 2003 Annual Report, at pp. 6. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/ (Tab A-7)**

In our *Blueprint for Action*, we recommended that the Ontario government restore the access and privacy rights of public sector workers by repealing the Bill 7 provisions of the *Acts*. This reform has

> not yet been implemented. We urge the government to take action on this recommendation in 2005.
>
> [...]
>
> Make employment records subject to the *Act* [Sub-title]
>
> [...]
>
> By virtue of this amendment, employees of provincial and municipal government organizations are no longer entitled to submit requests for access to their own personnel files.
>
> In addition, because the exclusion of records applies to the privacy, as well as the access provisions of the *Acts*, the personal employment information of employees of government organizations is not subject to the statutory privacy protections in the legislation.
>
> This exclusion is particularly troubling when the employment information of employees of federally regulated organizations is subject to privacy legislation [...]
>
> [...] significant enhancements to the legislation are needed to bring Ontario's freedom of information laws up to the standards of the 21st century.
>
> [Emphasis added]

***Annual Report 2004*, Information and privacy Commissioner / Ontario, at pp. 6 to 8. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/ (Tab A-4)**

42. The existence of the s. 65(6)3 exclusion provision of the *Act* also has the perverse effect of degrading the access to information context in Ontario to a degree that is of public importance:

> For example, this office has repeatedly encouraged government institutions not to deny access to a record simply because an exemption may be claimed. There are still too many cases where institutions are resisting the disclosure of information that should be in the public domain through the unnecessary application of exemptions. The fact that a timely response was provided is of little comfort to the requester. In addition, some institutions continue to give an overly broad interpretation to sections 65(6)/52(3) of the Acts, which relate to employment and labour relations matters. These provisions are often applied to deny access to basic information that should be routinely disclosed.
>
> [Emphasis added]

***12,160,282 …and that's just the people in Ontario who are entitled to open, accountable government and strong privacy protection*, Information and privacy Commissioner / Ontario, 2006 Annual Report, at p. 26. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/ (Tab A-1)**

43. Therefore, there is a social cost to leaving the matter undecided, as follows.

(a) Ontario society continues to suffer from unfair information practices, regarding personal privacy:

i. Government institutions can continue to violate the privacy of past and present employees without transparency or accountability.

ii. Past and present employees of the government of Ontario continue to have no right to know what personal information is collected, generated or used, or to know that their privacy has been violated; including the *Charter*-protected biographical core of personal information.

(b) Ontario society continues to suffer from unfair information practices, in relation to access:

i. Present or past employees of the government cannot know or request access to their own personal information.

ii. Government institutions can continue to and do use the impugned exclusion provision as a shield against access to one's own basic personal information that should be routinely disclosed.

(c) Some 2% to 3% of all personal information requests known to the IPC are denied on the claimed basis of the s. 65(6) employment exclusion provision. [4] It is not possible to quantify the chill effect that the said provision has on personal information requests, nor to quantify the magnitude of the resulting lack-of-knowledge barrier inhibiting privacy complaints, but one can infer a large chill and a large barrier.

[4] IPC 2002 Annual Report, at p. 20 **(Tab A-3)**; IPC 2001 Annual Report, at p. 19 **(Tab A-5)**; not reported other years.

Court's role as adjudicator

44. The Applicant respectfully submits that there is nothing in the court's discretion to hear and decide a constitutional challenge of a statute brought by a party that can be viewed as intruding into the role of the legislative branch. It is the proper function of the court to decide constitutional questions. Matters that are not constitutional are distinguished.

University's *CLA* argument for mootness

45. The University argues (its para. 41) that the "Court should be particularly reluctant in this context [of *Criminal Lawyers Association*, "*CLA*"] to exercise its discretion to proceed without a live controversy." [5]

46. *CLA* is not authority for the constitutionality of denied access to one's own intimate personal information held by government.

47. *CLA* addresses an access request made pursuant to s. 10 of the *Act*, which is the general access right, not s. 47 of the *Act*, which is the right to access one's own personal information. [6]

48. As such, *CLA* is confined to the s. 1(a) purposes provision of the *Act* (general access to information exempting personal information), whereas the instant application captures the s. 1(b) purposes provision of the *Act*:

> The purposes of this Act are, (a) [...]; and (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[5] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII), http://canlii.ca/t/2b5ss , ("*CLA*") (Joint book of authorities)

[6] Relevant comments on some distinctions between ss. 10 and 47 of the *Act* were recently made by the Divisional Court: *Ontario (Ministry of Community and Social Services) v. John Doe*, [2014] O.J. No. 2362, 2014 ONSC 239, 120 O.R. (3d) 451, (Divisional Court), at paras. 49 to 51 and 55 (Joint book of authorities)

49. In *CLA*, the alleged breach of a *Charter* right was limited to expression rights for public participation, and did not have a privacy component whatsoever.

50. Furthermore, *CLA* did not make a determination on whether an exclusion nor even an exemption provision of the *Act* is constitutional.

51. Rather, in *CLA*, s. 23 of the *Act* — which is a compelling-public-interest override of exemptions — was decided to be constitutional on the basis of not meeting the threshold test for constitutional scrutiny; on the basis of not having a logical connection to the alleged breach of a *Charter* right:

> [61] It is unnecessary to pursue this inquiry further because, in any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(b) were engaged, it would not be breached. The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections, properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

***Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23 (CanLII), http://canlii.ca/t/2b5ss , ("CLA"), para. 61, and see para. 62**

52. With all due respect, the University's particular claim (at its para. 100) that "The only *Charter* basis for a challenge to any provision of *FIPPA* is that set out in *Criminal Lawyers Association* …" should be seen as unrestrained hyperbole, irrelevant to the issue of mootness.

B. UNCONSTITUTIONALITY OF S. 65(6)3 IN ITS GENERAL EFFECT

53. A present live controversy in the instant judicial review is whether s. 65(6)3 of the *Act* is unconstitutional in its general effect, irrespective of achieving the threshold for *Charter*

scrutiny in the particular circumstances of the instant case? ("ISSUE #4" in the Applicant's factum on the main application) (See Facts, above)

54. The live controversy regarding general effect has no necessary connection to whether the Applicant is provided access to his own personal information (the psychiatric report), since it relies on the general effect of the impugned provision of the *Act*.

55. The Applicant submits that there is no logical basis to conclude that the live controversy regarding general effect is moot. Standing to bring the issue of unconstitutionality by general effect does not depend on a right of the Applicant to have access to the psychiatric report. The Applicant's right to bring the issue itself was affirmed by the Adjudicator, and is uncontested by the opposing party.

Representations of the appellant (now the Applicant) dated 2015-04-14, Private Record - IPC, Tab 2, pp. 11-71 (at para. 77, pp. 46-47)

Adjudicator's Order, Applicant's Application Record (Tab 2), paras. 115 and 116

Factum of the Applicant (for the main application), para. 56

Factum of the University, paras. 94 to 99

Factum of the IPC, paras. 109 to 111

56. In the alternative, if the said issue of general effect is moot (which is denied), then the Applicant's arguments that this Honourable Court should apply its discretion to hear the issue of the particular case (Effect on the Applicant, above) apply *mutatis mutandis* and are submitted for the issue of general effect.

CONCLUSION

57. The application is not moot.

58. If it is moot (which is denied), then it should be heard by this Honourable Court.

Part IV: ORDER REQUESTED ON THE MOOTNESS MOTION

59. That the court grant permission for the instant supplementary factum — responding to the matter of mootness and filled on consent — if permission is required.

60. The Applicant requests that this Honourable Court deny the University's preliminary motion on mootness with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January, 2018.

Dr. Denis Rancourt
Applicant

Schedule A: List of Authorities and Documents Referred To In Applicant's Supplementary Factum on Mootness

AUTHORITY **(in planned joint book of authorities)**	**Paras. or pp. cited**
Borowski v. Canada (Attorney General), [1989] 1 SCR 342, 1989 CanLII 123 (SCC), http://canlii.ca/t/1ft7d	pp. 353-362
Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner), 2011 ABCA 94 (CanLII), http://canlii.ca/t/fkqkl	29
Mental Health Centre Penetanguishene v. Ontario, 2010 ONCA 197 (CanLII), http://canlii.ca/t/28llt	39, 41, 42
Ontario (Ministry of Community and Social Services) v. John Doe, [2014] O.J. No. 2362, 2014 ONSC 239, 120 O.R. (3d) 451, (Divisional Court)	49-51, 55
Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR 815, 2010 SCC 23 (CanLII), http://canlii.ca/t/2b5ss , ("*CLA*")	61, 62
Ontario (Solicitor General) v. Mitchinson, 2001 CanLII 8582 (ON CA), http://canlii.ca/t/1ffwz	38

TAB	**DOCUMENT (attached herein)**	**Page cited**
A - 1	*12,160,282 …and that's just the people in Ontario who are entitled to open, accountable government and strong privacy protection*, Information and privacy Commissioner / Ontario, 2006 Annual Report. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/	p. 26
A - 2	*Annual Report 1998*, Information and privacy Commissioner / Ontario. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/	p. 10

A - 3	*Annual Report 2002*, Information and privacy Commissioner / Ontario. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/	p. 20
A - 4	*Annual Report 2004*, Information and privacy Commissioner / Ontario. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/	pp. 6-8
A - 5	*It's Your Information*, Information and privacy Commissioner / Ontario, 2001 Annual Report. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/	p. 19
A - 6	*OCUFA Update on Freedom of Information and Protection of Privacy Issues*, Cathy Lace and Emma Phillips (Sack, Goldblatt, Mitchell), May, 2013, www.wlufa.ca/wp-content/uploads/2010/01/FIPPA-SGM-update-May-2013.doc	p. 4
A - 7	*Privacy and Access: A Blueprint for Change*, Information and privacy Commissioner / Ontario, 2003 Annual Report. Accessed 2017-12-17: https://www.ipc.on.ca/about-us/annual-reports/	pp. 6-7

Schedule B: Text of Relevant Provisions of Statutes

INDEX	
Statute	**Sections cited**
Canadian Charter of Rights and Freedoms http://laws-lois.justice.gc.ca/eng/Const/page-15.html	1, 2, 7, 8
Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 https://www.ontario.ca/laws/statute/90f31	1, 37-56, 65(6), 65(7)

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

[…]

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

[…]

Freedom of Information and Protection of Privacy Act

R.S.O. 1990, CHAPTER F.31

Purposes

1 The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. F.31, s. 1.

[…]

PART III
PROTECTION OF INDIVIDUAL PRIVACY
Collection and Retention of Personal Information

Application of Part
37 This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public. R.S.O. 1990, c. F.31, s. 37.

Personal information
38 (1) In this section and in section 39,

"personal information" includes information that is not recorded and that is otherwise defined as "personal information" under this Act. R.S.O. 1990, c. F.31, s. 38 (1).

Collection of personal information
(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. R.S.O. 1990, c. F.31, s. 38 (2).

Manner of collection
39 (1) Personal information shall only be collected by an institution directly from the individual to whom the information relates unless,

(a) the individual authorizes another manner of collection;

(b) the personal information may be disclosed to the institution concerned under section 42 or under section 32 of the Municipal Freedom of Information and Protection of Privacy Act;

(c) the Commissioner has authorized the manner of collection under clause 59 (c);

(d) the information is in a report from a reporting agency in accordance with the Consumer Reporting Act;

(e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or tribunal;

(g) the information is collected for the purpose of law enforcement; or

(h) another manner of collection is authorized by or under a statute. R.S.O. 1990, c. F.31, s. 39 (1).

Notice to individual
(2) Where personal information is collected on behalf of an institution, the head shall, unless notice is waived by the responsible minister, inform the individual to whom the information relates of,

(a) the legal authority for the collection;

(b) the principal purpose or purposes for which the personal information is intended to be used; and

(c) the title, business address and business telephone number of a public official who can answer the individual's questions about the collection. R.S.O. 1990, c. F.31, s. 39 (2).

Exception
(3) Subsection (2) does not apply where the head may refuse to disclose the personal information under subsection 14 (1) or (2) (law enforcement), section 14.1 (Civil Remedies Act, 2001) or section 14.2 (Prohibiting Profiting from Recounting Crimes Act, 2002). 2002, c. 2, s. 19 (6); 2007, c. 13, s. 43 (3).

Retention of personal information
40 (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information. R.S.O. 1990, c. F.31, s. 40 (1).

Standard of accuracy
(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date. R.S.O. 1990, c. F.31, s. 40 (2).

Exception
(3) Subsection (2) does not apply to personal information collected for law enforcement purposes. R.S.O. 1990, c. F.31, s. 40 (3).

Disposal of personal information

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations. R.S.O. 1990, c. F.31, s. 40 (4).

Use and Disclosure of Personal Information

Use of personal information
41 (1) An institution shall not use personal information in its custody or under its control except,

(a) where the person to whom the information relates has identified that information in particular and consented to its use;

(b) for the purpose for which it was obtained or compiled or for a consistent purpose;

(c) for a purpose for which the information may be disclosed to the institution under section 42 or under section 32 of the Municipal Freedom of Information and Protection of Privacy Act; or

(d) subject to subsection (2), an educational institution may use personal information in its alumni records and a hospital may use personal information in its records for the purpose of its own fundraising activities, if the personal information is reasonably necessary for the fundraising activities. R.S.O. 1990, c. F.31, s. 41; 2005, c. 28, Sched. F, s. 5 (1); 2010, c. 25, s. 24 (9).

Notice on using personal information for fundraising
(2) In order for an educational institution to use personal information in its alumni records or for a hospital to use personal information in its records, either for its own fundraising activities or for the fundraising activities of an associated foundation, the educational institution or hospital shall,

(a) give notice to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be used for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, give notice to the individual to whom the personal information relates of his or her right to request that the information cease to be used for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, publish a notice of the individual's right to request that the individual's personal information cease to be used for fundraising purposes. 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (10).

Discontinuing use of personal information

(3) An educational institution or a hospital shall, when requested to do so by an individual, cease to use the individual's personal information under clause (1) (d). 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (11).

Where disclosure permitted
42 (1) An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part II;

(b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;

(c) for the purpose for which it was obtained or compiled or for a consistent purpose;

(d) where disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and where disclosure is necessary and proper in the discharge of the institution's functions;

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;

(f) where disclosure is by a law enforcement institution,

(i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or

(ii) to another law enforcement agency in Canada;

(g) where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(i) in compassionate circumstances, to facilitate contact with the spouse, a close relative or a friend of an individual who is injured, ill or deceased;

(j) to a member of the Legislative Assembly who has been authorized by a constituent to whom the information relates to make an inquiry on the constituent's behalf or, where the constituent is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the constituent;

(k) to a member of the bargaining agent who has been authorized by an employee to whom the information relates to make an inquiry on the employee's behalf or, where the employee is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the employee;

(l) to the responsible minister;

(m) to the Information and Privacy Commissioner;

(n) to the Government of Canada in order to facilitate the auditing of shared cost programs; or

(o) subject to subsection (2), an educational institution may disclose personal information in its alumni records, and a hospital may disclose personal information in its records, for the purpose of its own fundraising activities or the fundraising activities of an associated foundation if,

(i) the educational institution and the person to whom the information is disclosed, or the hospital and the person to whom the information is disclosed, have entered into a written agreement that satisfies the requirements of subsection (3), and

(ii) the personal information is reasonably necessary for the fundraising activities. R.S.O. 1990, c. F.31, s. 42; 2005, c. 28, Sched. F, s. 6 (1); 2006, c. 19, Sched. N, s. 1 (5-7); 2006, c. 34, Sched. C, s. 5; 2010, c. 25, s. 24 (12).

Notice on disclosing personal information for fundraising

(2) In order for an educational institution to disclose personal information in its alumni records or for a hospital to disclose personal information in its records, either for the purpose of its own fundraising activities or the fundraising activities of an associated foundation, the educational institution or hospital shall ensure that,

(a) notice is given to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be disclosed for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, notice is given to the individual to whom the personal information relates of his or her right to request that the information cease to be disclosed for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, notice is published in respect of the individual's right to

request that the individual's personal information cease to be disclosed for fundraising purposes. 2005, c. 28, Sched. F, s. 6 (2); 2010, c. 25, s. 24 (13).

Fundraising agreement
(3) An agreement between an educational institution and another person for the disclosure of personal information in the educational institution's alumni records for fundraising activities, or an agreement between a hospital and another person for the disclosure of personal information in the hospital's records for fundraising activities, must,

(a) require that the notice requirements in subsection (2) are met;

(b) require that the personal information disclosed under clause (1) (o) be disclosed to the individual to whom the information relates upon his or her request; and

(c) require that the person to whom the information is disclosed shall cease to use the personal information of any individual who requests that the information not be used. 2005, c. 28, Sched. F, s. 6 (2); 2010, c. 25, s. 24 (14).

Consistent purpose
43 Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information is a consistent purpose under clauses 41 (1) (b) and 42 (1) (c) only if the individual might reasonably have expected such a use or disclosure. R.S.O. 1990, c. F.31, s. 43; 2006, c. 34, Sched. C, s. 6.

Personal Information Banks

Personal information banks
44 A head shall cause to be included in a personal information bank all personal information under the control of the institution that is organized or intended to be retrieved by the individual's name or by an identifying number, symbol or other particular assigned to the individual. R.S.O. 1990, c. F.31, s. 44.

Personal information bank index
45 The responsible minister shall publish at least once each year an index of all personal information banks setting forth, in respect of each personal information bank,

(a) its name and location;

(b) the legal authority for its establishment;

(c) the types of personal information maintained in it;

(d) how the personal information is used on a regular basis;

(e) to whom the personal information is disclosed on a regular basis;

(f) the categories of individuals about whom personal information is maintained; and

(g) the policies and practices applicable to the retention and disposal of the personal information. R.S.O. 1990, c. F.31, s. 45.

Inconsistent use or disclosure
46 (1) A head shall attach or link to personal information in a personal information bank,

(a) a record of any use of that personal information for a purpose other than a purpose described in clause 45 (d); and

(b) a record of any disclosure of that personal information to a person other than a person described in clause 45 (e). R.S.O. 1990, c. F.31, s. 46 (1).

Record of use part of personal information
(2) A record retained under subsection (1) forms part of the personal information to which it is attached or linked. R.S.O. 1990, c. F.31, s. 46 (2).

Notice and publication
(3) Where the personal information in a personal information bank under the control of an institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not one of the uses included under clauses 45 (d) and (e), the head shall,

(a) forthwith notify the responsible minister of the use or disclosure; and

(b) ensure that the use is included in the index. R.S.O. 1990, c. F.31, s. 46 (3).

Right of Individual to Whom Personal Information Relates to Access and Correction

Rights of access and correction
Right of access to personal information
47 (1) Every individual has a right of access to,

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution. R.S.O. 1990, c. F.31, s. 47 (1).

Right of correction
(2) Every individual who is given access under subsection (1) to personal information is entitled to,

(a) request correction of the personal information where the individual believes there is an error or omission therein;

(b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and

(c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement. R.S.O. 1990, c. F.31, s. 47 (2).

Requests and manner of access
Request
48 (1) An individual seeking access to personal information about the individual shall,

(a) make a request in writing to the institution that the individual believes has custody or control of the personal information, and specify that the request is being made under this Act;

(b) identify the personal information bank or otherwise identify the location of the personal information; and

(c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 7; 2017, c. 2, Sched. 12, s. 4 (2).

Access procedures
(2) Subsections 10 (2), 24 (1.1) and (2) and sections 25, 26, 27, 27.1, 28 and 29 apply with necessary modifications to a request made under subsection (1). 1996, c. 1, Sched. K, s. 7.

Manner of access
(3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

(a) permit the individual to examine the personal information; or

(b) provide the individual with a copy thereof. R.S.O. 1990, c. F.31, s. 48 (3).

Comprehensible form
(4) Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which

indicates the general terms and conditions under which the personal information is stored and used. R.S.O. 1990, c. F.31, s. 48 (4).

Exemptions
49 A head may refuse to disclose to the individual to whom the information relates personal information,

(a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 49 (a) of the Act is amended by adding "15.1" after "15". (See: 2017, c. 8, Sched. 13, s. 4)

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

(c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

(c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,

(i) assessing the teaching materials or research of an employee of an educational institution or a hospital or of a person associated with an educational institution or a hospital,

(ii) determining suitability, eligibility or qualifications for admission to an academic program of an educational institution or a hospital, or

(iii) determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

(d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;

(e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or

(f) that is a research or statistical record. R.S.O. 1990, c. F.31, s. 49; 2001, c. 28, s. 22 (4); 2002, c. 2, ss. 15 (4), 19 (7); 2002, c. 18, Sched. K, s. 10; 2005, c. 28, Sched. F, s. 7; 2010, c. 25, s. 24 (15).

PART IV
APPEAL

Right to appeal
50 (1) A person who has made a request for,

(a) access to a record under subsection 24 (1);

(b) access to personal information under subsection 48 (1); or

(c) correction of personal information under subsection 47 (2),

or a person who is given notice of a request under subsection 28 (1) may appeal any decision of a head under this Act to the Commissioner. R.S.O. 1990, c. F.31, s. 50 (1).

Fee
(1.1) A person who appeals under subsection (1) shall pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 8.

Time for application
(2) Subject to subsection (2.0.1), an appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal. R.S.O. 1990, c. F.31, s. 50 (2); 2016, c. 5, Sched. 10, s. 3 (1).

Extension of time
(2.0.1) If the time limit specified in subsection (2) presents a barrier, as defined in the Accessibility for Ontarians with Disabilities Act, 2005, to the person, the Commissioner may extend the time limit for a period of time that is reasonably required in the circumstances to accommodate the person for the purpose of making the appeal. 2016, c. 5, Sched. 10, s. 3 (2).

Immediate dismissal
(2.1) The Commissioner may dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the record or the personal information to which the notice relates exists. 1996, c. 1, Sched. K, s. 8.

Non-application
(2.2) If the Commissioner dismisses an appeal under subsection (2.1), subsection (3) and sections 51 and 52 do not apply to the Commissioner. 1996, c. 1, Sched. K, s. 8.

Notice of application for appeal
(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an

interest in the appeal, including an institution within the meaning of the Municipal Freedom of Information and Protection of Privacy Act, of the notice of appeal. 2006, c. 34, Sched. C, s. 7.

Ombudsman Act not to apply
(4) The Ombudsman Act does not apply in respect of a complaint for which an appeal is provided under this Act or the Municipal Freedom of Information and Protection of Privacy Act or to the Commissioner or the Commissioner's delegate acting under this Act or the Municipal Freedom of Information and Protection of Privacy Act. R.S.O. 1990, c. F.31, s. 50 (4).

Mediator to try to effect settlement
51 The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal. R.S.O. 1990, c. F.31, s. 51.

Inquiry
52 (1) The Commissioner may conduct an inquiry to review the head's decision if,

(a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or

(b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected. 1996, c. 1, Sched. K, s. 9.

Procedure
(2) The Statutory Powers Procedure Act does not apply to an inquiry under subsection (1). R.S.O. 1990, c. F.31, s. 52 (2).

Inquiry in private
(3) The inquiry may be conducted in private. R.S.O. 1990, c. F.31, s. 52 (3).

Powers of Commissioner
(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation. R.S.O. 1990, c. F.31, s. 52 (4).

Record not retained by Commissioner
(5) The Commissioner shall not retain any information obtained from a record under subsection (4). R.S.O. 1990, c. F.31, s. 52 (5).

Examination on site
(6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site. R.S.O. 1990, c. F.31, s. 52 (6).

Notice of entry

(7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose. R.S.O. 1990, c. F.31, s. 52 (7).

Examination under oath
(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath. R.S.O. 1990, c. F.31, s. 52 (8).

Evidence privileged
(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court. R.S.O. 1990, c. F.31, s. 52 (9).

Protection
(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person. R.S.O. 1990, c. F.31, s. 52 (10).

Protection under Federal Act
(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the Canada Evidence Act. R.S.O. 1990, c. F.31, s. 52 (11).

Prosecution
(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section. R.S.O. 1990, c. F.31, s. 52 (12).

Representations
(13) The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50 (3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made. 2006, c. 34, Sched. C, s. 8 (1).

Right to representation
(14) Each of the following may be represented by a person authorized under the Law Society Act to represent them:

1. The person who requested access to the record.

2. The head of the institution concerned.

3. Any other institution or person informed of the notice of appeal under subsection 50 (3). 2006, c. 34, Sched. C, s. 8 (5).

Burden of proof
53 Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head. R.S.O. 1990, c. F.31, s. 53.

Order
54 (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal. R.S.O. 1990, c. F.31, s. 54 (1).

Idem
(2) Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part. R.S.O. 1990, c. F.31, s. 54 (2).

Terms and conditions
(3) Subject to this Act, the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate. R.S.O. 1990, c. F.31, s. 54 (3); 1996, c. 1, Sched. K, s. 10.

Notice of order
(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 50 (3) written notice of the order. R.S.O. 1990, c. F.31, s. 54 (4).

Confidentiality
55 (1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (1).

Not compellable witness
(2) The Commissioner or any person acting on behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (2).

Proceedings privileged
(3) No proceeding lies against the Commissioner or against any person acting on behalf or under the direction of the Commissioner for anything done, reported or said in good faith in the course of the exercise or performance or intended exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (3).

Delegation by Commissioner
56 (1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation. R.S.O. 1990, c. F.31, s. 56 (1).

Exception re records under s. 12 or 14
(2) The Commissioner shall not delegate to a person other than an Assistant Commissioner his or her power to require a record referred to in section 12 or 14 to be produced and examined. R.S.O. 1990, c. F.31, s. 56 (2).

[…]

65 (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

4. Meetings, consultations, discussions or communications about the appointment or placement of any individual by a church or religious organization within an institution, or within the church or religious organization.

5. Meetings, consultations, discussions or communications about applications for hospital appointments, the appointments or privileges of persons who have hospital privileges, and anything that forms part of the personnel file of those persons. 1995, c. 1, s. 82; 2010, c. 25, s. 24 (18).

Exception
(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.

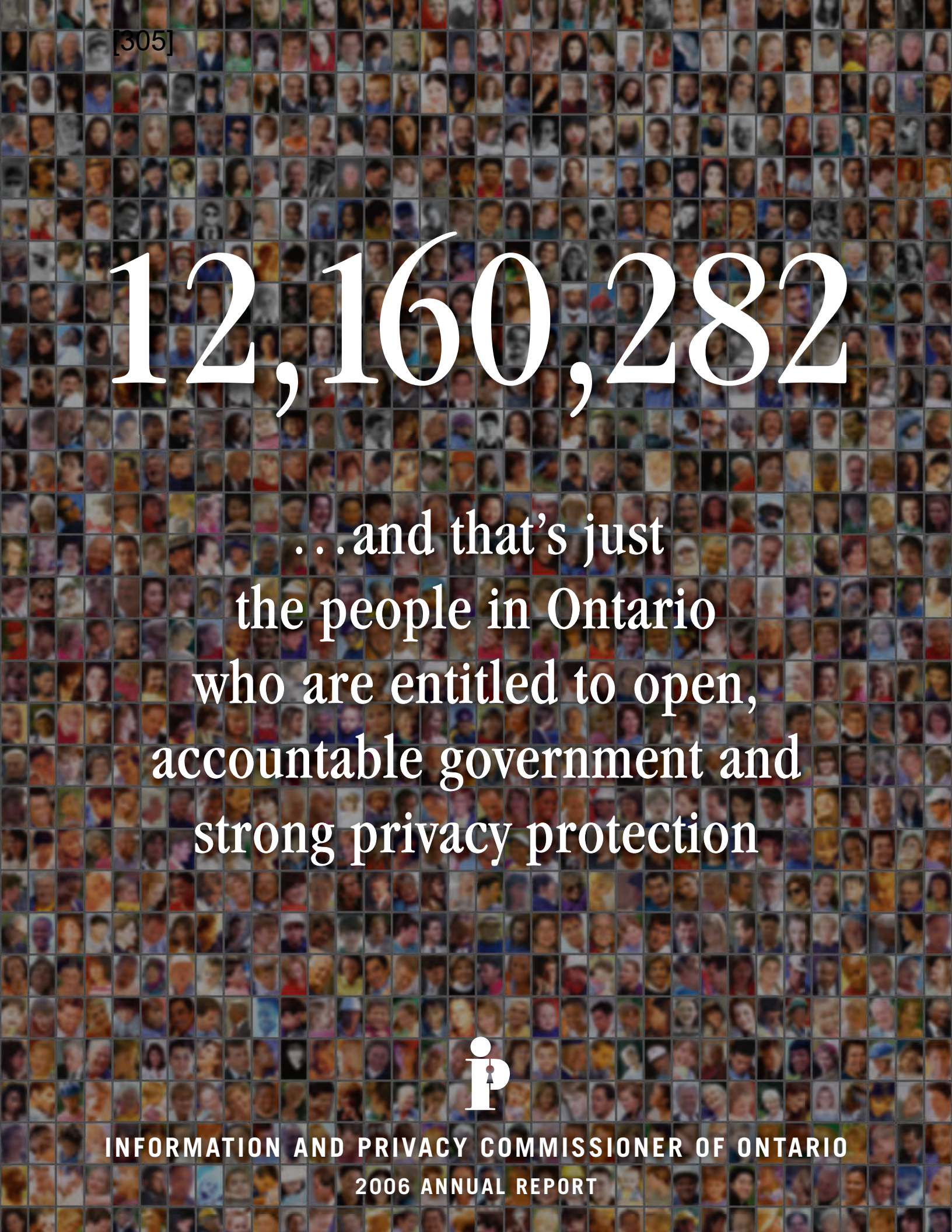
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment. 1995, c. 1, s. 82.

[…]

[305]



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…and that's just
the people in Ontario
who are entitled to open,
accountable government and
strong privacy protection

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

2006 ANNUAL REPORT

Commissioner's Message

WHILE THERE WERE SOME PROGRESSIVE STEPS TAKEN IN 2006 IN BOTH THE ACCESS AND PRIVACY FIELDS, NEW CHALLENGES AROSE. Among the positive steps was the first *Right to Know Week* in Ontario, which my office used as a springboard to promote the underlying principles of freedom of information. Another was the groundswell of support – which has continued to grow – for the *Privacy-Embedded 7 Laws of Identity*, which I unveiled in October. These 7 Laws are about the need to have control over our personal information in the digital world, just as we do in the real world. And, later in October, Privacy and Data Protection Commissioners from around the world accepted the *Global Privacy Standard (GPS)* that a committee of international commissioners, which I chaired, brought forward. The GPS represents a harmonization of fair information practices into a single instrument, and for the first time, includes the language of data minimization.

CULTURE OF PRIVACY

I need to raise a truly regrettable situation that occurred at an Ontario hospital to drive home the point that having a privacy policy, in and of itself, is not enough: A culture of privacy must be developed so that everyone handling personal information understands what may or may not be done with it.

A patient admitted to the Ottawa Hospital made a specific request to ensure that her estranged husband, who worked at that hospital, and his girlfriend, a nurse at the hospital, did not become aware of her hospitalization, and that steps be taken to protect her privacy. She learned later that the nurse had repeatedly gained access to her personal information.

Despite having clearly alerted the hospital to the possibility of harm, the harm occurred nonetheless. While the hospital had policies in place to safeguard health information, they were not followed completely, nor were they sufficient to prevent a privacy breach from occurring. In addition, the fact that the nurse chose to disregard, not only the hospital's policies, but her ethical obligations as a registered nurse, and continued to surreptitiously access a patient's electronic health record,

disregarding three warnings alerting her to the seriousness of her unauthorized access, is especially troubling. Protections against such blatant disregard for a patient's privacy by an employee must be built into the policies and practices of all health care institutions.

As I emphasized in the postscript to the order I issued, HO-002:

> "This speaks broadly to the culture of privacy that must be created in health care institutions across the province. Unless policies are interwoven into the fabric of a hospital's day-to-day operations, they will not work. Hospitals must ensure that they not only educate their staff about the *Act* and information policies and practices implemented by the hospital, but must also ensure that privacy becomes embedded into their institutional culture."
>
> "As one of the largest academic health sciences centres in Canada, the Ottawa Hospital had properly developed a number of policies and procedures; but yet, they were insufficient to prevent members of its staff from deliberately undermining them."

I urge all health information custodians and access and privacy staff to read this order, available on our website, **www.ipc.on.ca**, and to develop a culture of privacy in their organizations.

Upholding compliance with Ontario privacy legislation is not simply a matter of following the provisions of enacted legislation, but ensuring that the use and disclosure of sensitive personal information is strongly monitored, and access controlled to those who truly need it in the performance of their duties.

Regardless of the type of institution or health care provider – from a town hall to a police service, from a library board to a school board, from a university to a hospital, a doctor's office or a health clinic – predicating access to personal information on a "need to know" basis is vital.

THE PRIVACY-EMBEDDED 7 LAWS OF IDENTITY

I was struck by the growing disconnect between the real and the digital worlds when it came to disclosing personally identifiable information and proving identity. Surveillance and fraud appear to be far more rampant in the online world. Individual users are losing control over what personal information is collected about them, by whom, and for what purposes, resulting in profound consequences for privacy. With the loss of control comes a loss of confidence and trust in the Internet as a beneficial medium for enriching our lives. And the tension is mounting, because the next generation of intelligent and interactive web services ("Web 2.0") will require more, not fewer, verifiable identity credentials, and much greater mutual trust in order to succeed.

This is why I published a set of privacy-embedded "laws of identity" to help guide the development of interoperable identity management systems in a privacy-enhanced way. I wanted to help minimize the risks that one's online identities and activities would be recorded and linked together, without one's knowledge or consent. Just as important, identity systems that are consistent with the *Privacy-Embedded 7 Laws of Identity* will help consumers verify the identity of legitimate organizations before they decide to proceed with an online transaction.

The privacy-embedded laws were inspired by the 7 Laws of Identity formulated through a global dialogue among security and privacy experts, headed by Kim Cameron, Chief Identity Architect at Microsoft. The *Privacy-Embedded 7 Laws of Identity* offer individuals:

- easier and more direct user control over their personal information when online;
- enhanced user ability to minimize the amount of identifying data revealed online;
- enhanced user ability to minimize the linkage between different identities and actions; and
- enhanced user ability to detect fraudulent messages and websites, thereby minimizing the incidence of phishing and pharming.

We have called upon software developers, the privacy community and public policy-makers to consider the *Privacy-Embedded 7 Laws of Identity* closely, to discuss them publicly, and to take them to heart.

And we see evidence of that already happening. Some of the largest companies and groups in the technology field have stepped forward to present their own identity management projects and to explain how their solutions are user-centric, privacy-respectful and privacy-enhancing. The IPC is currently holding talks with several collaborative, open-source identity management initiatives, such as members

of Liberty Alliance (including companies such as Oracle, Sun Microsystems, and Hewlett-Packard) and members of Project Higgins (which includes IBM among many others), to further advance privacy in the identity age.

For our foundation paper on the *Privacy-Embedded 7 Laws of Identity*, go to: **http://www.ipc.on.ca/images/Resources/up-7laws_whitepaper.pdf.**

TRANSPARENCY AND ACCOUNTABILITY

The rights of citizens to access government-held information is essential in order to hold elected and appointed officials accountable to the people they serve. In my last annual report, I focused on the need for public accountability on the expenditure of public funds and recommended that all contracts entered into by government institutions for the provision of programs or services be made public on a routine basis.

That would only be the initial step. I am now calling on government organizations to make the full procurement process much more transparent – releasing information not only about the winning bid, but of all bids. Ensuring the integrity and effectiveness of the procurement process is an essential element of government accountability.

This issue is reviewed in depth in the *Issues* section of this annual report (including a look at how several provinces and states provide accountability). I also make a very specific recommendation in the *Commissioner's Recommendations* section.

KEY COURT DECISIONS

In two landmark decisions released in late 2006, the Divisional Court affirmed, for the first time, that I have the authority as part of my "legislative" functions to investigate and report on privacy complaints brought by members of the public against government institutions, despite the absence of an explicit grant of power under either the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*. I have been making the case for this outcome for many years and I am pleased to see the Court rule in our favour. At the same time, the Court held that my privacy rulings are protected by "Parliamentary privilege" and are not subject to judicial review by the courts because they fall within my general oversight and reporting mandate as an Officer of the Legislature.

Also in 2006, in its first judgment relating to an application for judicial review of an IPC decision, the Supreme Court of Canada established new guidelines governing the Ontario Courts' processes on judicial review of the IPC's decisions on access appeals.

More information on these and other key 2006 court decisions is presented in the *Judicial Reviews* section of this annual report.

CREATION OF A GLOBAL PRIVACY STANDARD

In 2005, at the 27th International Data Protection Commissioners Conference, I chaired a Working Group of Commissioners, which was convened for the sole purpose of creating a single Global Privacy Standard. With globalization and the convergence of business practices, and massive developments in technology, which knows no borders, I believed there was a pressing need to harmonize various sets of fair information practices into a single Global Privacy Standard. Once such a foundational policy piece was in place, businesses and technology companies could turn to a single instrument for evaluating whether their business practices or information systems were actually privacy enhancing, both in nature and substance.

My office embarked on the preliminary work of conducting a "gap analysis" – examining the leading privacy practices and codes from around the world to compare their various attributes, and the scope of the privacy principles enumerated therein. We identified the strengths and weaknesses of the major codes in existence and then tabled our gap analysis with the Working Group of Commissioners.

In the ensuing months, we embarked upon the work of harmonizing the privacy principles into a single set of fair information practices. This led to the development of the Global Privacy Standard (GPS), which builds upon the strengths of existing codes containing time-honoured privacy principles and, for the first time, reflects a noteworthy enhancement by explicitly recognizing the concept of "data minimization" under the collection limitation principle.

The final version of the GPS was formally tabled and accepted on November 3, 2006 at the 28th International Data Protection Commissioners Conference, in the United Kingdom.

The Global Privacy Standard reinforces the mandate of privacy and data protection authorities by:

- focusing attention on fundamental and universal privacy concepts;
- widening current privacy awareness and understanding;

- stimulating public discussion of the effects of new information and communication technologies, systems, standards, social norms, and laws, on privacy; and
- encouraging ways to mitigate threats to privacy.

The GPS addresses privacy concerns for decision-makers in any organization that has an impact on the way in which personal information is collected, used, retained, and disclosed. The GPS is intended to enhance, not pre-empt, any laws or legal requirements bearing upon privacy and personal information in various jurisdictions.

BUILDING EXTERNAL RELATIONSHIPS

One of this office's strengths is in forging external relationships; in this way, we are able to extend our influence and more effectively fulfil our research and educational responsibilities, and thus create "win-win" outcomes with partners from both the public and private sectors. In 2006, in addition to the GPS, we had the privilege of working with numerous organizations on projects covering a wide range of topics. They include:

- **The *Privacy-Embedded 7 Laws of Identity***, described above, with Microsoft's Chief Identity Architect, Kim Cameron, and subsequent discussions with other interested parties, including IBM, Oracle and Sun Microsystems;
- **Two papers on RFID (radio frequency identification) systems**. We worked with EPCglobal Canada, an industry association that sets standards for electronic product codes. After discussing core privacy principles and learning more about the technological potential of RFIDs, I released a video early in 2006, *A Word about RFIDs and your Privacy in the Retail Sector* (which, in addition to being available from my office, is being aired at the RFID Information Centre in Markham, Ontario). In June, I released *Privacy Guidelines for RFID Information Systems* and a second paper, *Practical Tips for Implementing RFID Privacy Guidelines*, explaining how responsible businesses can implement RFID systems in a privacy-protective manner;
- **Ontario's first *Right to Know Week***. We worked with the Toronto Region branch of the Institute of Public Administration of Canada and the Canadian Newspaper Association to organize the sold-out luncheon that was the focal point of the week.
- ***Reduce Your Roaming Risks – A Portable Privacy Primer***, released in September, was the result of a collaboration between my office and the BMO Financial Group. This practical, hands-on brochure outlines specific steps that people working away from the traditional office – and using mobile devices such as laptops and PDAs – can take to reduce the chances that the personal information in their care will be lost or stolen;
- ***When Online Gets Out of Line – Privacy: Make an Informed Online Choice***, a brochure released in October, encourages users of online social networking sites to carefully consider their privacy options. Social networking websites quickly became a significant technological and social phenomenon in 2006, with a number of media reports about the security and privacy issues involved. We met with officials from Facebook, one of the largest social networking sites, and also set up a focus group of college and university students, to find out directly from both the creators and users what this phenomenon was all about, and then produced our brochure.
- ***Breach Notification Assessment Tool.*** This structured assessment tool was jointly produced by my office and that of my counterpart in British Columbia, Commissioner David Loukidelis, in mid-December. It will guide organizations through a review of notification issues if a privacy breach occurs.
- **Ethics at Ryerson Speaker Series**. We were pleased to be the presentation partner for the first year of Ryerson University's *Faculty of Arts Ethics Network Speaker Series*. The 2006-7 theme was *Privacy and Access Issues Across the Professions*. The opening lecture in this series, which I delivered, was the launch event for our *When Online Gets Out of Line* brochure about online social networking. Among the other speakers were Alan Borovoy of the Canadian Civil Liberties Association, CBC Ombudsman Vince Carlin, and my Assistant Commissioner for Privacy, Ken Anderson.
- Among other interactions, I was very pleased to accept the invitation of Ontario Government Services Minister Gerry Phillips to sit on the Independent Advisory Committee to provide advice to the provincial government on best practices for managing business transformation of the public service through information and

information technology (I&IT). This is the next phase of a process of transforming how the Ontario Public Service handles large I&IT projects. Previously, I served on the Chair's Advisory Committee on e-Government.

- I am also serving on the International Biometric Advisory Council, which was established in 2005 to provide advice and expert opinion to the European Biometrics Forum, its members and partners, on the most pertinent issues facing biometrics globally. A charter has been developed and fruitful discussions begun about testing, certification, privacy and data protection.

Many of these relationships underline a belief I have held ever since I first joined the IPC in its very early days, some two decades ago: *technology transcends jurisdiction*. Along with the Dutch Data Protection Authority, we co-developed the concept and methodology recognized around the world today as *privacy-enhancing technologies*, or *PETs*. I have consistently spoken out, across Canada and internationally, in favour of building privacy directly into technology at the design stage, not added on as an afterthought, or later "fix." We affectionately call this "*privacy by design*."

Similarly, privacy must be built into organizational cultures in the most pervasive ways possible – whether the setting be a corporate boardroom, a hospital nursing station, a government ministerial office or a town hall – through widely dispersed written policies, employee orientation and update seminars, evaluation, shareholders meetings, management retreats, etc. Good privacy practices must become the norm, not the exception – build them in!

MY PERSONAL THANKS

Again, I would like to sincerely thank all of the wonderful staff in my office. With the external changes and vast pressures in the FOI and privacy fields in recent years, the demands on my office have grown significantly. My staff have not only met, but repeatedly exceeded the growing expectations placed upon them. Everyone at the IPC takes their responsibilities, and the mandate of this office, very seriously, and I am both very proud of my team, and exceedingly grateful. You have my heartfelt thanks, now, as always.

Ann Cavoukian, Ph.D.
Information and Privacy Commissioner of Ontario

Your identity, your choice: make these work for you

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The Purposes of the Acts

The purposes of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* are:

a) To provide a right of access to information under the control of government organizations in accordance with the following principles:

- information should be available to the public;
- exemptions to the right of access should be limited and specific;
- decisions on the disclosure of government information may be reviewed by the Information and Privacy Commissioner.

b) To protect personal information held by government organizations and to provide individuals with a right of access to their own personal information.

The purposes of the *Personal Health Information Protection Act* are:

To protect the confidentiality of personal health information in the custody or control of health information custodians and to provide individuals with a right of access to their own personal health information and the right to seek correction of such information, with limited exceptions.

Role and Mandate

Ontario's *Freedom of Information and Protection of Privacy Act (FIPPA)*, which came into effect on January 1, 1988, established an Information and Privacy Commissioner (IPC) as an officer of the Legislature, who is appointed by and reports to the Legislative Assembly of Ontario and is independent of the government of the day.

The *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA),* which came into effect January 1, 1991, broadened the number of public institutions covered by Ontario's access and privacy legislation.

The *Personal Health Information Protection Act, 2004 (PHIPA)*, which came into force on November 1, 2004, is the third of the three provincial laws for which the IPC provides oversight. *PHIPA* governs the collection, use and disclosure of personal health information within the health care system.

The Commissioner's mandate is to provide an independent review of the decisions and practices of government organizations concerning access and privacy; to provide an independent review of the decisions and practices of health information custodians in regard to personal health information; to conduct research on access and privacy issues; to provide comment and advice on proposed government legislation and programs; to review the personal health information policies and practices of certain entities under *PHIPA*; and to help educate the public about Ontario's access, privacy and personal health information issues and laws.

The Commissioner plays a crucial role under the three *Acts*. Together, *FIPPA* and *MFIPPA* establish a system for public access to government information with limited exemptions, and for protecting personal information held by government organizations at the provincial or municipal level. *PHIPA* establishes privacy rules for the protection of personal health information held by health information custodians and provides a right of access to an individual's own personal health information.

FIPPA applies to all provincial ministries and most provincial agencies, boards and commissions, and to universities and colleges of applied arts and technology. *MFIPPA* covers local government organizations, such as municipalities; police, library, health and school boards; public utilities; and transit commissions.

Freedom of information refers to public access to general records relating to the activities of government, ranging from administration and operations to legislation and policy. The underlying objective is open government and holding elected and appointed officials accountable to the people they serve.

Privacy protection, on the other hand, refers to the safeguarding of personal information – data about individuals held by government organizations, and personal health information in the custody or control of health information custodians. The three *Acts* establish rules about how government organizations and health information custodians may collect, use and disclose personal data. In addition, individuals have a right of access to their own personal information – and to seek correction of these records, if necessary.

To safeguard the rights established under the *Acts*, the IPC has seven key roles:

- resolving appeals when government organizations refuse to grant access to information;
- investigating privacy complaints related to government-held information;
- ensuring that government organizations comply with the *Acts*;
- conducting research on access and privacy issues and providing advice on proposed government legislation and programs;
- educating the public about Ontario's access, privacy and personal health information laws and access and privacy issues;
- investigating complaints related to personal health information;
- reviewing policies and procedures, and ensuring compliance with *PHIPA*.

In accordance with the legislation, the Commissioner has delegated some of the decision-making powers to various staff. Thus, the Assistant Commissioner (Privacy), Assistant Commissioner (Access) and selected staff were given the authority to assist her by issuing orders, resolving appeals and investigating privacy complaints.

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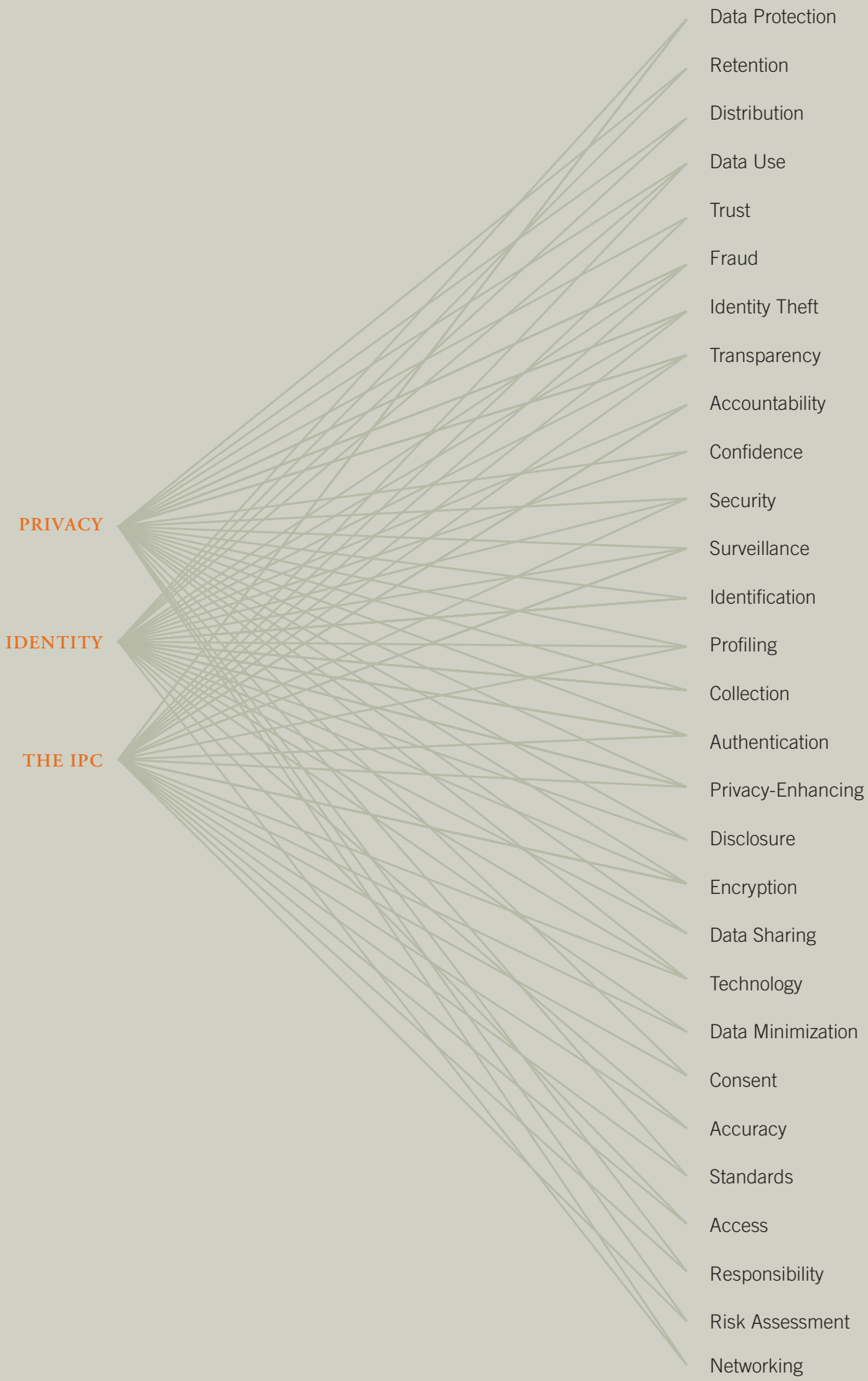
PRIVACY
IDENTITY
THE IPC
Data Protection
Retention
Distribution
Data Use
Trust
Fraud
Identity Theft
Transparency
Accountability
Confidence
Security
Surveillance
Identification
Profiling
Collection
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Privacy-Enhancing
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Response Rate Compliance – Only Part of the Story

EACH YEAR, TO HELP FOCUS ATTENTION ON THE IMPORTANCE OF COMPLYING WITH THE RESPONSE REQUIREMENTS OF THE *ACTS*, THE IPC REPORTS COMPLIANCE RATES FOR EACH MINISTRY AND SELECTED OTHER GOVERNMENT ORGANIZATIONS.

These numbers need to be understood in the overall context of the *Acts*. The 30-day compliance rate measures only one aspect of an institution's access to information program. This rate measures an institution's timeliness in responding to formal freedom of information requests. It does not, however, provide a complete view of whether an institution has embraced the philosophy of openness and transparency, which is equally, if not more, important. In other words, a high compliance rate of responding within 30 days does not necessarily mean that an institution is open and transparent in its operations.

The IPC has applauded the Premier for repeatedly stressing the importance of the province's access to information laws. The Premier has established the fundamental principle that, in Ontario, information should be made public unless there is a "clear and compelling reason" not to do so. This principle goes far beyond simply responding to requests in a timely fashion. Although a ministry may respond to a freedom of information request within the timeframe established by the *Acts*, the "quality" of that response may be lacking. The IPC continues to deal with appeals where an institution has improperly withheld information or delayed disclosure, even though its response (its decision regarding what, if anything, would be released) to the requester was provided within the 30-day timeframe.

For example, this office has repeatedly encouraged government institutions not to deny access to a record simply because an exemption may be claimed. There are still too many cases where institutions are resisting the disclosure of information that should be in the public domain through the unnecessary application of exemptions. The fact that a timely response was provided is of little comfort to the requester. In addition, some institutions continue to give an overly broad interpretation to sections 65(6)/52(3) of the *Acts*, which relate to employment and labour relations matters. These provisions are often applied to deny access to basic information that should be routinely disclosed. Again, the fact that such a response was received within the 30-day timeline should not reflect positively on an institution.

There are other ways that institutions, while providing a requester with a timely response, may frustrate the intent of the *Acts*. For example, a fee may be requested that is unjustified, or a fee waiver may be refused where the circumstances would call for such a waiver. As well, even after the IPC has issued an order, institutions may still resist disclosure, even though "clear and compelling" circumstances do not exist. In response to a subsequent request in identical circumstances, an institution may still refuse disclosure, despite an order that speaks otherwise, which then requires a frustrated requester to file an appeal with this office. On occasion, a government institution may bring an application for judicial review of an IPC order, despite the absence of compelling circumstances. This requires a requester to again wait until a lengthy court process is completed, and significant taxpayer dollars have been expended.

Responding to freedom of information requests within the timeframes set by the *Acts* is a laudable goal. However, the ultimate objective of an institution's access to information re-

PROVINCIAL: NUMBER OF REQUESTS COMPLETED IN 2006

(includes organizations where the Minister is the Head)

MINISTRY	REQUESTS RECEIVED	REQUESTS COMPLETED	WITHIN 1-30 DAYS		WITHIN 31-60 DAYS		WITHIN 61-90 DAYS		OVER 90 DAYS	
			No.	%	No.	%	No.	%	No.	%
Agriculture, Food and Rural Affairs	33	35	14	40.0	6	17.1	9	25.7	6	17.1
Attorney General	337	313	267	85.3	16	5.1	10	3.2	20	6.4
Cabinet Office	38	34	32	94.1	0	0.0	1	2.9	1	2.9
Children and Youth Services	37	44	39	88.6	2	4.6	1	2.3	2	4.6
Citizenship and Immigration	4	6	4	66.7	2	33.3	0	0.0	0	0.0
Community and Social Services	551	556	500	89.9	46	8.3	7	1.3	3	0.5
Community Safety and Correctional Services	3,323	3,244	2,634	81.2	482	14.9	63	1.9	65	2.0
Culture	9	12	9	75.0	3	25.0	0	0.0	0	0.0
Democratic Renewal Secretariat	2	2	1	50.0	1	50.0	0	0.0	0	0.0
Economic Development and Trade	14	10	1	10.0	2	20.0	2	20.0	5	50.0
Education	44	42	32	76.2	5	11.9	2	4.8	3	7.1
Energy	30	31	12	38.7	2	6.5	3	9.7	14	45.2
Environment	6,004	5,987	3,609	60.3	1,619	27.0	392	6.6	367	6.1
Finance	156	138	95	68.8	21	15.2	10	7.3	12	8.7
Government Services	221	206	191	92.7	11	5.3	4	1.9	0	0.0
Health and Long-Term Care	189	193	120	62.2	36	18.7	13	6.7	24	12.4
Health Promotion	11	11	7	63.6	3	27.3	0	0.0	1	9.1
Intergovernmental Affairs	7	7	6	85.7	1	14.3	0	0.0	0	0.0
Labour	977	961	896	93.2	32	3.3	14	1.5	19	2.0
Municipal Affairs and Housing	62	66	48	72.7	10	15.2	6	9.1	2	3.0
Natural Resources	106	99	61	61.6	22	22.2	9	9.1	7	7.1
Northern Development and Mines	13	13	5	38.5	7	53.9	0	0.0	1	7.7
Francophone Affairs	1	1	1	100.0	0	0.0	0	0.0	0	0.0
Aboriginal Affairs Secretariat	25	17	10	58.8	7	41.2	0	0.0	0	0.0
Ontario Seniors Secretariat	1	1	0	0.0	1	100.0	0	0.0	0	0.0
Ontario Women's Directorate	1	2	1	50.0	0	0.0	0	0.0	1	50.0
Public Infrastructure Renewal	27	25	21	84.0	1	4.0	2	8.0	1	4.0
Research and Innovation	0	3	3	100.0	0	0.0	0	0.0	0	0.0
Tourism	4	4	3	75.0	0	0.0	1	25.0	0	0.0
Training, Colleges and Universities	65	68	62	91.2	4	5.9	1	1.5	1	1.5
Transportation	251	240	216	90.0	9	3.8	5	2.1	10	4.2

gime should be to provide the fullest disclosure possible to the public. Over the coming year, the IPC will closely scrutinize, not only the timeliness of responses, but also the decisions made by institutions throughout the request and appeal process to determine whether the spirit of openness embodied in the *Acts*, and the Premier's message, are being supported.

As for the actual statistics on the compliance rates, there are two sets of charts illustrating these rates. The first set shows the compliance rate for each institution in meeting the 30-day standard set by the *Acts* for responding to freedom of information requests. The second chart shows compliance rates when Notices of Extension and Notices to Affected Person are included in the compliance calculations. When legitimately required, these notices allow a government organization to be in compliance with the applicable *Act*, despite taking more than 30 days to respond to a request. (Notices of Extension are explained in section 27(1) of the provincial *Act* and section 20(1) of the municipal *Act*. Notices to Affected Person are explained in section 28(1) of the provincial *Act* and section 21(1) of the municipal *Act*.)

PROVINCIAL ORGANIZATIONS

The 30-day compliance rate for provincial ministries dropped by 6.6 per cent in 2006 – to 73.5 per cent – the second drop in the provincial compliance rate since 1998. With the exception of 2004, the compliance rate had risen steadily since the IPC began publishing individual ministry compliance rates. With notices included, however, the 2006 compliance rate was 86.5 per cent, virtually identical to 2005's 86.4.

There were a number of positive stories. The 90 per cent-plus club – more than 90 per cent compliance when notices are considered – grew to 19 from 16. This group includes ministries and Cabinet Office. Newcomers in 2006 were the **Ministry of Children and Youth Services** (95.5 per cent), the **Ministry of Training, Colleges and Universities** (95.6), and the **Ministry of Education** (92.9).

PROVINCIAL

EXTENDED COMPLIANCE INCLUDES NOTICE OF EXTENSION AND NOTICE TO THIRD PARTIES

MINISTRY	30-DAY COMPLIANCE %	EXTENDED COMPLIANCE* %
Agriculture, Food & Rural Affairs	40.0	60.0
Attorney General	85.3	98.7
Cabinet Office	94.1	97.1
Children & Youth Services	88.6	95.5
Citizenship & Immigration	66.7	100.0
Community & Social Services	89.9	92.4
Community Safety & Correctional Services	81.2	97.8
Culture	75.0	100.0
Democratic Renewal Secretariat	50.0	100.0
Economic Development & Trade	10.0	30.0
Education	76.2	92.9
Energy	38.7	38.7
Environment	60.3	76.5
Finance	68.8	93.5
Government Services	92.7	99.0
Health & Long-Term Care	62.2	75.7
Health Promotion	63.6	63.6
Intergovernmental Affairs	85.7	85.7
Labour	93.2	93.2
Municipal Affairs & Housing	72.7	97.0
Natural Resources	61.6	83.8
Northern Development & Mines	38.5	92.3
Office of Francophone Affairs	100.0	100.0
Ontario Secretariat for Aboriginal Affairs	58.8	58.8
Ontario Seniors' Secretariat	0.0	100.0
Ontario Women's Directorate	50.0	50.0
Public Infrastructure Renewal	84.0	96.0
Research and Innovation	100.0	100.0
Tourism	75.0	100.0
Training, Colleges & Universities	91.2	95.6
Transportation	90.0	92.9

** Including sections 27(1) and 28(1) of FIPPA*

Universities

Ontario's 19 universities fell under the *Freedom of Information and Protection of Privacy Act* as of June 10, 2006. The vast majority, compliance wise, are off to a good start. Eleven of the 16 universities that received freedom of information requests in 2006 had a compliance rate, with notices, of 100 per cent.

The three universities with the most completed requests were the University of Toronto (23), York University (22) and Laurentian University (21).

The **University of Toronto** had an 87 per cent 30-day compliance rate; with notices, the compliance rate climbed to 100 per cent. **York University** had a 30-day compliance rate of 54.5 per cent; with notices, 68.2 per cent, while **Laurentian University** compiled an 85.7 per cent 30-day compliance rate, which climbed to 95.2 per cent with notices.

Ryerson University, at 12.5 per cent, and **McMaster University**, at 23.1 per cent, were the only universities with a 30-day compliance rate under 50 per cent. And, with a compliance rate with notices of 25 per cent, Ryerson was the only university with an overall compliance rate under 60 per cent.

The accompanying chart lists the compliance rates for all of Ontario's universities.

UNIVERSITIES

EXTENDED COMPLIANCE INCLUDES NOTICE OF EXTENSION AND NOTICE TO THIRD PARTIES

UNIVERSITY	REQUESTS COMPLETED %	30-DAY COMPLIANCE %	EXTENDED COMPLIANCE* %
Toronto	23	87.0	100.0
York	22	54.5	68.2
Laurentian	21	85.7	95.2
Ryerson	16	12.5	25.0
McMaster	13	23.1	61.5
Queen's	8	87.5	100.0
Western	8	87.5	100.0
Carleton	6	100.0	100.0
Ottawa	6	100.0	100.0
Windsor	4	100.0	100.0
Lakehead	3	66.7	66.7
Trent	3	100.0	100.0
Guelph	2	100.0	100.0
Nipissing	2	100.0	100.0
Brock	1	100.0	100.0
Waterloo	1	100.0	100.0
U of OIT	0	n/a	n/a
Wilfrid Laurier	0	n/a	n/a
OCAD	0	n/a	n/a

TOP EIGHT MUNICIPAL CORPORATIONS

(based on number of requests completed)

	REQUESTS RECEIVED	REQUESTS COMPLETED	WITHIN 1-30 DAYS		WITHIN 31-60 DAYS		WITHIN 61-90 DAYS		OVER 90 DAYS	
			No.	%	No.	%	No.	%	No.	%
POPULATION UNDER 50,000										
City of Clarence-Rockland *(21,624)*	18	18	18	100.0	0	0.0	0	0.0	0	0.0
Township of Dorion *(383)*	0	23	23	100.0	0	0.0	0	0.0	0	0.0
Town of Georgina *(44,000)*	46	46	45	97.8	1	2.2	0	0.0	0	0.0
Town of Gravenhurst *(10,899)*	20	20	18	90.0	1	5.0	1	5.0	0	0.0
The Corporation of Haldimand County *(43,728)*	27	23	14	60.9	6	26.1	3	13.0	0	0.0
Municipality of Highlands East *(2,681)*	14	14	0	0	14	100	0	0	0	0
The Corporation of the Town of Innisfil *(26,979)*	32	32	29	90.6	3	9.4	0	0.0	0	0.0
City of Stratford *(28,617)*	15	15	8	53.3	7	46.7	0	0	0	0
POPULATION BETWEEN 50,000 AND 200,000										
City of Barrie *(130,535)*	87	85	73	85.9	10	11.8	1	1.2	1	1.2
City of Burlington *(148,471)*	88	88	88	100.0	0	0.0	0	0.0	0	0.0
City of Cambridge *(122,000)*	105	105	103	98.1	1	1.0	1	1.0	0	0.0
City of Kitchener *(178,178)*	418	415	414	99.8	1	0.2	0	0.0	0	0.0
Corporation of the Town of Oakville *(144,128)*	608	608	605	99.5	3	0.5	0	0.0	0	0.0
Town of Richmond Hill *(176,830)*	400	400	391	97.8	9	2.3	0	0.0	0	0.0
City of Greater Sudbury *(155,339)*	154	149	124	83.2	21	14.1	4	2.7	0	0.0
City of Thunder Bay *(102,617)*	121	121	121	100.0	0	0.0	0	0.0	0	0.0
POPULATION OVER 200,000										
City of Brampton *(422,600)*	324	324	318	98.2	3	0.9	1	0.3	2	0.6
City of Hamilton *(490,268)*	134	130	129	99.2	1	0.8	0	0.0	0	0.0
City of Mississauga *(700,000)*	477	482	480	99.6	2	0.4	0	0.0	0	0.0
Regional Municipality of Niagara *(399,696)*	68	59	59	100.0	0	0.0	0	0.0	0	0.0
City of Ottawa (870,254)	319	309	270	87.4	28	9.1	6	1.9	5	1.6
Regional Municipality of Peel *(1,180,599)*	131	111	99	89.2	9	8.1	2	1.8	1	0.9
City of Toronto *(2,481,494)*	5152	4832	4162	86.1	562	11.6	66	1.4	42	0.9
Region of York *(786,355)*	92	86	82	95.3	4	4.7	0	0.0	0	0.0

MUNICIPAL ORGANIZATIONS

Municipal government institutions responded to freedom of information requests within the statutory 30-day period at an excellent 86.4 per cent rate in 2006, up from 83.9 per cent in 2005. This was the third year in a row that municipal organizations improved their compliance rate. When notices are considered, the average compliance rate for municipal organizations across Ontario was an impressive 90.7 per cent.

The charts used in this section illustrate individual response rates from the eight **municipalities** that completed the most requests in each of three population categories, as well as the eight **police services** and eight **school boards** that completed the most requests.

Municipalities

Overall, municipal corporations achieved a highly commendable 90.2 per cent 30-day compliance rate, up from 87.6 per cent in 2005.

Among the eight municipalities with a population over 200,000 that completed the most requests in 2006, the **Regional Municipality of Niagara** was the only one with a perfect 100 per cent 30-day compliance score, albeit on only 59 requests. **Mississauga**, which scored 100 per cent in 2005 on 430 requests, nearly equalled that feat in 2006 with a 99.6 per cent rate for 30-day compliance despite handling more requests. Others scoring in the 90th percentile for 30-day compliance in this (the highest) population category were **Hamilton** (99.2 per cent – an increase of more than 15 per cent), **Brampton** (98.2 per cent) and the **Region of York** (95.4 per cent).

The compliance leaders among the municipalities with the most requests in the middle population category (between 50,000-200,000) were **Thunder Bay** and **Burlington**, both achieving 100 per cent 30-day compliance, with 121 and 88 completed requests, respectively. **Kitchener**, with 415 requests, achieved a highly commendable 99.8 per cent 30-day compliance (and, when notices are considered, scored 100 per cent). The **Town of Oakville**, with the most completed requests in this population category, 608, achieved an impressive 99.5 per cent 30-day compliance rate – 99.8 per cent with notices.

TOP EIGHT MUNICIPAL CORPORATIONS

(based on number of requests completed)

	30-DAY COMPLIANCE %	EXTENDED COMPLIANCE* %
EXTENDED COMPLIANCE INCLUDES NOTICE OF EXTENSION AND NOTICE TO THIRD PARTIES		
POPULATION UNDER 50,000		
City of Clarence-Rockland	100.0	100.0
Township of Dorion	100.0	100.0
Town of Georgina	97.8	100.0
Town of Gravenhurst	90.0	100.0
The Corporation of Haldimand County	60.9	60.9
Municipality of Highlands East	0.0	100.0
The Corporation of the Town of Innisfil	90.6	100.0
City of Stratford	53.3	53.3
POPULATION BETWEEN 50,000 TO 200,000		
City of Barrie	85.9	85.9
City of Burlington	100.0	100.0
City of Cambridge	98.1	98.1
City of Kitchener	99.8	100.0
Corporation of the Town of Oakville	99.5	99.8
Town of Richmond Hill	97.8	100.0
City of Greater Sudbury	83.2	87.9
City of Thunder Bay	100.0	100.0
POPULATION OVER 200,000		
City of Brampton	98.2	98.5
City of Hamilton	99.2	99.2
City of Mississauga	99.6	99.6
Regional Municipality of Niagara	100.0	100.0
City of Ottawa	87.4	93.5
Regional Municipality of Peel	89.2	89.2
City of Toronto	86.1	88.2
Region of York	95.3	95.3

** Including sections 20(1) and 21(1) of MFIPPA*

Municipalities with populations under 50,000 were led by the **City of Clarence-Rockland** and the **Township of Dorion**, both registering 30-day 100 per cent compliance rates on 18 and 23 completed requests, respectively. Two of last year's leaders, **the towns of Georgina** and **Innisfil**, which had the most requests in this category in 2006 with 46 and 32 respectively, dropped slightly from 2005's perfect 100 per cent 30-day compliance to still very commendable 97.8 per cent and 90.6 per cent, respectively, in 2006.

Police Services

Police services overall increased their 30-day compliance to 83.4 per cent in 2006, up from 80.5 per cent the previous year. **Halton Regional Police Services** was among the leaders with 100 per cent 30-day compliance on 872 completed requests. Halton was joined at the top of the compliance list in 2006 by the neighbouring **Peel Regional Police Services**, which completed all 991 of its requests within 30 days. **Hamilton Police Services** cracked the 90 per cent-plus group with a 91.2 per cent 30-day compliance rate on 1,215 completed requests.

Boards of Education

School boards' overall 30-day compliance dipped slightly to 80.9 per cent in 2006 from 2005's 82.9 per cent. Once again, the **District School Board of Niagara** had by far the most completed requests, 74, and achieved an 87.8 per cent 30-day compliance rate, down slightly from 2005's 92.3 per cent. The only other board to complete more than 10 requests was the **Dufferin-Peel Catholic District School Board**, with 14. It recorded a 57.1 per cent 30-day compliance rate in 2006, up from 50 per cent the previous year. **Hamilton-Wentworth District School Board** and **Ottawa-Carleton District School Board** both achieved 100 per cent 30-day compliance on nine and six completed requests, respectively.

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TOP EIGHT POLICE INSTITUTIONS

(ranked on number of requests completed)

	REQUESTS RECEIVED	REQUESTS COMPLETED	WITHIN 1-30 DAYS		WITHIN 31-60 DAYS		WITHIN 61-90 DAYS		OVER 90 DAYS	
			No.	%	No.	%	No.	%	No.	%
Durham Regional Police Service	885	930	609	65.5	247	26.6	47	5.1	27	2.9
Halton Regional Police Service	895	872	872	100.0	0	0.0	0	0.0	0	0.0
Hamilton Police Service	1240	1215	1108	91.2	101	8.3	3	0.2	3	0.2
London Police Service	544	558	356	63.8	199	35.7	3	0.5	0	0.0
Niagara Regional Police Service	942	922	706	76.6	213	23.1	3	0.3	0	0.0
Peel Regional Police	991	991	991	100.0	0	0.0	0	0.0	0	0.0
Toronto Police Services Board	3085	3074	2524	82.1	406	13.2	95	3.1	49	1.6
Windsor Police Service	557	590	439	74.4	151	25.6	0	0.0	0	0.0

COMPLIANCE INCLUDING NOTICE OF EXTENSION AND NOTICE TO THIRD PARTIES

	30-DAY COMPLIANCE %	EXTENDED COMPLIANCE* %
Durham Regional Police Service	65.5	69.8
Halton Regional Police Service	100.0	100
Hamilton Police Service	91.2	91.2
London Police Service	63.8	98.9
Niagara Regional Police Service	76.6	83.2
Peel Regional Police	100.0	100
Toronto Police Services Board	82.1	85.3
Windsor Police Service	74.4	100

TOP EIGHT SCHOOL BOARDS

(ranked on number of requests completed)

	REQUESTS RECEIVED	REQUESTS COMPLETED	WITHIN 1-30 DAYS		WITHIN 31-60 DAYS		WITHIN 61-90 DAYS		OVER 90 DAYS	
			No.	%	No.	%	No.	%	No.	%
Dufferin-Peel Catholic District School Board	12	14	8	57.1	4	28.6	1	7.1	1	7.1
Hamilton-Wentworth District School Board	9	9	9	100.0	0	0.0	0	0.0	0	0.0
District School Board of Niagara	74	74	65	87.8	8	10.8	1	1.4	0	0.0
Ottawa-Carleton District School Board	6	6	6	100.0	0	0.0	0	0.0	0	0.0
Peel District School Board	7	7	6	85.7	1	14.3	0	0.0	0	0.0
Thames Valley District School Board	6	6	4	66.7	0	0.0	0	0.0	2	33.3
Toronto District School Board	6	6	3	50.0	0	0.0	0	0.0	3	50.0
York Catholic District School Board	8	8	5	62.5	3	37.5	0	0.0	0	0.0

EXTENDED COMPLIANCE INCLUDES NOTICES OF EXTENSION AND NOTICE TO THIRD PARTIES

	30-DAY COMPLIANCE %	EXTENDED COMPLIANCE* %
Dufferin-Peel Catholic District School Board	57.1	100.0
Hamilton-Wentworth District School Board	100.0	100.0
District School Board of Niagara	87.8	87.8
Ottawa-Carleton District School Board	100.0	100.0
Peel District School Board	85.7	85.7
Thames Valley District School Board	66.7	66.7
Toronto District School Board	50.0	83.3
York Catholic District School Board	62.5	100.0

** Including sections 20(1) and 21(1) of MFIPPA*

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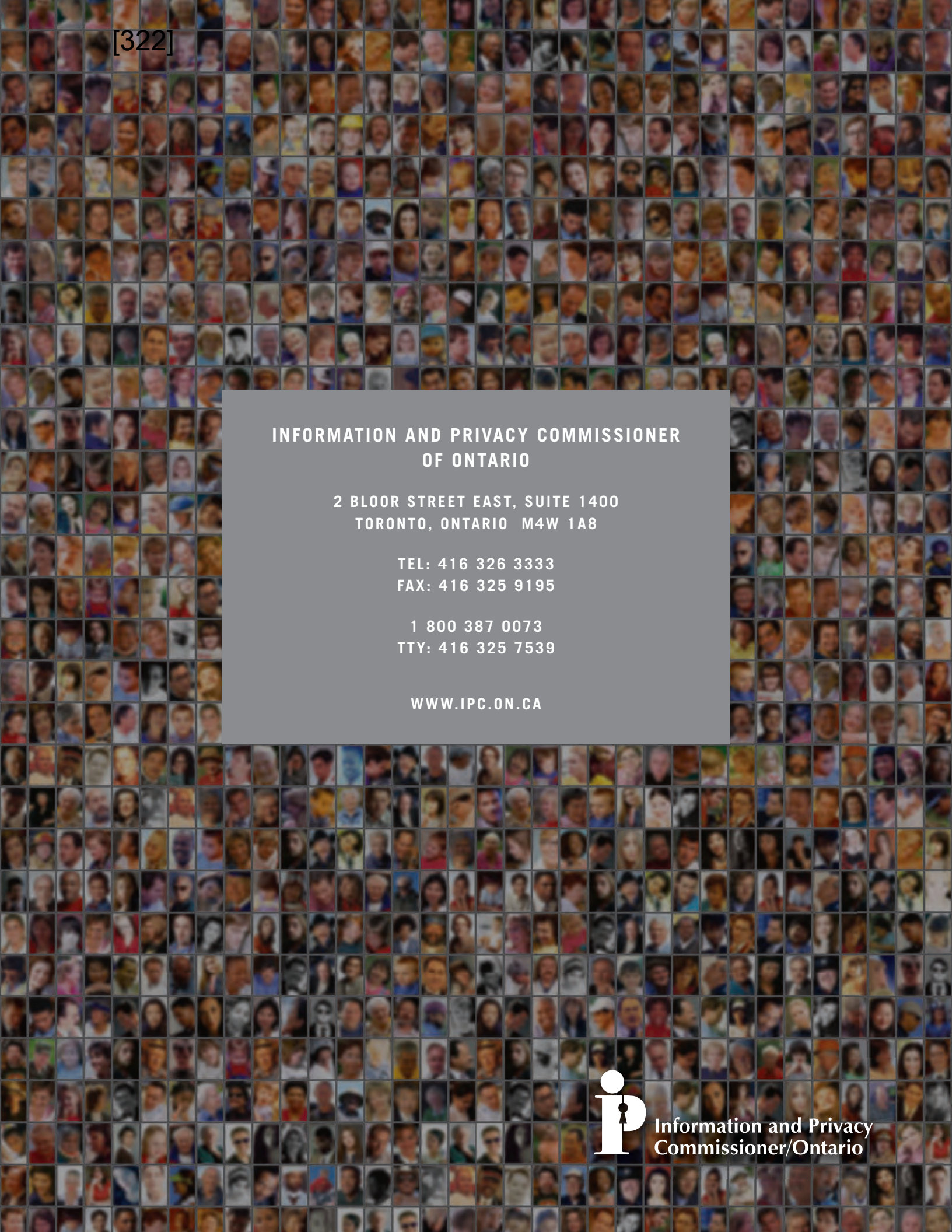

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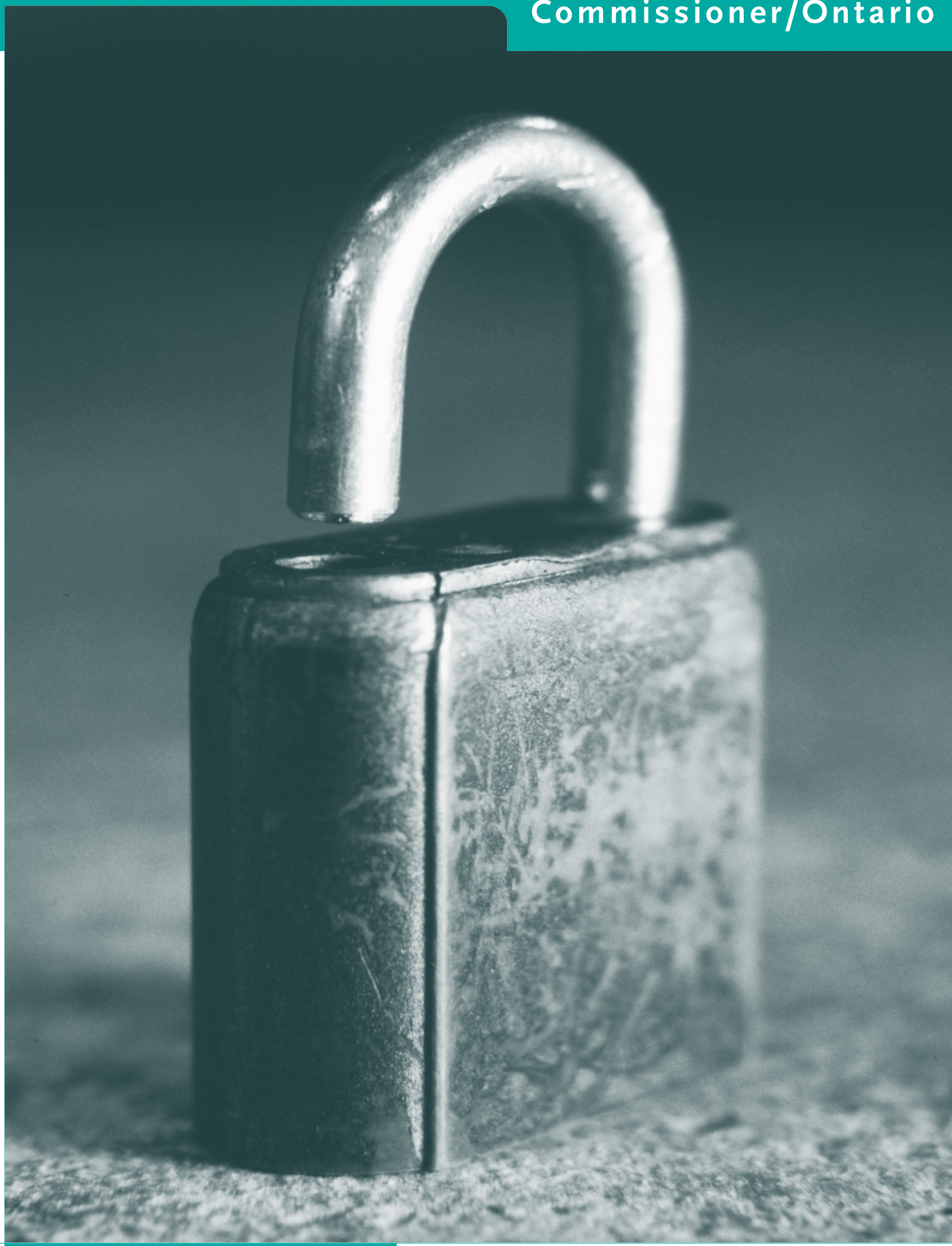
Information and Privacy Commissioner/Ontario



ANNUAL REPORT 1998

The Purposes of the *Acts*

The purposes of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* are:

a) To provide a right of access to information under the control of government organizations in accordance with the following principles:

- information should be available to the public;
- exemptions to the right of access should be limited and specific;
- decisions on the disclosure of government information may be reviewed by the Information and Privacy Commissioner.

b) To protect personal information held by government organizations and to provide individuals with a right of access to their own personal information.

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Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

The Honourable Chris Stockwell,
Speaker of the Legislative Assembly

I have the honour to present the 1998 annual report of the Information and Privacy Commissioner/Ontario to the Legislative Assembly.

This report covers the period from January 1, 1998 to December 31, 1998.

Sincerely yours,

Ann Cavoukian, Ph.D.
Commissioner

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Role and Mandate

Ontario's *Freedom of Information and Protection of Privacy Act,* which came into effect on January 1, 1988, established an Information and Privacy Commissioner as an officer of the Legislature to provide an independent review of the decisions and practices of government organizations concerning access and privacy. The Commissioner is appointed by and reports to the Legislative Assembly of Ontario. The Commissioner is independent of the government of the day in order to ensure impartiality.

The *Municipal Freedom of Information and Protection of Privacy Act,* which came into effect January 1, 1991, broadened the number of public institutions covered by Ontario's access and privacy legislation.

The Information and Privacy Commissioner (IPC) plays a crucial role under the two *Acts*. Together, the *Acts* establish a system for public access to government information, with limited exemptions, and for protecting personal information held by government organizations at the provincial or municipal level.

The provincial *Act* applies to all provincial ministries and most provincial agencies, boards and commissions; colleges of applied arts and technology; and district health councils. The municipal *Act* covers local government organizations, such as municipalities; police, library, health and school boards; public utilities; and transit commissions.

Freedom of information refers to public access to general records relating to the activities of government, ranging from administration and operations to legislation and policy. The underlying objective is open government and holding elected and appointed officials accountable to the people they serve.

Privacy protection, on the other hand, refers to the safeguarding of personal information – that is, data about individuals held by government organizations. The *Acts* establish rules about how government organizations may collect, and disclose personal data. In addition, individuals have a right to see their own personal information and are entitled to have it corrected if necessary.

The mandate of the IPC is to provide an independent review of government decisions and practices concerning access and privacy. To safeguard the rights established under the *Acts,* the IPC has five key roles:

- resolving appeals when government organizations refuse to grant access to information;
- investigating privacy complaints about government-held information;
- ensuring that government organizations comply with the *Acts;*
- conducting research on access and privacy issues and providing advice on proposed government legislation and programs;
- educating the public about Ontario's access and privacy laws and access and privacy issues.

In accordance with the legislation, the Commissioner delegated some of the decision-making powers to various staff. Thus, the Assistant Commissioner and selected staff were given the authority to assist her by issuing orders, resolving appeals and investigating privacy complaints. Under the authority of the Commissioner, government practices were reviewed, and proposed inter-ministry computer matches commented on.

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Access and Privacy Today

New legislation and other steps taken by some government organizations are beginning to erode access and privacy rights in Ontario.

The *Freedom of Information and Protection of Privacy Act,* which came into effect January 1, 1988, and the *Municipal Freedom of Information and Protection of Privacy Act,* effective January 1, 1991, established the basic rights of access to government-held information and the obligations imposed on provincial and municipal government organizations for the proper treatment of personal information in their custody and control.

However, since that time, specific exclusionary provisions, the outsourcing and privatization of some government functions, and new legislation overriding aspects of freedom of information and protection of privacy legislation are impacting on access and privacy rights of Ontarians.

Exclusions

One primary concern of the IPC is legislation or programs that exclude information or records from the scope of the *Acts.* When this happens, access and privacy rights are compromised, and the right of review by an independent body, the IPC, is lost.

One piece of legislation that excludes records from the *Acts is the Labour Relations Act, 1995* (Bill 7). Its stated purpose is "to restore balance and stability to labour relations and to promote economic prosperity." However, very broadly drafted provisions in the new law exclude many employment-related records about public sector employees, including records that do not have any bearing on labour relations. As a result, public sector employees may be precluded from obtaining access to employment-related records about themselves, and from making a privacy complaint if their personal information is improperly used or disclosed. These new provisions have been interpreted in a number of IPC orders, and records excluded from the *Acts* have been found to include the requester's personnel file, records relating to the requester's retirement, records about job competitions, and harassment investigation files, among others.

This approach to information about employees is not in keeping with world-wide trends favouring fair information practices, and in particular, the protection of personal privacy. Examples of this trend include the privacy directive of the European Union, the adoption of Fair Information Practice Codes by many private sector enterprises, the recently adopted information and privacy laws in other Canadian provinces such as Alberta and Manitoba, the extension of privacy protection legislation to the private sector in the Province of Quebec, and the recent introduction of Bill C-54, the *Personal Information and Electronic Documents Act,* by the federal government, extending the application of privacy laws to the privacy sector.

Fees

Another step that has had an impact on the number of Ontarians using access and privacy legislation was the introduction of an amended fee structure for access requests in 1996.

The government has frequently stressed the importance of user-pay, a principle which has found wide acceptance among members of the public. This approach has been applied to the *Acts* as a result of changes brought about by the *Savings and Restructuring Act,* 1996 (Bill 26). A $5 fee for each access request is now required, including requests for a person's own personal information, and appeal fees ($10 or $25, depending on the type of appeal) have also been imposed. The two hours of free search time was also eliminated as part of this new fee structure.

These new fee provisions have had a dramatic impact on the public's use of the *Acts*. From 1995 (the last year before the new fees were introduced) to 1998, the number of requests declined by 25% In the same period, appeals declined by 56%.

The sheer size of the decrease in the number of requests and appeals compels us to question whether the new fees have gone too far, particularly the appeal filing fee.

The IPC supports the user-pay principle, and observes that some reduction of requests and appeals may result from the elimination of questionable use of the *Acts*. As well, the IPC welcomes the increase in routine disclosure by government organizations of frequently requested information – which has also been a factor in the reduction of requests. However, the removal of certain kinds of information from the scope of the *Acts,* under legislation such as the *Labour Relations Act,* 1995 has had an impact as well. The sheer size of the decrease in the number of requests and appeals compels us to question whether the new fees have gone too far, particularly the appeal filing fee. The right of access to government information is an important accountability mechanism, and it is unfortunate that use of this avenue appears to have declined, at least in part, as a result of the new fee structure.

Privatization and Alternate Service Delivery

The transfer of government enterprises to the private sector or to other independent bodies is another way that access and privacy rights can be lost or reduced. For example, under the *Energy Competition Act, 1998,* Ontario Hydro has been divided into five separate corporations. Two of these, the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation, have not been scheduled as institutions under either of the *Acts,* despite the fact that, in the past, all of Ontario Hydro has been covered. IPC Order P-1190, upheld by the Ontario Court of Appeal, illustrates why continued access to information in Ontario Hydro's possession remains important. Based on a provision of the legislation that permits the IPC to do so where it is in the public interest, the IPC ordered disclosure of records which assessed the safety of several nuclear power plants in Ontario.

The IPC met with representatives of Ontario Hydro and the Ministry of Energy, Science and Technology to discuss our concerns. The government has not agreed to make these new corporations subject to the Acts.

The *Safety and Consumer Statutes Administration Act, 1996,* may also reduce access and privacy rights. This law provides for supervisory or inspection functions in a number of areas, including elevators, amusement rides and gasoline handling, by independent non-profit corporations. These particular functions were previously administered directly by the government, and associated records, including inspection reports, were therefore accessible under the provincial *Act*. Now that the administration has been transferred to an independent corporation, this may no longer be the case. The important public safety issues have not changed, so why shouldn't the public continue to have access to these records? Given that these corporations will also be collecting personal information, the

preservation of privacy protection is also critically important. The IPC attempted to secure these rights when the legislation was passed, but without success.

Protected Rights

Not all the news about the impact of new legislation on access and privacy rights is worrisome, however. The Ministry of Community and Social Services, working closely with the IPC, incorporated extensive privacy safeguards into the *Social Assistance Reform Act* in 1997. Among legislation enacted during 1998, the *Highway 407 Act, 1998,* and the *Legal Aid Services Act, 1998,* are good examples of new laws where steps where taken to protect access or privacy rights. The IPC suggested amendments to the *Highway 407 Act, 1998,* to ensure that the privacy of users of the electronically monitored highway would be protected, and also suggested that the agreement transferring the highway should require the new owner to adhere to the spirit and intent of the provincial *Act*. These suggestions were agreed to and adopted by the government. The bill was amended in committee.

The *Legal Aid Services Act, 1998,* makes fundamental changes to the way that Legal Aid is delivered in Ontario. Formerly administered by the Law Society of Upper Canada, Legal Aid will now be run by a new corporation called Legal Aid Ontario. The IPC commented on several sections that covered the collection of personal information from applicants for Legal Aid, and required lawyers to give client information to Legal Aid Ontario. Our suggestions were aimed at protecting personal privacy as well as solicitor-client privilege. The vast majority of our recommendations were adopted, and, as a result, these important rights were enhanced for all Legal Aid applicants and recipients in Ontario.

Looking Forward

A number of recommendations by Commissioner Ann Cavoukian are included in the *Commissioner's Recommendations* section, immediately following.

This approach to information about employees is not in keeping with global trends favouring fair information practices, and in particular, the protection of personal privacy.

Commissioner's Recommendations

If you use a debit or credit card, belong to a loyalty program or visit any Web sites, many of the issues reviewed in this annual report will have already touched your life.

Concerns about privacy have risen exponentially as companies are discovering more and more ways to glean competitive advantages from increasingly larger databases of personal information, compiled from day-to-day transactions and communications.

At the same time that information about individuals may be obtained more readily, Ontarians are discovering that their ability to access government records is being curtailed, either directly or as a byproduct of new legislation, the outsourcing of some programs to the private sector, and the level of resources being directed to provide answers to Ontarians.

In response to these issues and concerns, I have outlined some specific recommendations for the government to consider:

(1) Privacy Legislation

The impending federal privacy legislation (Bill C-54), which will protect privacy and safeguard personal information collected, used or disclosed in the private sector, is a major step forward. But there is a key decision that Ontario must make. When the federal Act comes into force, it will apply to all federally regulated businesses using or requiring personal information for commercial activities within more than one province. Three years after proclamation, the Act will apply to all provincially regulated businesses as well, unless the province has already enacted comparable legislation. While my office has had considerable input into the federal legislation, if Ontario fails to bring in a provincial counterpart, I foresee needless confusion and inefficiency. For example, if Ontario does not act, jurisdiction for handling privacy complaints will be split between the Ontario Information and Privacy Commissioner, responsible for the provincial and municipal *public* sector, and the federal Privacy Commissioner, who would be responsible for the provincial *private* sector. This would create considerable confusion as to who to turn to and which office to use, potentially weakening the impact of this very important legislation.

- I recommend that Ontario introduce privacy legislation covering the private sector, harmonized with Bill C-54.

(2) Quality Service

Quality Service standards are an important priority of the Ontario government, and include a commitment to respond to general correspondence within 15 working days. However, some Ontario ministries are consistently failing to meet the legislated 30-day response standard on access requests. To help Management Board Secretariat deliver the message that effective administration of Ontario's freedom of information and privacy program is a key government commitment, and that meeting the legislated time frames for this important public program is a must, I recommend:

- Adding a commitment to meeting the 30-day response standard for access requests within the Quality Service framework and including this commitment as part of the performance contracts for Deputy Ministers and other senior government officials;

- Recognizing the critically important role played by Freedom of Information and Privacy Co-ordinators, through appropriate levels of delegated decision-making authority, and appropriate job classification as befits the nature and responsibility of the position;
- Adequate resourcing of Co-ordinator's offices to enable Quality Service for access and privacy to be consistently achieved.

(3) Fees

The *Savings and Restructuring Act, 1996* (Bill 26) brought in new user fees. While the IPC supports the user- pay principle, the dramatic decrease in the number of requests for information and appeals underscores the need to review the fee structure.

- I recommend that the government review the fee structure and consider lowering the appeal fee to the same level as the request fee ($5).

(4) Exclusions

I am very concerned about legislation or programs that exclude information from the scope of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. When this happens, access and privacy rights are compromised, and the right of review by an independent body is lost. One Act in particular has had a very significant impact, namely the Labour Relations Act, 1995 (Bill 7). As has become abundantly clear through decisions of our agency, the scope of Bill 7 goes far beyond its stated original intent.

- I recommend that the government review the implications of Bill 7, with the intent of narrowing the scope of its impact on the provincial and municipal *Acts*.

(5) Closing doors

Access and privacy rights can be lost when government enterprises are transferred to the private sector or to other independent bodies. Ontario Hydro is a prime example. Under the *Energy Competition Act, 1998,* Ontario Hydro has been divided into five separate corporations, and the two largest segments – the Ontario Electricity Generation Corporation and the Ontario Electric Services Corporation – are not covered under either of the *Acts*. I understand the concerns about creating a level playing field in a competitive energy sector, but Ontarians are losing access and privacy rights to the key segments of the successors to the largest utility in Canada – including the corporation that will be running all of Ontario's nuclear power plants. As Paul Webster astutely noted in a recent article in one of our leading newspapers, "By stating that commercial secrecy outweighs the public's crucial interest in transparency and accountability, the government denies an important public need." I recommend that:

- the government review its decision to leave Hydro's successor corporations outside the scope of the Acts;
- that the government formally implement a process involving ongoing consultation with the IPC on access and privacy matters, prior to finalizing privatization or alternative delivery initiatives.

Ontarians are discovering that their ability to access government records is being curtailed, either directly or as a byproduct of new legislation, the outsourcing of some programs to the private sector, and the level of resources being directed to provide answers to the public.

	1998-99 ESTIMATES	1997-98 ACTUAL	1997-98 ESTIMATES
Salaries & Wages	$4,532,100	$3,607,678	$4,732,100
Employee Benefits	$861,100	$828,957	$923,800
Transportation and Communication	$141,400	$90,785	$141,400
Services	$823,800	$559,100	$668,800
Supplies and equipment	$151,800	$262,577	$106,800
Total Expenditures	**$6,510,200**	**$5,349,097**	**$6,572,900**

Note: The IPC's fiscal year begins April 1 and ends March 31. The financial administration of the IPC is audited on an annual basis by the Provincial Auditor.

Appendix 1

As required by the *Public Sector Salary Disclosure Act, 1996,* the following chart shows which IPC employees received more than $100,000 in salary and benefits during 1998

NAME	POSITION	SALARY PAID	TAXABLE BENEFITS
Cavoukian, Ann	Commissioner	$127,924.96	$368.64
Mitchinson, Tom	Assistant Commissioner	$124,447.03	$345.00
Anderson, Ken	Director of Corporate Services & General Counsel	$120,357.80	$344.16
Challis, William	Legal Counsel	$108,032.96	$308.56
Giuffrida, David	Legal Counsel	$101,525.33	$290.52

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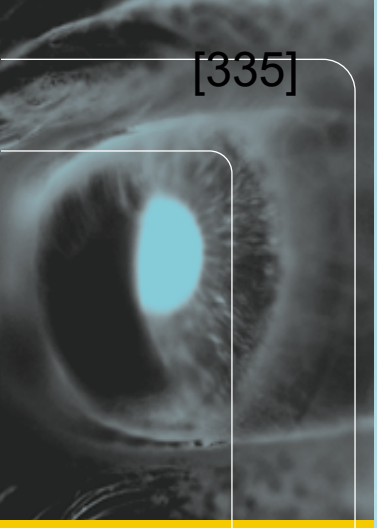

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Annual Report 2002

THE PURPOSES OF THE *ACTS*

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Information and Privacy Commissioner/Ontario
Commissaire à l'information et à la protection de la vie privée/Ontario

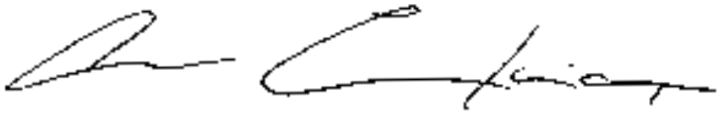
June 11, 2003

The Honourable Gary Carr
Speaker of the Legislative Assembly

I have the honour to present the 2002 annual report of the Information and Privacy Commissioner/Ontario to the Legislative Assembly.

This report covers the period from January 1, 2002 to December 31, 2002.

Sincerely yours,



Ann Cavoukian, Ph.D.
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[339] REQUESTS BY THE PUBLIC

Provincial and municipal government organizations are required under the *Acts* to submit a report to the IPC on the number of requests for information or correction to personal information they received in the prior calendar year, timeliness of responses, outcomes, fees collected, and other pertinent information.

In 2002, the total number of requests filed with provincial and municipal government organizations across Ontario jumped by 18 per cent over 2001 levels (26,863, up from 22,761). This is the fourth straight year that overall request volumes have increased.

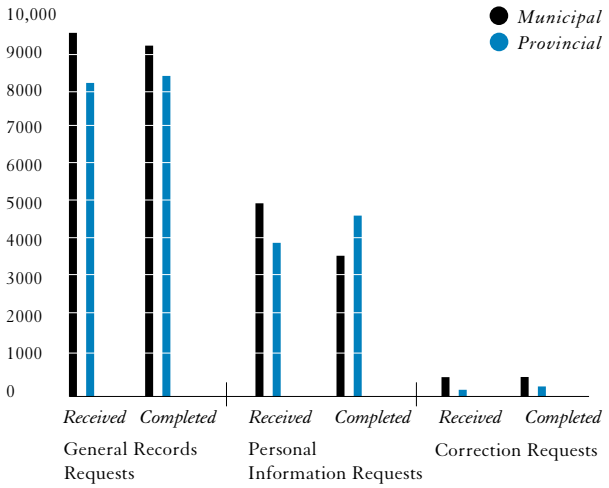
Provincial organizations received 9.8 per cent more requests in 2002 (12,198, up from 11,110 in 2001). Of these, 32 per cent (3,973) were for personal information and 67 per cent (8,225) were for general records. Increases at the municipal level were more dramatic. Municipal government organizations received 25 per cent more requests in 2002 (14,665, as compared to 11,665 in 2001). One-third (4,968) were personal information requests and the other two-thirds (9,697) were for general records.

As in past years, the Ministry of Environment received the largest number of requests under the provincial *Act* (4,091), followed by the ministries of Health and Long-Term Care (2,194), Public Safety and Security (2,062), and Labour (939). Together, these four ministries received 76 per cent of all provincial requests.

Police Services Boards also repeated this year as the sector receiving the most requests under the municipal *Act* – 51.6 per cent of all requests. Municipal corporations were next with 46.1 per cent, followed by school boards at 1.2 per cent and health boards with less than one per cent.

57.8 per cent of requests under the provincial *Act* were answered within the required 30-day statutory time period. This percentage declines to 54.3 per cent when restricted to provincial organizations where a minister is the head.

Requests Received and Completed – 2002



Almost four out of five provincial requests (79.3 per cent) were answered within 60 days (a 0.7 per cent improvement from 2001), but nine per cent took more than 120 days, a two per cent increase from 2001. Although the overall 30-day response standard has been steadily improving, the percentage of requests that take more than 120 days is also on the rise, increasing from four per cent in 2000 to the current nine per cent. This trend is alarming and should receive attention by provincial organizations in the upcoming year.

Again in 2002, municipal government organizations outperformed their provincial counterparts, responding to 75.9 per cent of requests within 30 days. The 60-day figure comes in at 88.6 per cent, and only one in 40 (2.5 per cent) requests took more than 120 days to complete, marginally higher

than the previous year. (For a more detailed discussion of compliance rates, see the chapter entitled *Response Rate Compliance*, which follows.)

The majority of provincial requests in 2002 (68 per cent) were made by businesses, while the majority of municipal requests (60.6 per cent) came from individuals.

The *Acts* contain a number of exemptions that allow, and in some situations actually require, government organizations to refuse to disclose requested information. In 2002, the most frequently cited exemption for personal information requests was the protection of other individuals' privacy (sections 49/38, in the provincial/municipal *Acts*). Privacy protection (sections 21/14) was also the most used exemption for general records requests.

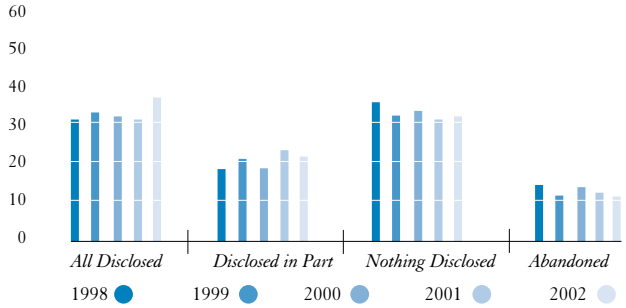
The *Acts* give individuals the right to request correction of their personal information. In 2002, provincial organizations received only two requests for corrections and refused three (one was a request received in 2001). Municipal organizations, on the other hand, received 585 correction requests and refused only four. When a correction is refused, the requester can attach a statement of disagreement to the record, outlining why the information is believed to be incorrect. In 2002, two statements of disagreement were filed with provincial organizations and two with municipal organizations.

The legislation contains a number of fee provisions. In addition to application fees, which are mandatory, government organizations can charge certain other prescribed fees for responding to requests. Where the anticipated charge is more than $25, a fee estimate can be given to a requester before search activity begins. Organizations have discretion to waive fees where it seems fair and equitable to do so after weighing several specific factors listed in the *Acts*.

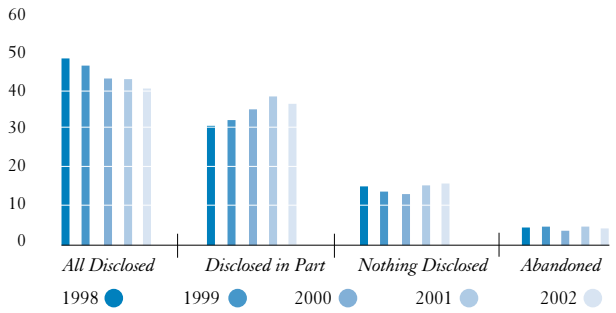
Provincial organizations reported collecting $197,230.14 in application fees and $130,785.02 in additional fees in 2002. The corresponding numbers for municipal organizations were $68,329.00 and $212,576.20.

Search fees were the most commonly charged category by provincial organizations (50 per cent), followed by reproduction costs (25 per cent) and shipping charges (16 per cent). Municipal organizations, in contrast, most frequently charged for reproduction costs (48 per cent), followed by search fees (24 per cent) and preparation costs (17 per cent).

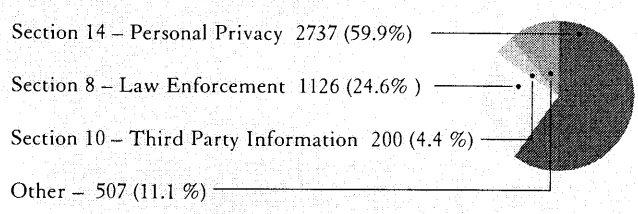
Outcome of Provincial Requests – 2002 (%)



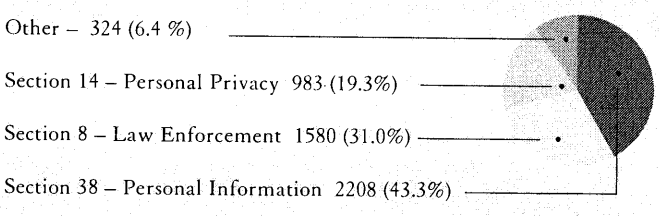
Outcome of Municipal Requests – 2002 (%)



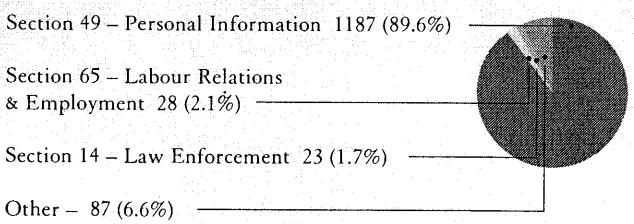
Municipal Exemptions Used General Records – 2002



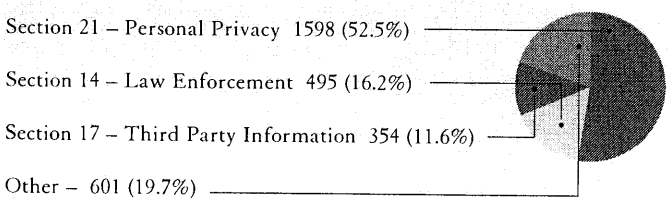
Municipal Exemptions Used Personal Information – 2002



Provincial Exemptions Used Personal Information– 2002



Provincial Exemptions Used General Records – 2002



Cases in Which Fees Were Estimated – 2002

	Provincial		*Municipal*	
Collected in Full	84.9%	4424	51.8%	3077
Waived in Part	8.7%	455	0.6%	331
Waived in Full	6.4%	333	47.6%	2830
Total Application Fees Collected (dollars)		$197,230.74		$68,329.00
Total Additional Fees Collected (dollars)		$130,785.02		$212,576.20
Total Fees Waived (dollars)		$49,243.39		$10,831.34

Average Cost of Provincial Requests for 2002

Personal Information	$9.10
General Records	$39.90

Average Cost of Municipal Requests for 2002

Personal Information	$7.73
General Records	$27.61

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APPENDIX I

As required by the *Public Sector Salary Disclosure Act*, 1996, the following chart shows which IPC employees received more than $100,000 in salary and benefits for the calendar year ending December 31, 2002.

Name	Position	Salary Paid	Taxable Benefits
Cavoukian, Ann	Commissioner	$ 171,343.96	$ 366.88
Mitchinson, Tom	Assistant Commissioner	$ 164,715.20	$ 350.92
Anderson, Ken	Director, Legal Services	$ 149,718.46	$ 339.54
Beamish, Brian	Director, Policy & Compliance	$ 117,675.22	$ 221.16
Challis, William	General Counsel	$ 166,002.91	$ 352.14
Goldstein, Judith	Legal Counsel	$ 131,547.52	$ 272.71
Goodis, David	Senior Adjudicator & Manager of Adjudication	$ 140,439.83	$ 284.09
Higgins, John	Legal Counsel	$ 141,063.56	$ 293.94
O'Donoghue, Mary	Manager, Legal Services	$ 142,742.80	$ 289.19
Swaigen, John	Legal Counsel	$ 138,264.08	$ 294.48

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

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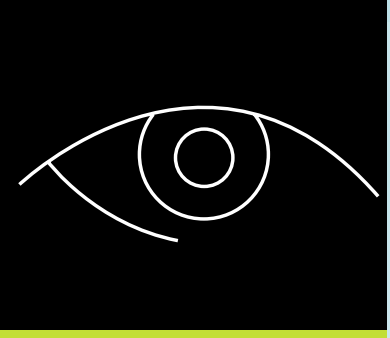
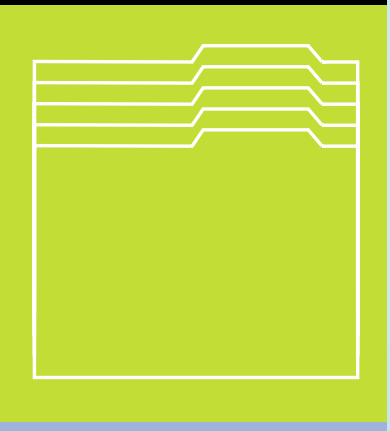
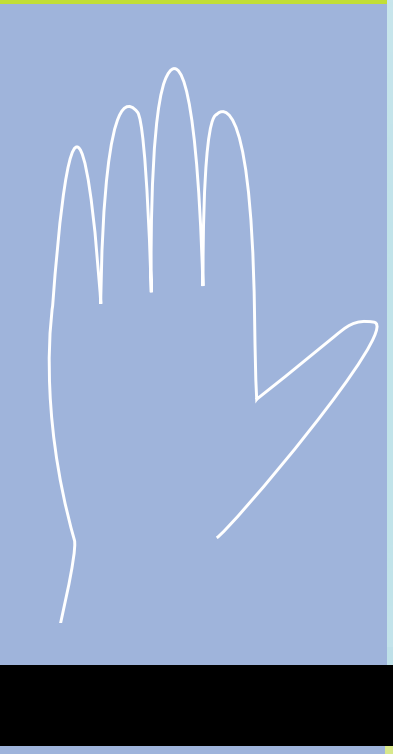
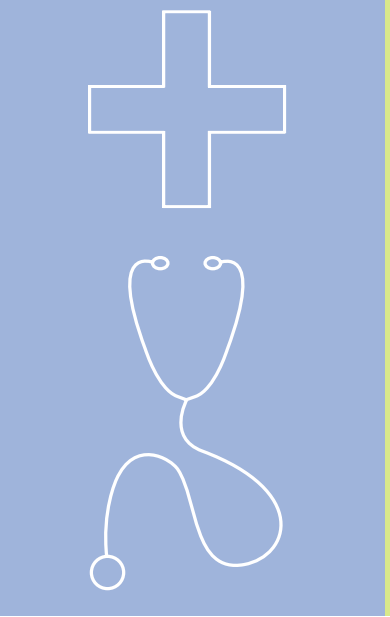






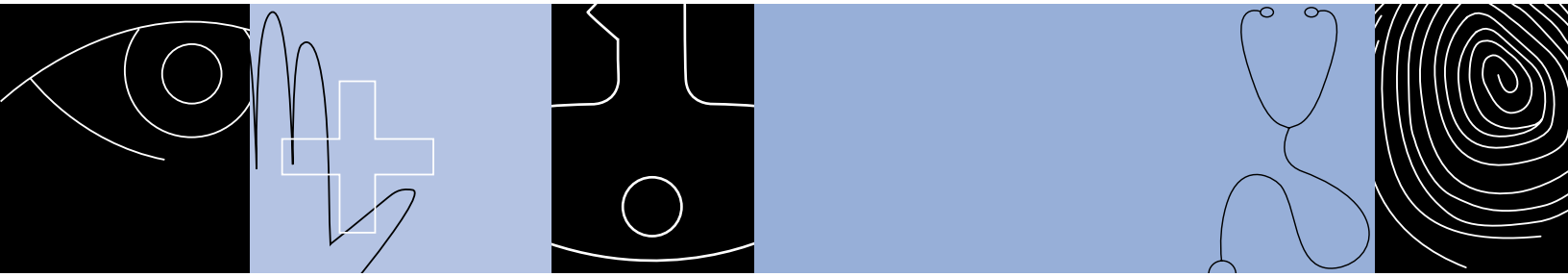


INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Annual Report 2004

The **Personal Health Information Protection Act, 2004**: (a) to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care; (b) to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions set out in this *Act*; (c) to provide individuals with a right to require the correction or amendment of personal health information about themselves, subject to limited and specific exceptions set out in this *Act;* (d) to provide for independent review and resolution of complaints with respect to personal health information....

THE PURPOSES OF THE *ACTS*



The purposes of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* are:

a) To provide a right of access to information under the control of government organizations in accordance with the following principles:

- information should be available to the public;
- exemptions to the right of access should be limited and specific;
- decisions on the disclosure of government information may be reviewed by the Information and Privacy Commissioner.

b) To protect personal information held by government organizations and to provide individuals with a right of access to their own personal information.

The purposes of the *Personal Health Information Protection Act* are:

To protect the confidentiality of personal health information in the custody or control of health information custodians and to provide individuals with a right of access to their own personal health information and the right to seek correction of such information, with limited exceptions.

Information and Privacy Commissioner/Ontario
Commissaire à l'information et à la protection de la vie privée/Ontario

June 22, 2005

The Honourable Alvin Curling
Speaker of the Legislative Assembly

I have the honour to present the 2004 annual report of the Information and Privacy Commissioner/Ontario to the Legislative Assembly.

This report covers the period from January 1, 2004 to December 31, 2004.

Sincerely yours,

Ann Cavoukian, Ph.D.
Commissioner

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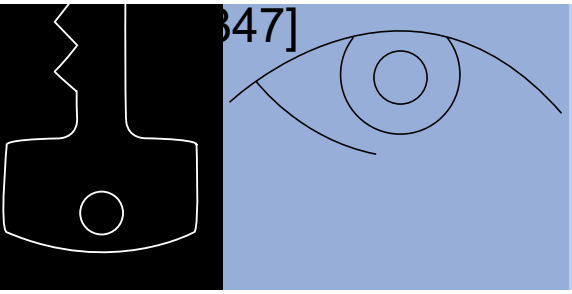

ROLE AND MANDATE

Ontario's *Freedom of Information and Protection of Privacy Act*, which came into effect on January 1, 1988, established an Information and Privacy Commissioner (IPC) as an officer of the Legislature to provide an independent review of the decisions and practices of government organizations concerning access and privacy. The Commissioner is appointed by and reports to the Legislative Assembly of Ontario and is independent of the government of the day.

The *Municipal Freedom of Information and Protection of Privacy Act*, which came into effect January 1, 1991, broadened the number of public institutions covered by Ontario's access and privacy legislation.

The *Personal Health Information Protection Act*, *2004 (PHIPA)*, which came into force on November 1, 2004, is the third of the three provincial laws for which the IPC is the oversight agency. *PHIPA* governs the collection, use and disclosure of personal health information within the health care system.

The Information and Privacy Commissioner plays a crucial role under the three *Acts*. Together, the *Acts* establish a system for public access to government information with limited exemptions, and for protecting personal information held by government organizations at the provincial or municipal level and by health information custodians.

The provincial *Act* applies to all provincial ministries and most provincial agencies, boards and commissions and colleges of applied arts and technology. The municipal *Act* covers local government organizations, such as municipalities; police, library, health and school boards; public utilities; and transit commissions.

Freedom of information refers to public access to general records relating to the activities of government, ranging from administration and operations to legislation and policy. The underlying objective is open government and holding elected and appointed officials accountable to the people they serve.

Privacy protection, on the other hand, refers to the safeguarding of personal information – that is, data about individuals held by government organizations and personal health information in the custody and control of health information custodians. The *Acts* establish rules about how government organizations and health information custodians may collect, use and disclose personal data. In addition, individuals have a right of access to their own personal information – and are entitled to have these records corrected, if necessary.

The mandate of the IPC under the *Acts* is to provide an independent review of government decisions and practices concerning access and privacy. To safeguard the rights established under the *Acts*, the IPC has seven key roles:

- resolving appeals when government organizations refuse to grant access to information;
- investigating privacy complaints related to government-held information;
- ensuring that government organizations comply with the *Acts*;
- conducting research on access and privacy issues and providing advice on proposed government legislation and programs;
- educating the public about Ontario's access, privacy and personal health information laws and access and privacy issues;
- investigating complaints related to personal health information;
- reviewing policies and procedures, and ensuring compliance with *PHIPA*.

In accordance with the legislation, the Commissioner has delegated some of the decision-making powers to various staff. Thus, the Assistant Commissioner (Privacy), Assistant Commissioner (Access) and selected staff were given the authority to assist her by issuing orders, resolving appeals and investigating privacy complaints.

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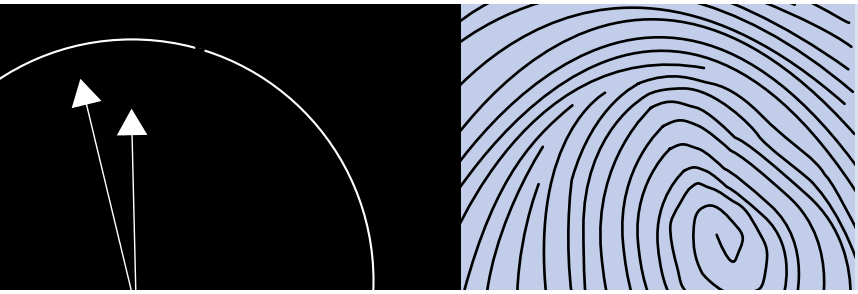

ACCESS AND PRIVACY BLUEPRINT FOR ACTION: A PROGRESS REPORT

In my last annual report, I set out a *Blueprint for Action* for the new Ontario government on access and privacy issues.

In particular, I made eight recommendations that were designed to enhance open, transparent government and the protection of individual privacy in Ontario. I emphasized that not all of these reforms needed to be made right away. During the past year, we have seen significant action on some of these recommendations, while other reforms remain on the government's agenda but have not yet been implemented.

Culture of Openness

Our *Blueprint for Action* urged the Ontario government to take steps to establish a new culture of openness. In particular, we recommended that Premier Dalton McGuinty issue an open letter to all ministers and deputy ministers that was similar in style and substance to the freedom of information (FOI) memoranda issued by then-U.S. President Bill Clinton and then-attorney general Janet Reno in 1993.

The government has fully implemented this recommendation. Within hours of the release of my 2003 annual report on June 15, 2004, the Premier sent a memorandum to all ministers and deputy ministers that urged them to "to strive to provide a more open and transparent government" and emphasized the importance of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

On December 1, 2004, Management Board Chair Gerry Phillips and Attorney General Michael Bryant issued a follow-up memorandum that emphasized the importance of FOI legislation in the democratic process. It urged ministries to go beyond the formal, reactive access to information process and to proactively disseminate information to the public. Equally important, it noted that although exemptions from disclosure will sometimes be necessary, discretionary exemptions should not be claimed solely on the basis that they are technically available; instead, they should be claimed only where there is a clear and compelling reason to do so.

In our view, these two memoranda are groundbreaking documents which will play a crucial role in ushering in a new culture of openness. We applaud the Ontario government for swiftly implementing this recommendation.

Private Sector Privacy Legislation

The federal *Personal Information Protection and Electronic Documents Act* currently applies to the private sector in Ontario and all other provinces that have not enacted "substantially similar" legislation. In our *Blueprint for Action*, we urged the Ontario government to bring forward a made-in-Ontario privacy law that would apply to the provincially regulated private sector. This has yet to happen.

The necessity for enacting a made-in-Ontario privacy law remains in need of action. Although Quebec, Alberta and British Columbia all have their own private sector privacy legislation, provincially regulated businesses in Canada's most populous province are still subject to federal privacy legislation. The Ontario government should model a provincial privacy bill after comparable private sector privacy laws that were enacted in Alberta and British Columbia. This would ensure that companies with operations in all three provinces face a consistent set of rules.

Open Meetings

We recommended that the Ontario government introduce a comprehensive "open meetings" law. In October 2004, Liberal MPP Caroline Di Cocco introduced Bill 123, the *Transparency in Public Matters Act, 2004*. This bill captures many of the principles that are key to an effective and meaningful open meetings law. We are pleased that a number of senior cabinet ministers and opposition politicians have expressed support for the bill, which has the potential to transform Ontario into one of the leading jurisdictions in North America when it comes to open, trans-

parent and accountable government. In a separate article in this annual report, we outline our reasons for strongly recommending that the Ontario government pass the bill into law after it has had the benefit of a thorough vetting by the Legislative Assembly of Ontario.

Chief Privacy Officer

We called on the Ontario government to appoint a chief privacy officer (CPO) for the province. The CPO would be responsible for acting as an internal advocate for privacy at the highest levels and ensuring that government programs are designed in a manner that protects and enhances the privacy rights of Ontarians.

On December 16, 2004, Management Board Chair Gerry Phillips announced in the legislature that the government would consider the feasibility of creating the position of CPO for the province of Ontario. This person would recommend how the government could strengthen its policies and practices to ensure the protection of personal information in all government operations. Minister Phillips' announcement was in response to the IPC's *Special Report to the Legislative Assembly of Ontario on the Disclosure of Personal Information by the Shared Services Bureau, Management Board Secretariat, and the Ministry of Finance*. We are pleased that the government is closely examining the feasibility of appointing a CPO and recommend that such an individual be appointed by the end of 2005.

Fees

Our *Blueprint for Action* noted that although we support the user-pay principle for accessing government-held information, we believe that the fee structure implemented in 1996 discourages government accountability and fetters the right of Ontarians to access and correct their own personal information. The *Savings and Restructuring Act*, *1996* brought in higher user fees for FOI requests and appeals. An individual is now charged $5 for each access request, including a request for his or her own personal information. If an individual appeals an institution's decision to the IPC, the fee is $10 for appeals relating to access to or correction of one's own personal information and $25 for appeals relating to access to general records. The new fee structure that was implemented in 1996 also eliminated the two hours of free search time that was previously available.

The Ontario government has not yet taken any action to reform the regressive fee structure that was implemented in 1996. Consequently, we reiterate our *Blueprint* recommendation that the government eliminate the fees charged for personal information requests and appeals, and restore the two hours of free search time.

Contentious Issues Management

Our *Blueprint for Action* expressed concern about "contentious issues management," a politically driven process that involved putting potentially controversial FOI requests on a different and potentially slower track than standard FOI requests. We urged the Ontario government to reform the contentious issues management process and put in place a policy that makes it clear that:

- The 30-day statutory timeframe for processing FOI requests must take precedence over any process for managing contentious issues; and
- The names of requesters shall only be disclosed on a "need-to-know" basis within a ministry.

It is our understanding that the Ontario government still has a process in place to give ministers a "heads up" about the disclosure of potentially controversial records under FOI, which, on its own, is not a problem. We are pleased that, over the past year, we have not seen any evidence to show that this process is having an adverse effect on the 30-day statutory timeframe for responding to FOI requests, or that the names of requesters are being disclosed inappropriately. Although we do not have any further recommendations in this area, we urge the government to continue to be vigilant about ensuring that politically driven processes do not interfere with the public's right to access government-held records.

Employment Information of Public Servants

In 1995, the Ontario government enacted the *Labour Relations and Employment Statute Law Amendment Act* (Bill 7), which contained provisions that excluded a wide range of employment-related records about public sector employees from the scope of the *Freedom of Information and Protection of Privacy Act* and the

Municipal Freedom of Information and Protection of Privacy Act (the *Acts*). Public sector employees are currently precluded from obtaining access to most employment-related records about themselves, and from filing a privacy complaint if they feel that their personal information has been improperly collected, used, disclosed or retained.

In our *Blueprint for Action*, we recommended that the Ontario government restore the access and privacy rights of public sector workers by repealing the Bill 7 provisions of the *Acts*. This reform has not yet been implemented. We urge the government to take action on this recommendation in 2005.

Public Registries

In our *Blueprint for Action*, we urged the Ontario government to initiate a public consultation process to identity how the *Acts* can be amended to properly deal with the treatment of publicly available personal information in an electronic world. The largest collections of publicly available personal information are known as public registries and include the land registry, the Personal Property Security Registration system, election finance records and the property assessments rolls.

We warned that if the entire content of such registries is readily accessible in electronic format, the personal information of citizens can be easily retrieved, searched, sorted, manipulated and used for purposes (e.g., identity theft) that have no connection to the original purpose for which the information was collected.

A 2004 Divisional Court decision has provided greater clarity to institutions that administer public registries. The Court quashed an IPC order that had directed the Municipal Property Assessment Corporation to disclose an electronic version of the province's property assessment rolls to a collection agency. It noted that the database would be used by the requester for purely commercial purposes and stated that "there are no compelling public policy considerations that override the privacy interests at stake in the case before us."

The Court distinguished this case from a 2002 Divisional Court decision, which involved a newspaper reporter who had requested access to an electronic database held by the City of Toronto that contained personal information about election campaign contributors. In that case, the Court ordered that the database be disclosed to the requester. It emphasized the importance of transparency in the democratic process and observed that "public accountability in the election process should, where necessary, override the privacy interests at stake...."

Although these court decisions clarify whether and in what circumstances public registries may be released in electronic format, we would note that there are a handful of jurisdictions around the world, such as New Zealand and the Australian state of New South Wales, which have put in place special statutory rules governing public registries. Consequently, we recommend that the Ontario government consider whether implementing similar rules in Ontario could alleviate remaining concerns about public registries and strike a better balance between the access and privacy interests at stake.

BRINGING ONTARIO'S FREEDOM OF INFORMATION LAWS INTO THE 21ST CENTURY

When passed in 1987, Ontario's *Freedom of Information and Protection of Privacy Act* (the *Act*) was among the most progressive of the day. Most jurisdictions, both in Canada and abroad, had not yet formally recognized the value of freedom of information by enacting legislation. Today, the landscape has changed. More than 50 countries have adopted FOI laws, and an additional 30 are in the process of doing so. In Canada, the governments of every province and territory are now subject to freedom of information legislation.

Since enactment, Ontario's provincial *Act*, and the subsequent *Municipal Freedom of Information and Protection of Privacy Act*, which came into force January 1, 1991, have enhanced government openness and transparency by making the vast majority of government records subject to public scrutiny. Through the two *Acts,* the public has been able to gain access to important information concerning policy proposals, contracts and spending priorities.

The current provincial government was elected on a platform that included a commitment to enhance openness and promote democratic renewal. One of the ways that the government has chosen to act on this mandate is to formally recognize the value of freedom of information legislation (see the *Access and Privacy Blueprint for Action: A Progress Report*).

While these initial developments are positive, further steps can be taken, including amending the *Acts*, to ensure that measures aimed at enhancing transparency and openness are enacted into law. This would bring Ontario's legislation into line with more recently enacted freedom of information legislation across Canada.

Scope of the *Acts*

One of the foundations underlying freedom of information is the principle that organizations that exist by virtue of public funding should be subject to public scrutiny through FOI laws. Ontario would be able to extend the application of this principle by extending the range of entities that are subject to the *Acts*.

Recently, the Ontario government extended the application of the provincial *Act* to the publicly owned hydro utilities, Hydro One Inc., and Ontario Power Generation Inc., a step the IPC had been calling for since the main successor companies to Ontario Hydro were moved outside FOI by the previous government.

And, in its spring 2005 budget bill, the government announced plans to bring universities under the *Act*, which the IPC has been urging for a number of years.

In the interests of promoting greater accountability and transparency, the government should expand the scope of coverage of the *Acts* by greatly expanding the range of organizations that are subject to the provisions. For example, the provincial *Act* applies only to ministries of the government of Ontario and any agency, board, commission, corporation or other body designated as an institution under the regulations. A number of organizations that are recipients of large transfer payments from the government are not subject to the *Acts*, and therefore, the records of these organizations are not subject to scrutiny by the public.

Recently, the provincial government passed the *Audit Statute Law Amendment Act, 2004*, which extended the power of the Auditor General of Ontario to conduct value-for-money audits of institutions in the broader public sector, including audits of hospitals and universities. Similar amendments should be undertaken with respect to records under Ontario's FOI regime.

The FOI laws in a number of other jurisdictions in Canada are more inclusive. For instance, in British Columbia, that province's statute applies to all organizations that are deemed to be "public bodies," which includes hospitals, universities and British Columbia's Child Protection Services (which is the equivalent of Ontario's Children's Aid Societies). None of these entities are covered under Ontario's FOI legislation, and subjecting these organizations to freedom of information requests would help shed light on the operations of these organizations.

Make employment records subject to the *Act*

In 1995, the Ontario government of the day passed Bill 7, the *Labour Relations and Employment Statute Law Amendment Act*. That law included amendments to Ontario's freedom of information legislation that removed a wide array of records concerning employees and labour relations from the scope of the *Acts*. By virtue of this amendment, employees of provincial and municipal government organizations are no longer entitled to submit requests for access to their own personnel files.

In addition, because the exclusion of records applies to the privacy, as well as the access provisions of the *Acts*, the personal employment information of employees of government organi-

zations is not subject to the statutory privacy protections in the legislation.

This exclusion is particularly troubling when the employment information of employees of federally regulated organizations is subject to privacy legislation – the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.

Under *PIPEDA,* employees of federally regulated organizations (such as banks and airlines) have a right of access to, and may seek correction of, their personal employment information, and the right to file privacy complaints related to the workplace. Public sector employees of the Ontario government and municipal organizations covered under the *Municipal Freedom of Information and Protection of Privacy Act* do not possess similar rights. The access and privacy rights of public sector workers should be restored through the repeal of the Bill 7 provisions.

Proactive disclosure

While making records available to the public in response to formal access requests is an important component of a culture of openness, government organizations should also strive to enhance transparency whenever possible by routinely and proactively disclosing relevant information, even in the absence of formal freedom of information requests.

From an international perspective, the connection between the Internet and freedom of information legislation is not new. In the United States, departments of the federal government are now required to create online "electronic reading rooms," where the public is able to access information that has been the subject of multiple FOI requests.The government of Quebec recently introduced Bill 86, which would amend that province's access to information legislation to require all public bodies to implement "information distribution policies." These policies would establish which documents held by government should be proactively disclosed, and specifically notes that certain information should be made systematically available through the Internet. A similar scheme should be adopted in Ontario.

Conclusion

The IPC is pleased with the steps the provincial government has taken on freedom of information. However, significant enhancements to the legislation are needed to bring Ontario's freedom of information laws up to the standards of the 21st century.

PRIVACY PROTECTION FOR YOUR MOST SENSITIVE PERSONAL INFORMATION

Personal health information – among the most sensitive of all personal information – finally has long-awaited statutory privacy protection.

The *Personal Health Information Protection Act, 2004* (*PHIPA*), the first new privacy *Act* in Ontario in nearly 14 years, came into effect Nov. 1, 2004. The IPC, which has been calling for such a law for years, has been designated as the oversight body responsible for its enforcement.

PHIPA provides a set of comprehensive rules that apply across Ontario's health sector, governing the collection, use and disclosure of personal health information. It is based on internationally recognized fair information practices, including accountability, consent, accuracy, limiting collection, use, and disclosure, and establishing security safeguards.

The law, with very limited exceptions, provides individuals with the right to access their own personal health information, and to seek correction of it. And, anyone who feels that a health information custodian has inappropriately collected, used or disclosed his or her personal health information has the right to make a complaint to the IPC. Individuals can also file a complaint if denied access to their own personal health records, or correction of those records.

Overall, *PHIPA* strikes the right balance between the legitimate need of health professionals to collect, use or disclose personal health information and the need to maintain the confidentiality of such sensitive information. It accomplishes this by giving individuals greater control over how their personal information is handled while, at the same time, providing health information professionals with a flexible framework to access and use health information as necessary – but just within the health care system.

PHIPA sets out specific limitations and restrictions on how personal health information is to be managed by health information custodians. It applies to all types of personal health information in the custody and control of health care providers and other health information custodians.

One of the unique features of this law is the implied consent model that enables health information custodians to rely on implied consent to collect, use and disclose personal health information when providing health care (such as when a patient is referred to a specialist or sent for x-rays). Custodians and researchers are also permitted to use and disclose personal health information for research purposes if the approval of a research ethics board is obtained and other requirements are met.

Another critical feature of *PHIPA* is that all health information custodians are required to implement policies and safeguards to ensure that security standards are in place. Custodians are also required to be open about their information practices and to provide notices about the anticipated uses and disclosures of personal health information.

Compliance

As part of her oversight responsibilities, the legislation gives the Commissioner the authority to investigate, adjudicate and issue orders to resolve complaints filed against health information custodians.

Commissioner Ann Cavoukian has appointed Ken Anderson as the Assistant Commissioner for health privacy to assist in issuing orders, resolving complaints and investigating health privacy breaches.

The Commissioner is required, in consultation with the Assistant Commissioner for health privacy, to provide information on the number and nature of complaints received by the Commissioner under *PHIPA* – and the disposition of these – in an annual report. There were no complaints received during the first two months that *PHIPA* was in force (through December 2004).

Copies of all 2005 orders to date and summaries of complaints resolved through mediation are posted on the IPC's website, **www.ipc.on.ca**.

Over the latter half of 2004, the IPC produced seven publications devoted to *PHIPA* (all are available on the website) and continues to produce new publications related to the *Act*. In the final four months of 2004, approximately 70,000 copies of these publications were either distributed by the IPC or downloaded from its website.

Besides the extensive publishing program, the IPC also undertook a number of other significant steps to help health information custodians and the public understand their rights and obligations under *PHIPA*. These included an extensive speaking program under which the Commissioner and senior staff made presentations across Ontario; a series of meetings where the Commissioner and Assistant Commissioner for health privacy

met with the regulatory colleges for health professionals and with the leaders of professional associations; and extensive participation in a series of information sessions on *PHIPA* that the Ministry of Health and Long-Term Care scheduled in major cities across Ontario. As well, the IPC set up a system to respond to the more than 2,000 calls and e-mails it received over the final four months of the year about *PHIPA*. And, forms for filing *PHIPA* complaints to the IPC and information on new protocols and other processes were developed and posted to the website.

As well as copies of all the IPC's *PHIPA* publications, the health privacy section of the IPC's website (accessible from the first page), includes copies of many of the Commissioner's *PHIPA* presentations, forms, flow charts showing how *PHIPA* complaints are dealt with, orders and mediation summaries, news releases related to *PHIPA*, links to related sites and more.

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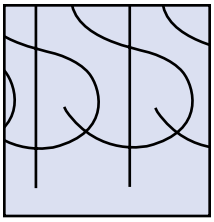

FINANCIAL STATEMENT

	2004-2005 Estimates $	2003-2004 Estimates $	2003-2004 Actual $
Salaries and wages	6,543,300	5,703,300	5,555,198
Employee benefits	1,648,000	1,356,300	982,069
Transportation and communications	300,000	180,400	184,835
Services	1,733,400	840,200	1,186,535
Supplies and equipment	533,900	275,400	440,254
Total	**10,758,600**	**8,355,600**	**8,348,891**

Note: The IPC's fiscal year begins April 1 and ends March 31.

The financial administration of the IPC is audited on an annual basis by the provincial Auditor.

APPENDIX I

As required by the *Public Sector Salary Disclosure Act*, 1996, the following chart shows which IPC employees received more than $100,000 in salary and benefits for the calendar year ending December 31, 2004.

Name	Position	Salary Paid	Taxable Benefits
Cavoukian, Ann	Commissioner	$176,788.40	$310.12
Anderson, Ken	Assistant Commissioner, Privacy	$187,328.50	$301.30
Beamish, Brian	Assistant Commissioner, Access	$137,721.90	$203.67
Mitchinson, Thomas	Assistant Commissioner	$187,328.50	$301.30
Challis, William	General Counsel	$178,703.79	$301.30
Goldstein, Judith	Legal Counsel	$143,371.24	$245.17
Goodis, David	Legal Counsel	$157,194.06	$269.69
Gurski, Mike	Senior Technology and Policy Adviser	$102,499.62	$167.28
Higgins, John	Senior Adjudicator & Manager of Adjudication	$161,808.64	$274.19
Morrow, Bernard	Adjudicator	$110,974.53	-
O'Donoghue, Mary	Manager, Legal Services	$160,023.75	$273.67
Senoff, Shirley	Legal Counsel	$103,629.27	$177.20
Swaigen, John	Adjudicator	$161,590.12	$264.39

INFORMATION AND PRIVACY COMMISSIONER / ONTARIO

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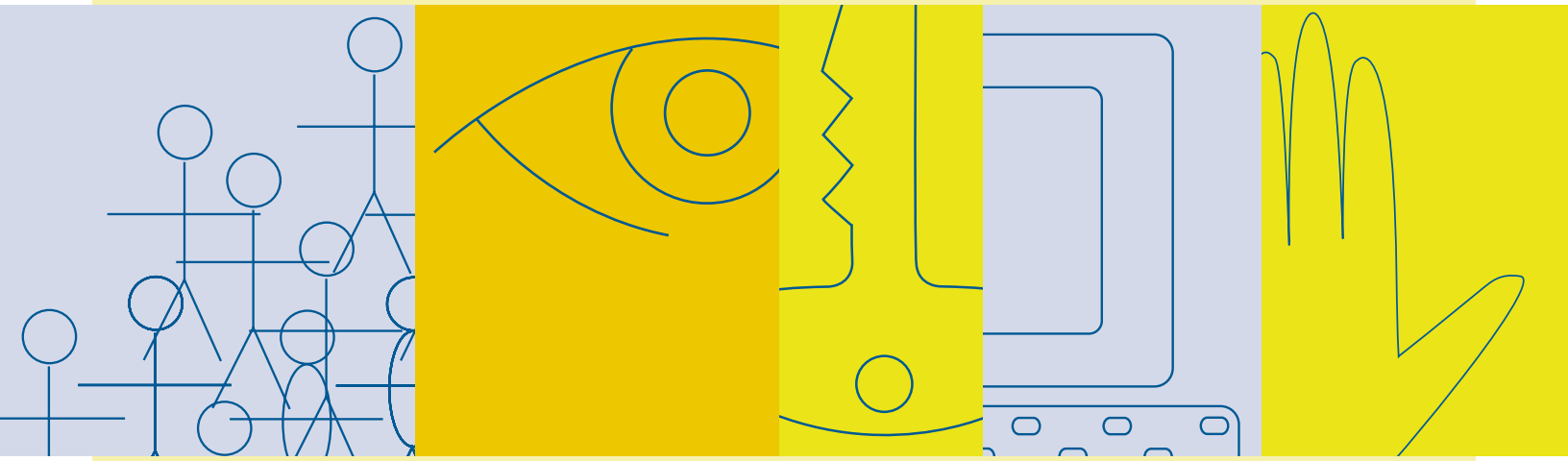
IT'S **YOUR** INFORMATION



INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Annual Report 2001

THE PURPOSES OF THE *ACTS*

The purposes of the ***Freedom of Information and Protection of Privacy Act*** and the ***Municipal Freedom of Information and Protection of Privacy Act*** are:

a) To provide a right of access to information under the control of government organizations in accordance with the following principles:

- information should be available to the public;
- exemptions to the right of access should be limited and specific;
- decisions on the disclosure of government information may be reviewed by the Information and Privacy Commissioner.

b) To protect personal information held by government organizations and to provide individuals with a right of access to their own personal information.

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

June 12, 2002

The Honourable Gary Carr
Speaker of the Legislative Assembly

I have the honour to present the 2001 annual report of the Information and Privacy Commissioner/Ontario to the Legislative Assembly.

This report covers the period from January 1, 2001 to December 31, 2001.

Sincerely yours,

Ann Cavoukian, Ph.D.
Commissioner

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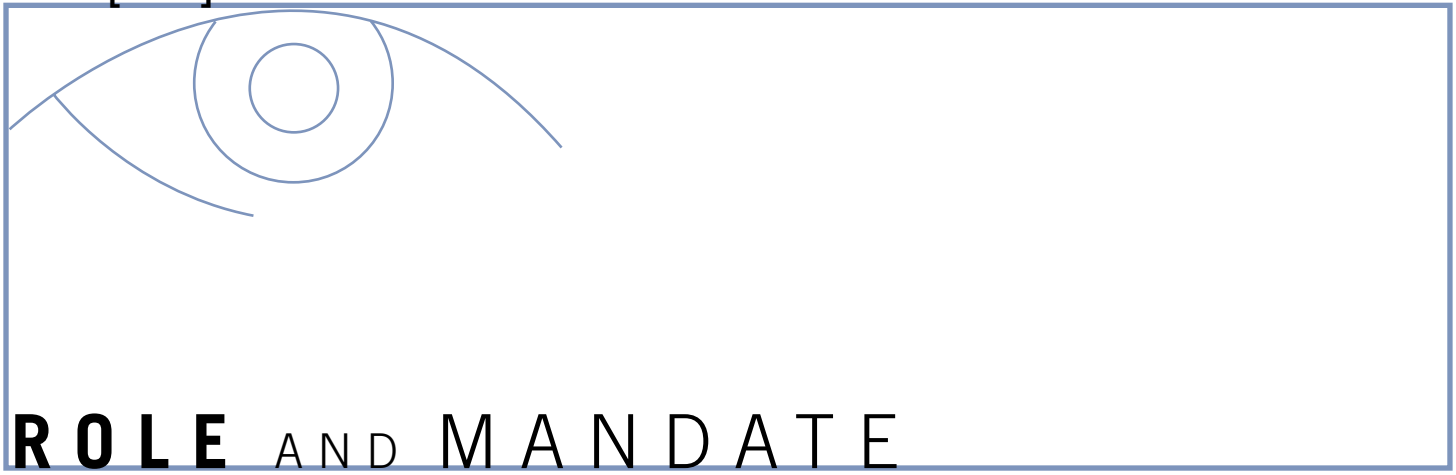

ROLE AND MANDATE

Ontario's *Freedom of Information and Protection of Privacy Act*, which came into effect on January 1, 1988, established an Information and Privacy Commissioner as an officer of the Legislature to provide an independent review of the decisions and practices of government organizations concerning access and privacy. The Commissioner is appointed by and reports to the Legislative Assembly of Ontario. The Commissioner is independent of the government of the day in order to ensure impartiality.

The *Municipal Freedom of Information and Protection of Privacy Act*, which came into effect January 1, 1991, broadened the number of public institutions covered by Ontario's access and privacy legislation.

The Information and Privacy Commissioner (IPC) plays a crucial role under the two *Acts*. Together, the *Acts* establish a system for public access to government information, with limited exemptions, and for protecting personal information held by government organizations at the provincial or municipal level.

The provincial *Act* applies to all provincial ministries and most provincial agencies, boards and commissions; colleges of applied arts and technology; and district health councils. The municipal *Act* covers local government organizations, such as municipalities; police, library, health and school boards; public utilities; and transit commissions.

Freedom of information refers to public access to general records relating to the activities of government, ranging from administration and operations to legislation and policy. The underlying objective is open government and holding elected and appointed officials accountable to the people they serve.

Privacy protection, on the other hand, refers to the safeguarding of personal information - that is, data about individuals held by government organizations. The *Acts* establish rules about how government organizations may collect, and disclose personal data. In addition, individuals have a right to see their own personal information and are entitled to have it corrected if necessary.

The mandate of the IPC is to provide an independent review of government decisions and practices concerning access and privacy. To safeguard the rights established under the *Acts*, the IPC has five key roles:

- resolving appeals when government organizations refuse to grant access to information;
- investigating privacy complaints about government held information;
- ensuring that government organizations comply with the *Acts*;
- conducting research on access and privacy issues and providing advice on proposed government legislation and programs;
- educating the public about Ontario's access and privacy laws, and access and privacy issues.

In accordance with the legislation, the Commissioner has delegated some of the decision-making powers to various staff. Thus, the Assistant Commissioner and selected staff were given the authority to assist her by issuing orders, resolving appeals and investigating privacy complaints. Under the authority of the Commissioner, government practices were reviewed and one indirect collection of personal information was approved in 2001.

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REQUESTS BY THE PUBLIC

Provincial and municipal government organizations are required under the *Acts* to submit a yearly report to the IPC, based on the calendar year, on the number of requests for information or corrections to personal information they received, how quickly they responded to them, what the results were, fees collected, and other pertinent information.

For the third straight year, the number of freedom of information requests filed with provincial and municipal government organizations has increased. Across Ontario, there were 22,761 requests filed in 2001, compared to 21,768 in 2000, an increase of 4.56 per cent.

Provincial government organizations received 11,110 requests, compared to 10,824 the previous year. Of these, 3,143 were for personal information and 7,967 were for general records. Municipal government organizations received a total of 11,651 requests, compared to 10,944 in 2000. These included 4,410 requests for personal information and 7,241 for general records.

The Ministry of Environment, once again, reported the largest number of requests received under the provincial *Act* (3,873). The Ministry of Health and Long-Term Care (1,679) was next in line, followed by the Ministry of the Solicitor General (1,570) and the Ministry of Labour (988). Together, these four ministries accounted for 73 per cent of all provincial requests.

At the municipal level, police services boards received more than half (56.5%) of the requests. Municipal corporations (including municipal governments) were next (40.5%), followed by school boards (1.3%) and boards of health (1.2%).

Overall, 55.6 per cent of the requests completed under the provincial *Act* were answered within the statutory 30-day requirement. (The 30-day compliance percentage for provincial organizations where a Minister is the head was 52.5 per cent.) In all, 78.6 per cent of provincial requests were answered within 60 days, a six per cent drop from the previous year. Under seven per cent of the requests took more than 120 days, up three per cent from 2000.

As they have for a number of years, municipal government organizations outperformed their provincial counterparts by responding to 78.4 per cent of the requests within 30 days. Overall, 93 per cent of municipal requests in 2001 were answered within 60 days, with two per cent taking more than 120 days to complete.

(Please see the chapter entitled *Response Rate Compliance*, which follows this chapter, for a more detailed discussion of the performance of provincial and municipal organizations.)

Last year, we began to report on the source of access to information requests. This practice, common in other jurisdictions, adds to our knowledge of who utilizes and benefits from the freedom of information process. About 65 per cent of the requests under the provincial *Act* were from businesses, the same figure as last year. The majority of the requests under the municipal *Act* came from individuals (56%), down slightly from just over 62 per cent last year.

Under the exemption provisions of the *Acts*, government organizations can, and in some cases must, refuse to disclose requested information. In 2001, the most frequent exemption cited in response to personal information requests was the protection of personal information (sections 49 and 38, for provincial and municipal organizations, respectively). For general record requests, the most frequent exemption cited was the protection of personal privacy, (sections 21 and 14 for provincial and municipal organizations, respectively).

Individuals also have the right to request correction of their personal information held by government. In 2001, provincial organizations received five requests for corrections and refused

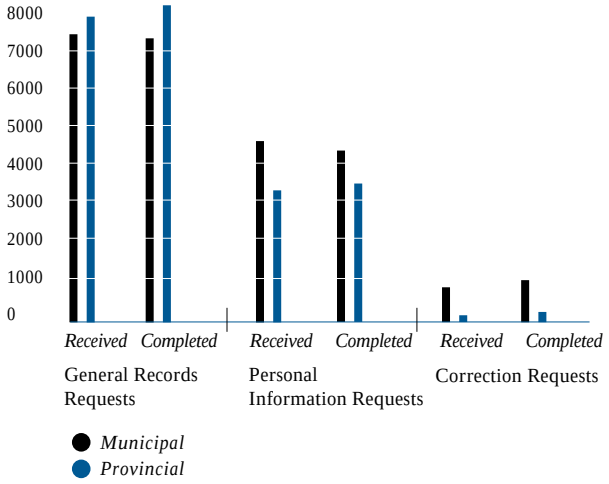
four. Municipal organizations received 709 correction requests and refused 10. When a correction is refused, the requester may attach a statement of disagreement to the record, outlining why the information is believed to be incorrect. During 2001, there were three provincial and nine municipal statements of disagreement filed.

In addition to application fees, the legislation permits government organizations to charge additional fees for providing access to information under certain conditions. Where the expected charge is over $25, a fee estimate is to be provided before work begins. Organizations have discretion to waive payment where it seems fair and equitable to do so after weighing several specific factors.

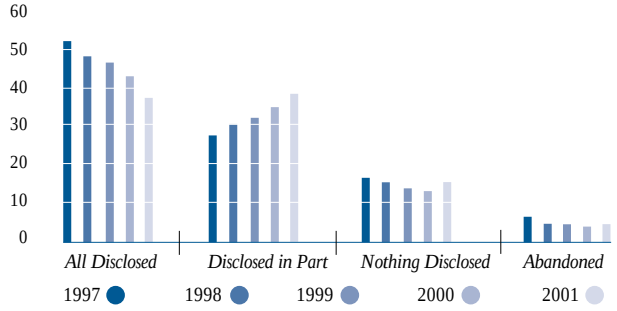
Provincial institutions reported collecting $52,785.10 in application fees and $273,287.66 in additional fees in 2001. Municipal institutions reported receiving $58,071.30 in application fees and $120,427.40 in additional fees.

Provincial organizations most often cited search time as the reason for collecting additional fees. Search-time costs were mentioned in 50 per cent of cases where fees were collected, followed by reproduction costs in 27 per cent and shipping costs in 13 per cent. Municipal organizations cited reproduction costs in 47 per cent of cases, search time in 25 per cent and preparation in 18 per cent.

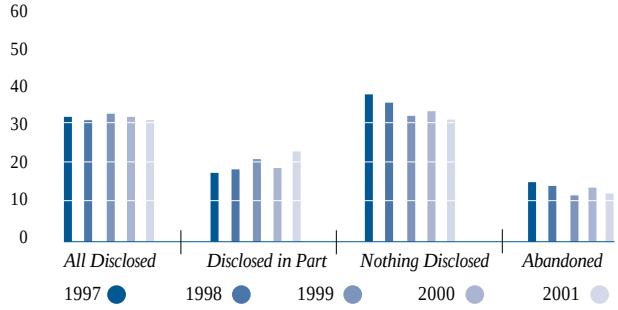
Requests Received and Completed – 2001



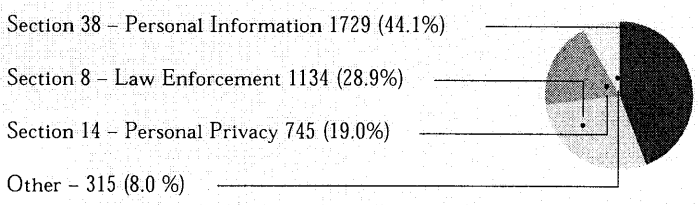
Outcome of Municipal Requests – 2001 (%)



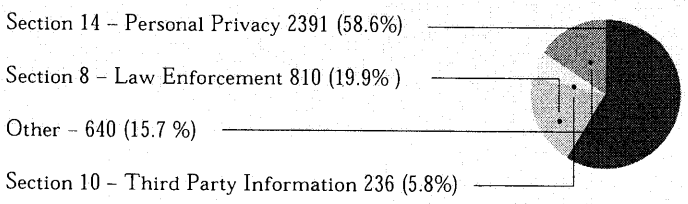
Outcome of Provincial Requests – 2001 (%)



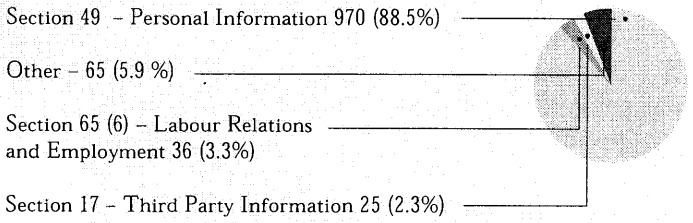
Municipal Exemptions Used Personal Information - 2001



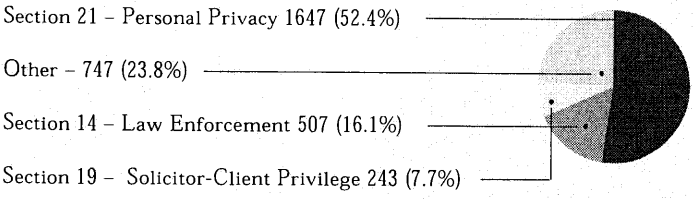
Municipal Exemptions Used General Records - 2001



Provincial Exemptions Used Personal Information - 2001



Provincial Exemptions Used General Records - 2001



Average Cost of Provincial Requests for 2001

Personal Information	$9.82
General Records	$42.22

Average Cost of Municipal Requests for 2001

Personal Information	$7.21
General Records	$22.29

Cases in Which Fees Were Estimated - 2001

	Provincial		*Municipal*	
Collected in Full	90.9%	4540	38.1%	1487
Waived in Part	5.9%	297	1.7%	67
Waived in Full	3.2%	159	60.2%	2353
Total Application Fees Collected (dollars)	$52,785.10		$58,071.30	
Total Additional Fees Collected (dollars)	$273,287.66		$120,427.40	
Total Fees Waived (dollars)	$14,659.45		$5,951.08	

APPENDIX I

Public Sector Salary Disclosure Act for the Calendar Year Ending December 31, 2001

Employees paid $100,000 or more in 2001

Surname	Position	Salary Paid	Taxable Benefits
Cavoukian, Ann	Commissioner	$157,826.31	$380.34
Mitchinson, Tom	Assistant Commissioner	$187,109.83	$381.55
Anderson, Ken	Director, Legal and Corporate Services	$178,033.66	$369.24
Beamish, Brian	Director, Policy & Compliance	$104,925.52	$242.69
Challis, William	General Counsel	$178,642.96	$365.48
Goldstein, Judith	Legal Counsel	$140,177.46	$284.40
Goodis, David	Senior Adjudicator/Manager, Adjudication	$139,052.09	$283.39
Higgins, John	Legal Counsel	$153,714.26	$313.33
O'Donoghue, Mary	Manager, Legal Services	$143,526.08	$287.62
Swaigen, John	Legal Counsel	$157,822.69	$320.25

Prepared under the *Public Sector Salary Disclosure Act, 1996*

(Please note: Some of these amounts include retroactive payments during 2001 for past years.)

Update on Freedom of Information and Protection of Privacy Issues
Cathy Lace and Emma Phillips (Sack, Goldblatt, Mitchell)
May, 2013

FIPPA – Brief Summary and Background

In June 2006 the Ontario Freedom of Information and Protection of Privacy Act ("FIPPA") became applicable to all "educational institutions" in Ontario. FIPPA has two primary goals: (i) to provide a right of access to information under the control of the institutions to which it applies; and (ii) to protect the privacy of individuals with respect to personal information about themselves held by institutions, and to provide individuals with a right of access to that information.

As a result of the inclusion of Ontario universities under FIPPA, Faculty Associations have been faced with a number of new questions, including:

1. Who has access to the personal information of faculty members and under what circumstances?

2. When can FIPPA be relied upon by Faculty Associations and their members to protect the members' interests?

3. When can Faculty Associations and their members use FIPPA to gain access to information held by the University?

This is a new and evolving area of the law with no clear answers. However, this update outlines the current state of the law and suggests strategies for protecting members' interests through collective bargaining, including some suggestions which Associations may want to consider during bargaining.

II. What counts as "personal information" under FIPPA?

FIPPA establishes conditions under which individuals can access information held by universities, and at the same time establishes protections for personal information held by universities. In particular, FIPPA provides that "every person has a right of access to a record or part of a record in the custody or under the control of an institution" (s.10),

unless the record falls within certain exemptions set out by the Act or contains personal information.

"Personal information" is defined generally as "recorded information about an identifiable individual,"[1] such as information relating to the race, religion, or age of the individual.

Notably, FIPPA specifically defines "personal information" as including: "(e) the personal opinions or views of the individual except where they relate to another individual" and "(g) the views or opinions of another individual about the individual."

In other words, where a faculty member expresses a personal opinion about a subject matter, this would be considered to be the "personal information" of that member; however, where a faculty member expresses a personal opinion about another individual, such as a student, this would not be considered to be the faculty member's personal information, but rather the personal information of the student.

Certain classifications of documents are, however, exempted from FIPPA, regardless of whether they include personal information. This has two very different consequences:

1. Access to such records cannot be obtained through the access to information process created by FIPPA.

2. However, such records are not protected from disclosure by the privacy protections in the Act.

Examples of such exemptions that are particularly relevant in the university context include:

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[1]S.2 of FIPPA provides: "personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) 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,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution 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,

(g) the views or opinions of another individual about the individual, and

(h) 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;

- Section 65(6):

  "Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following….

  2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or part to a proceeding or an anticipated proceeding.[2]

  3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest…"

- Section 65 (8.1):

  "This Act does not apply,

  (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution;

  (b) to a record of teaching materials collected, prepared or maintained by an employee of an educational institution or by a person associated with an educational institution for use at the educational institution;…"

---

[2] However, the scope of this exemption is limited by subsection (7) which provides:

(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment. 1995, c. 1, s. 82.

As is explained in more detail below, the Privacy Commissioner has given a liberal interpretation to the "research" exemption, which limits the access that information requesters will have to a faculty member's research records.

In addition, the exemption from the Act granted by s. 65(6)(3) has been given a very broad interpretation by the courts (see the discussion of the University of Windsor case below). As a result, information requesters will not be able to seek access to a faculty member's "employment-related" records, such as performance evaluations and records relating to a harassment complaint, through the access to information provisions in FIPPA.[3] Conversely, however, and of more concern, the protection of privacy provisions do not apply to these records.

It may seem counter-intuitive that sensitive employment information—such as employee financial or health information, peer review assessments of faculty members, or student evaluations of teaching—is not subject to the protection of privacy provisions of the Act and therefore that there is no statutory restriction on the Employer's ability to disclose such information. Rightly or wrongly, however, that is the clear implication of court decisions to date.

Accordingly, faculty associations should give consideration to proposing collective agreement language which ensures that employment-related information considered private by members is protected from disclosure regardless of the non-application of FIPPA.

III. Custody and Control of Documents

As noted above, FIPPA provides that "every person has a right of access to a record or part of a record in the custody or under the control of an institution" (s.10), unless the record falls within certain exemptions set out by the Act or contains personal information. The definition of "custody or control"—and therefore what documents must be disclosed pursuant to an information request —has therefore been the subject of some dispute.

The scope of "custody or control" over faculty members' records was the subject of two arbitration awards arising out of a request by an individual for records mentioning his name at the University of Ottawa. In the two related awards, Arbitrator Philip Chodos held that members' records are not under the custody and control of the university (and therefore were not subject to third party FIPPA requests) unless they pertain to university business. Examples of records linked to university business are records relating to administrative duties (such as the records of a chair or program director acting in the course of that administrative role), departmental or committee duties, personnel or peer review committees, career path and performance evaluations, general university communications (for example, memoranda issued to all faculty

[3] The Privacy Commissioner has also found that records relating to the appointment of a new Dean were excluded from the Act pursuant to s. 65(6)3, and therefore denied an access to information request on that basis: see PO-2933, November 25, 2010.

members), student exams, and exam copies submitted to the university by the member. Arbitrator Chodos specifically found that any personal notes or annotations are also excluded from the custody and control of the university.

However, the same fact situation that led to the arbitration awards also led to an appeal before the Ontario Information and Privacy Commissioner under FIPPA. The Commissioner found that she was not bound by the ruling of the arbitrator and that she has the exclusive jurisdiction to determine the application of FIPPA. In a detailed analysis of the request, the Commissioner found that the essential factors to be considered in assessing whether records are within a university's "custody or control" are:

- whether the record is in the physical control of the university (for example in a paper file or in electronic form on the network server);
- the relationship between the university's mandate and the records in question;
- the principle of academic freedom (which may be informed by the terms of the collective agreement), and the practices which exist to protect it, which impose limits on the university's access to or use of the records; and
- the customary practices of the university, and other institutions of a similar nature, with respect to whether the records have been considered to be in the university's control.

"Customary practices" refers to how records of a particular nature have been treated historically at that particular institution, and whether they have been treated as if they were under the control of the Administration or of the individual faculty member. For example, some universities treat blank copies of exams or course syllabi as "belonging" to individual faculty members, while other universities maintain a central repository of exams and syllabi under the institution's control. (It should be noted, however, that both exams and syllabi are arguably exempt from disclosure under s. 65(8.1) of FIPPA which excludes "a record of teaching materials collected, prepared or maintained by an employee of an educational institution" from the Act.)

Taking these factors into account, the Commissioner came to the following conclusion with respect to which records are under the custody or control of the University:

1. records, or portions of records, in the possession of a member that relate to personal matters or activities that are "wholly unrelated" to the university's mandate are <u>not</u> in the university's custody or control;
2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody or control if they would be accessible by institutional customs or practice, taking academic freedom into account;
3. administrative records are prima facie in the university's custody or control, but would not be if they are unavailable to the university by institutional custom or practice, taking academic freedom into account.

The Commissioner cast doubt on Arbitrator Chodos' view that "personal notes and annotations" would be excluded from disclosure, commenting instead that whether personal notes or annotations are subject to disclosure would depend on the other factors described above, i.e. the relationship of the record to the university's mandate, and questions of academic freedom and "customary practice".

Finally, it should also be noted that the Commissioner held that records related to a faculty member's membership in or representation by the bargaining agent are not in the custody or control of the university, and are therefore not subject to disclosure.

The Commissioner's decision leaves open some significant questions, such as what kinds of personal communications will be considered "wholly unrelated" to the university's mandate, or what the evidence of custom or practice would be. Moreover, in the University of Ottawa case, the relevant collective agreement did not contain any express language with respect to custody and control over records, leaving open the question of how relevant provisions in a collective agreement would impact such an analysis.

It should be noted that while the Commissioner found that she has the exclusive jurisdiction to determine what records are under the custody or control of the university, and that she is not bound by an arbitral award on this issue, neither the decision of the Privacy Commissioner nor the award of Arbitrator Chodos was judicially reviewed. The jurisdiction of an arbitrator to adjudicate disputes over access to information requests remains untested in court.

It should also be noted that, consistent with the Ontario Privacy Commissioner's broad test for "custody or control", the Commissioner has determined that SSHRC-related records (including emails from members of SSHRC selection committees to SSHRC officials and other members of the committee), are within the custody and control of the university—despite the university's assertion that they related to an external agency and not the university itself—because peer review of research is related to the university's mandate and the records were in the physical possession of the university.[4]

However, the Privacy Commissioner also found that because the records in question were research-related, they fell within the scope of the "research" exemption, and therefore, could not be the subject of a request for access; see below.

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[4] Order PO-2836, October 28, 2009; Order PO-2842, November 10, 2009; Order PO-2846, November 19, 2009; Order PO-2942, January 13, 2011; Order PO-2946, January 26, 2011; Order PO-2947, January 27, 2011. It should be noted that the same issue with respect to the custody and control of emails of a faculty member sitting on a SSHRC selection committee was addressed by the Court of Queen's Bench of Alberta. In that case, the Alberta Office of the Information and Privacy Commissioner found, like the Ontario Commissioner, that SSHRC-related emails were in the custody or control of the University because the emails had "passed through its servers" or because the University had "some right to deal with the records". On judicial review, however, the Court of Queen's Bench overturned the Commissioner's order, finding that the emails were more analogous to personal emails and that employees may keep private items at the place of work without them falling within the employer's possession and custody. Although the final result was the same in Ontario and Alberta—in both jurisdictions the emails were found not to be disclosable—the reasoning of the Alberta Court may become important in future arguments about custody and control over Member records.

IV. Exemptions

Records relating to "Research"

Like employment-related records, research-related records are specifically exempted from FIPPA and are not subject to requests for disclosure, pursuant to s.65(8.1) of the Act. Although the term "research" is not defined in the Act, the Privacy Commissioner has defined "research" as "a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research."[5] A claim for the research-records exemption must be "referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of the University".

Defined in this way, s.65(8.1) has been held to exempt research-related records such as research expense reports, peer-evaluations related to SSHRC grant applications, and other SSHRC-related communications.[6] Key to the Privacy Commissioner's reasoning has been the view that the protection of academic freedom outweighs the requester's interest in the reports.

Records Related to Teaching

As with research-related records, FIPPA provides an exemption to "records of teaching related materials prepared or maintained by employees of educational institutions" (s.65(8.1)),and such records are not subject to the Act. However, this provision has not received any interpretation by the Privacy Commissioner, so the scope of this exemption has not yet been tested.

Student Evaluations of Teaching

There is very little Ontario case law addressing privacy considerations in relation to online student evaluations. Notably, however, in 2008, the Ontario Divisional Court found that FIPPA did not apply to student evaluations of teachers and therefore the privacy protections in FIPPA did not preclude the University from posting the evaluations on line.[7] In that case, the Windsor University Faculty Association had challenged the University of Windsor's practice of posting, without consent, aggregated student evaluation scores for individual faculty members. Because the student evaluation scores were a communication from students to the University about "employment-related matters", the Divisional Court held, the student evaluation scores were exempt from the application of FIPPA.

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[5] Order PO-2693, July 16, 2008; Order PO-2942, January 13, 2011.
[6] Order Order PO-3084, June 7, 2012; Order PO- 2942, January 13, 2011; Order PO-2946, January 26, 2011.
[7] *University of Windsor Faculty Association v. University of Windsor*, 2008 CanLII 23711 (ON S.C.D.C.)

The Divisional Court's decision suggests that FIPPA affords little or no protection against the use or disclosure of student evaluations by universities, and that any privacy protections for student evaluation scores must be bargained in the collective agreement.

Faculty Associations may want to consider negotiating a requirement that Universities must obtain the individual faculty member's consent before posting student evaluation scores on-line or, if this is not a viable option, that access to student evaluation scores are for private and personal use only and are not to be disclosed to third parties (for example, the press). For example, some institutions have a policy of making student evaluations available only to students with a valid student number for access to an online database of evaluations.

V. Using FIPPA to obtain access to University records

FIPPA Requests

Faculty Associations may also consider using FIPPA to make access to information requests for strategic purposes. For example, OCUFA has been successful in obtaining records such as contracts for senior administrators and for consultants, and briefing materials from relevant government officials on issues of importance to OCUFA members (for example, documents related to the development of satellite campuses). Certain records are exempt from FIPPA requests, however, such as employment-related records, records covered by solicitor-client or litigation privilege, and information created for the purposes of collective bargaining negotiations.

Donor Agreements

Donor agreements are currently not subject to freedom of information requests. In July 2012, OCUFA wrote to the Ontario government asking that FIPPA be amended to explicitly include, and make publicly accessible, donor agreements and all related documentation involving Ontario universities and third parties. The Minister's Office has responded that it will take this suggestion into account when it next considers amendments to the Act. Given that such an amendment is not likely to be made in the near future, Faculty Associations should consider proposing language for inclusion in the collective agreement which requires disclosure of donor agreements to the Association.

VI. Intellectual Property Rights

Issues with respect to the ownership and use of intellectual property rights in works created by members in the course of their employment are not affected by the passage

of FIPPA, but rather will continue to be governed by the relevant provisions of the collective agreement and any applicable law.

For example, the Copyright Act provides that ownership of copyright in works created by an employee in the course of employment generally rests with the employer in the absence of an agreement to the contrary. However, there are court and arbitration decisions that suggest that for university faculty, there is, by custom, an agreement to the contrary, with respect to certain kinds of works, such as their lectures. Typically, faculty association collective agreements explicitly provide for the ownership of intellectual property rights in different kinds of works created by the member in the course of the member's scholarship, teaching and service duties, and the right of the member or the university to use those works for certain purposes.

Faculty association collective agreements typically state that the faculty member owns the copyright in books and articles produced by the faculty member in the course of research, as well as lectures and instructional material, unless special arrangements have been made. FIPPA does not affect those provisions. It is possible, however, that customary practices or collective agreement provisions with respect to the ownership of intellectual property could inform the assessment of whether the university has "custody or control" over member records, if the records pertain to works for which the member controls the intellectual property rights.

VII. The Role of Faculty Associations

In a recent decision in Alberta involving the Association of Academic Staff of the University of Alberta (the "AASUA"), the court specifically addressed whether an academic staff association is a "person" for the purposes of Alberta's freedom of information legislation. In the course of determining whether the records in question (emails between a member of a SSHRC selection committee and SSHRC officials) were in the custody and control of the University of Alberta, the Privacy Adjudicator had asked the parties—the University and the information requester—to provide the Faculty Agreement between the University of Alberta and the AASUA and to answer questions in regards to its interpretation. The AASUA was not given notice of the hearing or provided with an opportunity to make submissions in regards to the Faculty Agreement. As a result, the AASUA sought judicial review of the Adjudicator's decision.

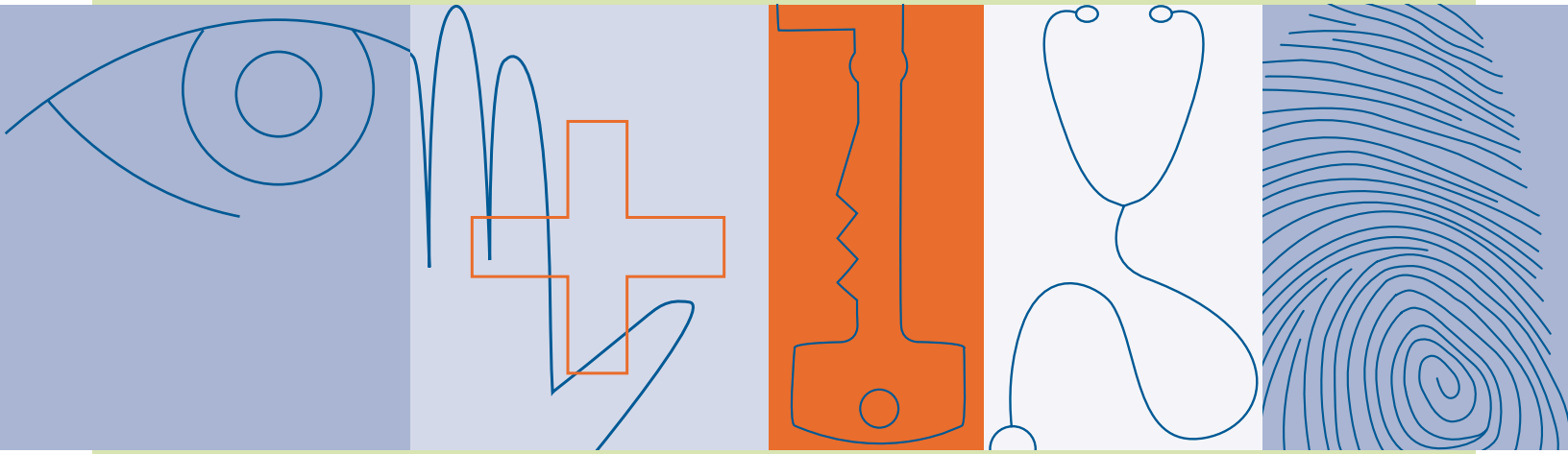
Despite the AASUA's assertion that it should have been given notice because of the broad impact of the Adjudicator's decision on its members, whose interests it represents both individually and collectively, the Court found that the AASUA was not an "affected person" because the Association would not be affected by the requester's access to the specific records in question. Although the Adjudicator's decision would set a precedent for future access requests under the Act, the Court noted, it is not binding on a grievance arbitrator under the Faculty Agreement, and therefore AASUA's interests were not affected.

Although this case has not yet been followed by Ontario courts, the reasoning of the Alberta Court confirms that the most effective way that Faculty Associations can act to protect the privacy interests of their members is to negotiate language in their collective agreements with respect to custody and control of members' records, and the privacy interests of members.[8]

Ultimately, Faculty Associations always have a role to play in addressing privacy issues on behalf of their members with the employer, including ensuring that confidential information is used appropriately and that member's privacy interests are protected.

[8]This decision arose out of the same set of facts that gave rise to the decision of the Alberta Court of Queen's Bench cited in footnote 2, *supra,* in which the Court found that SSHRC-related emails are not in the custody or control of the University.

PRIVACY AND ACCESS: A BLUEPRINT FOR CHANGE



INFORMATION AND PRIVACY COMMISSIONER / ONTARIO

Annual Report 2003

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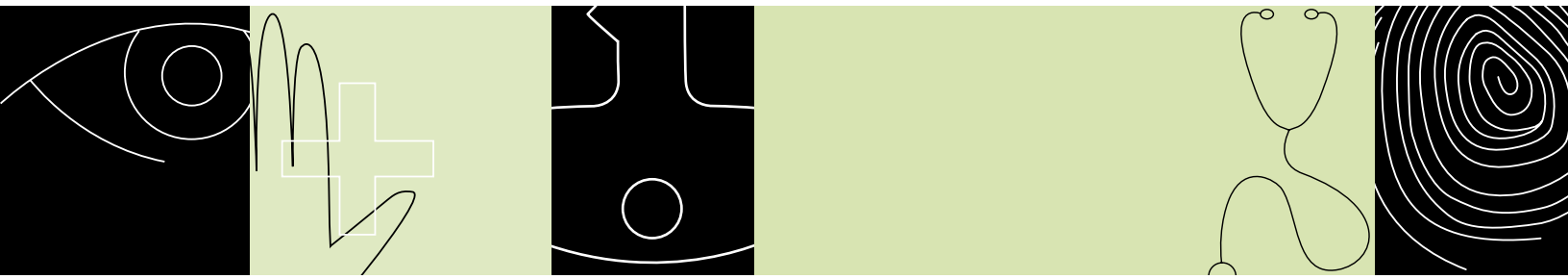
THE PURPOSES OF THE *ACTS*



The purposes of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* are:

a) To provide a right of access to information under the control of government organizations in accordance with the following principles:

- information should be available to the public;
- exemptions to the right of access should be limited and specific;
- decisions on the disclosure of government information may be reviewed by the Information and Privacy Commissioner.

b) To protect personal information held by government organizations and to provide individuals with a right of access to their own personal information.

Information and Privacy Commissioner/Ontario
Commissaire à l'information et à la protection de la vie privée/Ontario

June 15, 2004

The Honourable Alvin Curling
Speaker of the Legislative Assembly

I have the honour to present the 2003 annual report of the Information and Privacy Commissioner/Ontario to the Legislative Assembly.

This report covers the period from January 1, 2003 to December 31, 2003.

Sincerely yours,

Ann Cavoukian, Ph.D.
Commissioner

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ROLE AND MANDATE

Ontario's Freedom of Information and Protection of Privacy Act, which came into effect on January 1, 1988, established an Information and Privacy Commissioner as an officer of the Legislature to provide an independent review of the decisions and practices of government organizations concerning access and privacy. The Commissioner is appointed by and reports to the Legislative Assembly of Ontario. The Commissioner is independent of the government of the day in order to ensure impartiality.

The Municipal Freedom of Information and Protection of Privacy Act, which came into effect January 1, 1991, broadened the number of public institutions covered by Ontario's access and privacy legislation.

The Information and Privacy Commissioner (IPC) plays a crucial role under the two *Acts*. Together, the *Acts* establish a system for public access to government information, with limited exemptions, and for protecting personal information held by government organizations at the provincial or municipal level.

The provincial *Act* applies to all provincial ministries and most provincial agencies, boards and commissions; colleges of applied arts and technology; and district health councils. The municipal *Act* covers local government organizations, such as municipalities; police, library, health and school boards; public utilities; and transit commissions.

Freedom of information refers to public access to general records relating to the activities of government, ranging from administration and operations to legislation and policy. The underlying objective is open government and holding elected and appointed officials accountable to the people they serve.

Privacy protection, on the other hand, refers to the safeguarding of personal information – that is, data about individuals held by government organizations. The *Acts* establish rules about how government organizations may collect, and disclose personal data. In addition, individuals have a right to see their own personal information and are entitled to have it corrected if necessary.

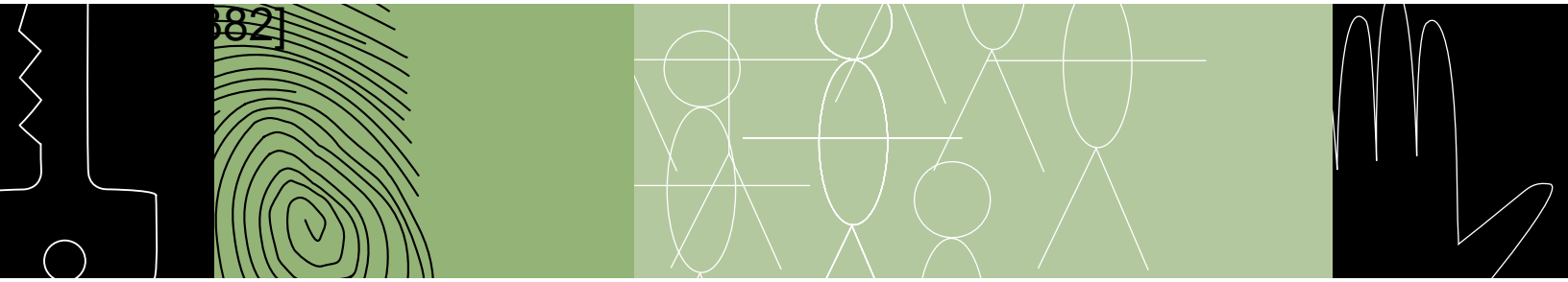
The mandate of the IPC under the *Acts* is to provide an independent review of government decisions and practices concerning access and privacy. To safeguard the rights established under the *Acts,* the IPC has five key roles:

- resolving appeals when government organizations refuse to grant access to information;
- investigating privacy complaints about government-held information;
- ensuring that government organizations comply with the *Acts*;
- conducting research on access and privacy issues and providing advice on proposed government legislation and programs;
- educating the public about Ontario's access and privacy laws, and access and privacy issues.

In accordance with the legislation, the Commissioner has delegated some of the decision-making powers to various staff. Thus, the Assistant Commissioner (Access) and selected staff were given the authority to assist her by issuing orders, resolving appeals and investigating privacy complaints.

◆

On December 17, 2003, the government introduced the *Personal Health Information Act, 2003 (PHIA)*. On passage, it will put clear rules in place to safeguard the privacy, confidentiality and security of Ontarians' health information. The mandate of the Commissioner will be expanded and the IPC will serve as the oversight body for reviewing policies, investigating complaints, resolving appeals, and ensuring compliance with *PHIA*.



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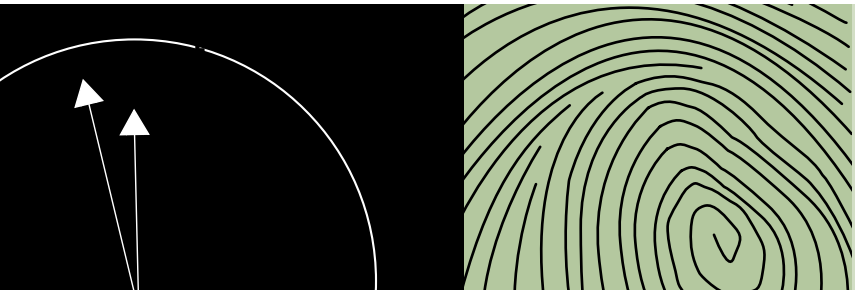


PRIVACY AND ACCESS: A BLUEPRINT FOR ACTION

2003 was a year of political change in Ontario. In October, a newly elected government took the reins at Queen's Park.

In its first throne speech in late November, the government promised to make the entire public sector more transparent and responsible to Ontarians. It also established a Democratic Renewal Secretariat and pledged to introduce "ambitious" new legislation to improve our democratic system of government.

In December, the government began to deliver on its promises by taking two important first steps. First, it introduced a health information privacy bill, the *Health Information Protection Act*, which attempts to strike a balance between an individual's right to privacy and the legitimate need of the health care sector to utilize personal health information for the administration of our health care system. And second, it added Hydro One and Ontario Power Generation to the list of institutions covered by the *Freedom of Information and Protection of Privacy Act*.

These are very positive developments for privacy and access. We have truly entered a new era with respect to the important values reflected in our privacy protection and open records laws, and we look forward to working collaboratively with the new government as its commitment to reform takes concrete shape.

Let me offer a number of suggestions that would represent real and noticeable change in the political climate of Ontario. Not all of these reforms need to be made right away, but it is critically important that the early steps taken by the government in December represent merely the starting point for a comprehensive program of change. The public has made it clear that transparency and accountability in public administration are of paramount importance to effective government. Equally important is the value citizens place on the protection of privacy. My hope is that we can all move forward together in ways that really matter to Ontarians.

Culture of Openness

The provincial and municipal access laws both contain strong purpose clauses that presume broad disclosure of government records. The *Acts* give members of the public a legal right to access government-held information, and require government bodies to apply any exemptions in a "limited and specific" way. The statutory entitlements are strong and clear; the challenge is in developing a culture of openness within government that reflects the underlying principles of the legislation.

When he was first elected in 1993, U.S. president Bill Clinton sent a memorandum to all heads of federal departments and agencies that characterized the U.S. *Freedom of Information Act* as "a vital part of the participatory system of government," and he made it clear to the leaders of his administration that "the existence of unnecessary bureaucratic hurdles has no place in its implementation." At the same time, his attorney general, Janet Reno, directed senior legal officers throughout the government to apply a presumption of disclosure when making access decisions. She made it clear that "where an item of information might technically or arguably fall within an exemption, it ought not to be withheld unless it need be."

The Ontario government's commitment to open and transparent government in its first throne speech was a very important symbolic first step in establishing a new culture of openness in Ontario. But that can only be the beginning. These good intentions must be translated into concrete action. We are calling on Premier McGuinty to go further and to issue an open letter to all ministers and deputy ministers that is similar in style and substance to the Clinton/Reno memoranda. In particular, it should emphasize the importance of Ontario's *Acts* in ensuring openness and transparency, and set expectations that information will be disclosed unless there is a clear and compelling reason not to do so.

Private-Sector Privacy Legislation

As of January 1, 2004, the federal *Personal Information Protection and Electronic Documents Act* (*PIPEDA)* applies to the private sector in Ontario and all other provinces that have not enacted "substantially similar" privacy legislation. *PIPEDA* sets out rules governing the collection, use and disclosure of personal information by private-sector organizations in the course of commercial activities.

Although the extension of *PIPEDA* to the provincially regulated private sector is a positive development from a privacy perspective, the constitutionality of this action remains in question. In December 2003, the Quebec Court of Appeal issued an order that allows Quebec's attorney general to challenge the constitutional validity of this federal law as an intrusion into matters of provincial jurisdiction.

Given this constitutional uncertainty, we urge the Ontario government to bring forward a made-in-Ontario privacy law that applies to the provincially regulated private sector (which includes the vast majority of businesses in Ontario). The Ministry of Consumer and Business Services (MCBS) prepared a privacy bill that was ready to go in 2003. Although an earlier draft of the bill attracted criticism from some businesses and charitable organizations, MCBS consulted extensively with stakeholders and came up with a vastly improved bill that remains available for introduction in the legislature.

As an even better alternative, the new government may wish to consider modeling Ontario's legislation after comparable private-sector privacy laws enacted in Alberta and British Columbia late last year. These simple, clearly worded laws strongly protect the privacy rights of consumers without imposing an undue burden on businesses. The enactment of a similar law in Ontario would have the added benefit of ensuring that companies with operations in all three provinces face a consistent set of privacy rules.

Open Meetings

In last year's annual report, we recommended that the Ontario government introduce a comprehensive open meetings law that would apply to municipal governments. We continued our push for this type of legislation by subsequently releasing a research report on open meetings and providing an opinion-page article that was published in various newspapers across Ontario during the 2003 municipal election period.

An open meetings law must ensure that both municipal officials and the public have a clearer understanding of which gatherings constitute a "meeting" and which do not. It also needs to ensure that citizens are given proper advance notice of meetings, and that municipal councils or boards do not try to slip something onto the agenda at the last minute without telling the public. The law also needs to provide for an efficient and effective oversight body that can investigate complaints and resolve disputes, and must provide remedies or penalties if municipal officials refuse to comply with open meetings requirements.

Shortly after coming to power, the new government announced the establishment of the Democratic Renewal Secretariat. Although the Secretariat will be exploring a broad range of issues directed at electoral reform, we strongly urge the Secretariat to include open meetings legislation within its mandate. The lack of transparency in the operation of municipal councils, police service boards, school boards and other similar public bodies is frequently the subject of editorial comment. Citizens feel left out of the decision-making processes and are becoming disengaged as a result. Open meetings legislation could represent a key tool to renewing public participation in these municipally based democratic institutions.

Chief Privacy Officer

In our 2001 annual report, I called on the Ontario government to appoint a chief privacy officer (CPO) for the province. I want to renew that call here. Since 2001, an increasing number of private-sector companies have appointed a CPO to oversee compliance with privacy legislation. However, governments have been slow to create such a position even though they collect and store highly sensitive personal information about citizens, are increasingly involved in electronic service delivery, and are responsible for balancing security and privacy in the post 9/11 era.

In April 2003, the United States Department of Homeland Security appointed a CPO whose responsibilities include ensuring that the department complies with the U.S. federal *Privacy Act* and evaluating emerging technologies from a privacy perspective. We urge the Ontario government to appoint a senior public servant as a CPO who would act as an internal advocate for privacy at the highest levels and ensure that government programs are designed in a manner that protects and enhances the privacy rights of Ontarians. The post of CPO should not be combined with the position of chief security officer because privacy responsibilities are too often diminished when such roles are merged.

Fees

The amount of fees charged to obtain information under the *Acts* must be compatible with the purpose of the legislation. Citizens cannot effectively scrutinize the activities of government and obtain or correct their own personal information if fees create a barrier to access.

The *Savings and Restructuring Act, 1996* brought in higher user fees for FOI. An individual is now charged $5 for each access request, including a request for his or her own personal information. There can also be significant additional fees for search time, copying documents, etc. The 1996 fee structure also eliminated the two hours of free search time that was previously available. If an individual appeals an institution's decision to our agency, the fee is $10 for appeals relating to access to or correction of one's own personal information, and $25 for appeals relating to access to general records.

We support the user-pay principle, but believe that the fee structure introduced in 1996 discourages government accountability and fetters the right of Ontarians to access and correct their own personal information. We urge the government to eliminate the fees charged for personal information requests and appeals, and recommend that the two hours of free search time be restored.

Contentious Issues Management

In our 2000 annual report, we expressed serious concern about a politically driven process within the government known as "contentious issues management." Under this process, which was managed by Cabinet Office, FOI requests deemed to be "contentious" were put on a different and potentially slower track than standard FOI requests. A request would be characterized as contentious if it came from certain individuals or groups (e.g., the media, public interest groups, politicians), or concerned a politically sensitive topic.

In September 2003, the *Toronto Star* published a *Right to Know* series by journalist and Atkinson Fellow Ann Rees that revealed detailed information about the "contentious issues management" system. The provincial *Act* requires institutions to respond to FOI requests within 30 days. However, Rees found that government delays in responding to requests were sometimes caused by the contentious issues process. For example, she obtained a Management Board Secretariat (MBS) memorandum that stated, "MBS reported a [30-day] compliance rate of 69 per cent for 2000 but this factor would have been 88 per cent but for files delayed by the contentious issues process."

Many governments have systems in place to give ministers a "heads up" about the disclosure of potentially controversial records under FOI. This, on its own, is not a problem. However, any such system must not interfere with the statutory timeframe for responding to FOI requests, and the identity of a requester must only be provided to those public servants who need this information in order to process the request. We urge the Ontario government to reform the contentious issues management process and put in place a policy that makes it clear that:

- The 30-day statutory timeframe for processing FOI requests must take precedence over any process for managing contentious issues; and
- the names of requesters shall only be disclosed on a "need to know" basis within a ministry.

Employment Information of Public Servants

In 1995, the government enacted the *Labour Relations and Employment Statute Law Amendment Act* (Bill 7), which contained provisions that exclude a wide range of records about public-sector employees from the scope of the *Acts*. Since then, the Courts have interpreted these provisions broadly, and our agency has been directed by the Courts to uphold government decisions to deny access to records that were routinely made available to employees outside the *Acts*. Order PO-2224 is a good example, where an employee was denied access to his own personnel file, simply because the ministry in that case decided to apply the Bill 7 provisions.

Public-sector employees in Ontario are currently precluded from obtaining access to most employment-related records about themselves, and from filing a privacy complaint if they feel that their personal information has been improperly collected, used, disclosed or retained. This approach to employee information is inconsistent with many other privacy laws, including *PIPEDA*, which provides employees of federally regulated companies with

a statutory right to access and correct personal information held by their employer, and to file a complaint with the federal privacy commissioner if they believe that their employer has inappropriately collected, used or disclosed their personal information.

We urge the Ontario government to restore the access and privacy rights of public sector workers by repealing the Bill 7 provisions of the *Acts*.

Public Registries

Despite our repeated urging, the government has failed to address an important privacy issue that is not adequately dealt with under the *Acts*. Ontario needs to initiate a public consultation process to identify how the *Acts* can be amended to properly deal with the treatment of publicly available personal information in an electronic format.

The largest collections of publicly available personal information are known as public registries and include the land registry, the Personal Property Security Registration system, election finance records, and the property assessments rolls. If the entire content of these registries is readily accessible in electronic format, the personal information of citizens can be easily retrieved, searched, sorted, manipulated and used for purposes that have no connection to the original purpose for which the information was collected. Some of these may by valid, but clearly others, such as identity theft, are not.

The extension of *PIPEDA* to the provincially regulated private sector in Ontario may provide some added privacy protection for publicly available personal information held by businesses. Under *PIPEDA* and its accompanying regulations, organizations can only collect, use and disclose personal information from public registries for a purpose that is directly related to the purpose for which this information appears in the registry. However, this rule does not apply to individuals or organizations that collect, use or disclose personal information while engaged in non-commercial activities; and more importantly, it also does not impose any legal obligations on provincial and municipal institutions, which hold a great deal of personal information in public registries.

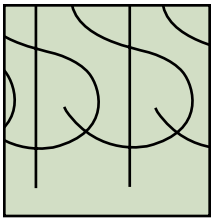
Over the years, our orders attempted to restrict bulk access to public registries, particularly in electronic format. However, in May 2002, the Ontario Divisional Court issued a decision that appears to suggest that distinguishing records on the basis of whether they are in paper or electronic records is not valid[1].

Although we deal with appeals on a case-by-case basis, taking into account the particular facts of each case, we are compelled to follow the Divisional Court's ruling in similar cases, and our orders are beginning to reflect a shift in interpretation[2].

In our view, this is not the best way to address this important issue. Finding the proper balance between access and privacy when dealing with potentially huge databases of personal information should be made on the basis of informed debate. Our *Acts* need to be amended to deal with this issue, and that can only take place after the various interests are identified and balanced appropriately.

[1] *Phinjo Gombu v. Tom Mitchinson, Assistant Commissioner et al.(2002), 59 O.R. (3d) 773*

[2] *Order MO-1693*



FINANCIAL STATEMENT

	2003-2004 Estimates $	2002-2003 Estimates $	2002-2003 Actual $
Salaries and wages	5,703,300	5,154,500	5,404,815
Employee benefits	1,356,300	1,005,100	806,030
Transportation and communications	180,400	180,400	208,056
Services	840,200	840,200	978,381
Supplies and equipment	275,400	275,400	112,544
Total	**8,355,600**	**7,455,600**	**7,509,826**

Note: The IPC's fiscal year begins April 1 and ends March 31.

The financial administration of the IPC is audited on an annual basis by the provincial Auditor.

APPENDIX I

As required by the *Public Sector Salary Disclosure Act, 1996*, the following chart shows which IPC employees received more than $100,000 in salary and benefits for the calendar year ending December 31, 2003.

Name	Position	Salary Paid	Taxable Benefits
Cavoukian, Ann	Commissioner	$ 180,894.73	$ 343.31
Mitchinson, Tom	Assistant Commissioner (Access)	$ 189,073.47	$ 332.53
Anderson, Ken	Assistant Commissioner (Privacy)	$ 182,781.14	$ 327.99
Beamish, Brian	Director, Policy & Communications	$ 122,276.61	$ 204.57
Challis, William	General Counsel	$ 182,517.17	$ 333.91
Goldstein, Judith	Legal Counsel	$ 140,835.60	$ 262.22
Goodis, David	Senior Adjudicator & Manager of Adjudication	$ 153,986.27	$ 279.86
Higgins, John	Legal Counsel	$ 158,368.95	$ 287.81
Morrow, Bernard	Adjudicator	$ 102,879.92	$ 0
O'Donoghue, Mary	Manager, Legal Services	$ 156,758.17	$ 284.87
Senoff, Shirley	Adjudicator	$ 101,811.13	$ 189.48
Swaigen, John	Legal Counsel	$ 151,521.51	$ 282.06

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DENIS RANCOURT
Applicant

- and -

UNIVERSITY OF OTTAWA
Respondent

Court File No.: 17-DC-2279

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at OTTAWA

APPLICANT'S SUPPLEMENTARY FACTUM RESPONDING TO THE ISSUE OF MOOTNESS

(FILED ON CONSENT)

Dr. Denis Rancourt
[redacted]
Ottawa, ON [redacted]
Tel.: [redacted]
Email: [redacted]

Applicant