



Hamilton

# PERSONAL HEALTH INFORMATION PROTECTION ACT TRAINING FOR COUNCIL

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# Who I am

- Partner with INQ Law (since 2021)
- Former **Assistant Information and Privacy Commissioner of Ontario**
  - over 30 years with Information and Privacy Commissioner
  - mainly legal role, did adjudication, represented Information and Privacy Commissioner in court
  - author of “2023 Ontario Annotated Freedom of Information and Protection of Privacy Acts”
  - teach law at Osgoode Hall, University of Toronto (administrative law, privacy law)

# What we will cover today

- *Municipal Freedom of Information and Protection of Privacy Act* refresher
- *Personal Health Information Protection Act* introduction
- *Municipal Freedom of Information and Protection of Privacy Act* vs. *Personal Health Information Protection Act* – which applies?
- Councillors handling constituents' personal information
- Identifiability and **small cell count**
- De-identification under *Personal Health Information Protection Act*
- Transparency vs. privacy
- Consulting with the **Information and Privacy Commissioner**

- *Municipal Freedom of Information and Protection of Privacy Act* applies to Ontario **municipalities** and **boards of health**
- Freedom of Information and privacy responsibilities on “head” [s.2]
- **Municipal head** is Council unless delegated (Hamilton delegated head is City Manager)
- **Board of Health head** is all the members of the board, unless individual/group designated by board

- Part I: **Freedom of Information** rules
- Any person can make request for access to records
- City must respond within 30 days
  - Unless time extension)
- City may charge **fees**
- Requester can appeal any denial of access to the **Information and Privacy Commissioner of Ontario**
  - Independent Legislative officer
- Information and Privacy Commissioner can **order** disclosure (can challenge in court)
- Head has duty to report Freedom of Information statistics to Information and Privacy Commissioner annually

- Part II: **Privacy** rules
- Rules for collection, use, disclosure, retention, destruction
- Rules for protecting Personal Information against **loss, theft, unauthorized access** [Regulations]
  - Includes need for **cybersecurity**
  - Prevent employee **snooping**
- Any person can make complaint to Information and Privacy Commissioner
- Information and Privacy Commissioner may investigate, but issues only **report** with recommendations (cannot challenge in court)

- Institutions must report privacy breaches to Information and Privacy Commissioner annually
- Act contains **offences** subject to fines for various things, including wilful disclosures, obstruction of Information and Privacy Commissioner [s.48]

# *Personal Health Information Protection Act* introduction

- *Personal Health Information Protection Act*
- Applies to **health information custodians** [s.3]
  - Health care practitioners, hospitals, long-term care homes, pharmacies, labs
  - Also includes **Medical Officer of Health** of a board of health under *Health Protection and Promotion Act*
- *Personal Health Information Protection Act* contains rules for handling of **personal health information** by **custodians** [s.4]
  - Must be “identifiable”
  - Must pertain to person’s mental or physical health



# ***Personal Health Information Protection Act*** introduction

- *Personal Health Information Protection Act* includes **circle of care** concept
- Personal Health Information can be shared among those involved in providing care to the patient [s.18]
- Patients have **right of access** to their own Personal Health Information [Part V]
  - If record “dedicated primarily to Personal Health Information about” person, they have right to full record [s.52(3)]
  - If not, they have right only to part with their Personal Health Information
- If mixed record held by custodian, may need to make access decision on Personal Health Information under ***Personal Health Information Protection Act*** , and rest under ***Municipal Freedom of Information and Protection of Privacy Act***

# ***Personal Health Information Protection Act*** introduction

- Person can complain to **Information and Privacy Commissioner** about custodian handling their Personal Health Information, or failing to give access
- **Information and Privacy Commissioner** has strong investigation and order making powers [Part VI]

# ***Personal Health Information Protection Act*** introduction

- *Personal Health Information Protection Act* gives **Medical Officer of Health** right to receive Personal Health Information...
- Custodian may share **personal health information** with **Medical Officer of Health** for public health purpose [*Health Protection and Promotion Act, Immunization of School Pupils Act*] [*Public Health Information Protection Act* s.39(2)(a)] **Information and Privacy Commissioner** may investigate complaints, make any **order** necessary to ensure compliance with the act [Part VI]
- Information and Privacy Commissioner decisions may be challenged in **court**

# *Personal Health Information Protection Act* introduction

- *Personal Health Information Protection Act* contains offence provisions
- Including wilful collection, use, disclosure [s.72]
- Fines up to \$200k, prison up to one year for individuals
- Fines increase to \$1M for organizations
- Health care professionals have been **convicted, fined** [e.g. in “snooping” cases]

## ***Municipal Freedom of Information and Protection of Privacy Act vs. Personal Health Information Protection Act***

- *Municipal Freedom of Information and Protection of Privacy Act* will be the controlling statute for any personal information held by the city
  - Even if about the person's physical or mental health
- But remember **Medical Officer of Health** is subject to *Personal Health Information Protection Act* and Board of Health is subject to *Municipal Freedom of Information and Protection of Privacy Act*
- see chart on next page...

# ***Municipal Freedom of Information and Protection of Privacy Act vs. Personal Health Information Protection Act***

<b>Type of information</b>	<b>Held by city</b>	<b>Held by Board of Health/Medical Officer of Health or other Health Information Custodian that's part of city</b>
Personal information	<b><i>Municipal Freedom of Information and Protection of Privacy Act</i></b>	<b><i>Municipal Freedom of Information and Protection of Privacy Act</i></b>
Personal health information	<b><i>Municipal Freedom of Information and Protection of Privacy Act</i></b>	<b><i>Personal Health Information Protection Act</i></b> (although can claim certain <i>Municipal Freedom of Information and Protection of Privacy Act</i> Freedom of Information exemptions)

# ***Municipal Freedom of Information and Protection of Privacy Act vs. Personal Health Information Protection Act***

Some examples:

- Access request to **city**, records contain Personal Information + Personal Health Information
  - City makes decision under *Municipal Freedom of Information and Protection of Privacy Act* to all records
- Access request to **Medical Officer of Health**, records contain Personal Information + Personal Health Information
  - if records dedicated primarily to requester's Personal Health Information, **Medical Officer of Health** makes access decision under *Personal Health Information Protection Act*
  - If records not dedicated primarily to requester's Personal Health Information, **Medical Officer of Health** makes decision under *Personal Health Information Protection Act* for requester's Personal Health Information, and decision under *Municipal Freedom of Information and Protection of Privacy Act* for rest

# Councillors handling constituent Personal Information

- Councillors routinely **receive or collect** personal information of constituents in daily work
- May include person complaining about a matter, seeking city's assistance
  - Person may provide **sensitive personal information** about themselves
- What can Councillor do with this Personal Information?
- Information and Privacy Commissioner decisions have dealt with these situations



# Councillors handling constituent Personal Information

## Information and Privacy Commissioner Privacy Complaint MC08-49 (Vaughan, 2010)

- Person sends letter to city manager complaining about a City Councillor's **expense claims**, requested audit
- Complainant's name and contents of letter made public
- Information and Privacy Commissioner rules disclosure acceptable
  - “Individuals raising matters before municipal councils should not expect anonymity...There is a **public interest in the transparency and accountability of...municipal government**, and...this...applies to the identity of individuals who may raise matters of public interest and concern”

# Councillors handling constituent Personal Information

## Information and Privacy Commissioner Privacy Complaint MC18-23 (Leamington, 2021)

- Person sends email to town, raises concerns about an annual outdoor event hosted by town
- Town disclosed his email to event organizers, other town residents
- Personal Information = person's personal opinions or views
- Information and Privacy Commissioner rules complainant **could not reasonably have expected** his email would be disclosed [*Municipal Freedom of Information and Protection of Privacy Act s.32(c)*]
- Key distinction: he did not ask town to **take any action!**

# Councillors handling constituent Personal Information

## *Best practice*

- When receiving complaint that contains Personal Information or Personal Health Information (almost always be the case, even if it's just email address)...
- Don't simply **forward** the communication unless person consents
- Dangerous to **assume** consent
- Consider **anonymizing** complaint if practical (person's identity could be irrelevant)
- Treat sensitive Personal Information/Personal Health Information very carefully, allow access on "**need to know**" basis
- Follow up to complaint: may be inappropriate to ask about **outcome**

# Identifiability and small cell count

- Under *Municipal Freedom of Information and Protection of Privacy Act* and *Personal Health Information Protection Act*
- Information not **personal** unless it is **identifiable**
- Must be reasonable to expect an individual can be identified from information [Pascoe (Ontario Court of Appeals 2002)]
- May include:
  - Handwriting [Order M-585]
  - Residential address [Order PO-2265]
  - Twitter handle [Order PO-3997]

# Identifiability and small cell count

- May not include:
  - Grades of 500 students [Order PO-2713]
  - Photos from long distance [Order PO-1972]
  - **Partial** postal codes [Order PO-2811, upheld by SCC 2014]
- **Small cell count** principle
- Where pool of possible choices to identify a particular individual is **so small**, possible to guess who the person might be
- Example: “How many people on my street complained to the city about my driveway?” [I live on a small street with only five houses]

# De-identification

- *Personal Health Information Protection Act* defines **de-identification** as:
  - Process of removing Personal Information that (i) identifies an individual or (ii) for which there is a reasonable expectation that the information could be used, either alone or with other information, to identify an individual
- *Information and Privacy Commissioner Personal Health Information Protection Act Decision 175 (2022)*
  - Complaint that medical record service provider was anonymizing, selling health data
  - Information and Privacy Commissioner finds act of de-identifying is “use” under *Personal Health Information Protection Act*
  - Patient **consent not required** if de-id process done properly, with sufficient safeguards
  - Custodians must be **transparent** about this use

# Transparency vs. privacy

- Generally, where **Personal Health Information** held by custodian, *Personal Health Information Protection Act* supersedes *Municipal Freedom of Information and Protection of Privacy Act*
- But *Health Protection and Promotion Act* may supersede *Personal Health Information Protection Act*
  - Chief Medical Officer of Health may order **Health Information Custodian** to produce information, including **Personal Information/Personal Health Information**, where sufficient risk to health [*Health Protection and Promotion Act* s.77.6]
  - Chief Medical Officer of Health may use/disclose information to investigate or reduce risk
  - Trumps *Personal Health Information Protection Act /Freedom of Information and Protection of Privacy Act/Municipal Freedom of Information and Protection of Privacy Act*
  - Broad discretion to collect, disclose

# Transparency vs. privacy

- *Personal Health Information Protection Act* permits Medical Officer of Health to disclose Personal Health Information in various situations including:
  - To eliminate or reduce risk of **serious harm** [s.40(1)];
  - To inform relative about **deceased individual** [s.38(4)];
  - For contemplated court/tribunal **hearing** [s.41];
  - To assist **law enforcement** investigation [s.43(1)(g)]; and,
  - To assist **research** [s.44]



# Transparency vs. privacy

- Information and Privacy Commissioner has found that *Freedom of Information and Protection of Privacy Act/Municipal Freedom of Information and Protection of Privacy Act* institutions should disclose personal information in the **public interest**
- Some examples:
  - Police chief/deputy salaries [York v. Information and Privacy Commissioner of Ontario, Ontario Court of Appeals, 2012]
  - Report on allegations of wrongdoing in hiring senior financial manager [Barker, Ontario Court of Appeals, 2019]
  - Records of injuries person sustained in nursing home [Order MO-2395]

# Transparency vs. privacy

- In exceptional cases, both *Personal Health Information Protection Act* and *Municipal Freedom of Information and Protection of Privacy Act* require institution/Health Information Custodian to disclose information where:
  - Reasonable grounds to believe it is in the public interest to do so and the record reveals a grave environmental, health or safety hazard to the public [*Municipal Freedom of Information and Protection of Privacy Act* s.5, *Personal Health Information Protection Act* s.8(2)]
- Disclosure may include **Personal Information/Personal Health Information**
- Never been invoked explicitly
- Proactive disclosure of COVID-19 information during pandemic may have implicitly fit

# Transparency vs. privacy

- Under *Personal Health Information Protection Act*, be careful about **identifiability** in proactive disclosures
- Example: releasing fact **an individual** passed away from specific disease
- Public may be able to piece together who the person was from **publicly available information** such as obituary
- On the other hand, may be **reasonable** to release if truly necessary to reduce risk to public health or safety

# Consulting with the Information and Privacy Commissioner

- Information and Privacy Commissioner can be good resource for *Personal Health Information Protection Act* advice
- Long track record of weighing in on particular matters (sometimes publicly through the **media**!)
- Information and Privacy Commissioner respects difficulty organizations face in balancing privacy and transparency
- Although will not likely give “blessing”, can give **practical advice**, cite relevant case law or published guidance



Hamilton

THANK YOU