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# FIPPA Compliance Briefing for the Hospital Sector

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## Introduction

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- *Broader Public Sector Accountability Act, 2010*
- Passed 3<sup>rd</sup> Reading – December 2<sup>nd</sup>
- Royal Assent – December 8<sup>th</sup>
- Includes:
  - Prohibition on publicly-funded lobbying
  - Reporting on use of consultants
  - Possible procurement directives
  - Extension of FIPPA to Hospitals

## **Agenda**

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Introduction to FIPPA in four parts:

1. Privacy Rights and Access Compliance
2. General Exemptions to Access
3. Hospital-Specific Exemptions
4. Operational and HR/LR Challenges

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## **FIPPA: PRIVACY RIGHTS**

**Porter Heffernan**

## **FIPPA: Privacy Rights**

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Individual right to control personal information (PI)

- Includes:
  1. Rules for:
    - collection, retention, use, disclosure and disposal
  2. Right to access and correct own PI
  3. Right to complain to IPC about breach

## **What is Personal Information?**

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- Recorded information about an individual
  - Examples:
    - Race, religion, sex, age, marital status
    - Education, employment history, medical info, etc.
    - Address, phone number
    - Personal opinions (except about another individual)
    - Opinions of others about the individual
- Or not recorded – collection still restricted!

## What is a Record?

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- Any information however recorded – print form, on film, electronic means
- Can include:
  - Documents, drafts, post-it notes
  - Computer hard drive files
  - Voice mail
  - Emails (blackberry messages!)
  - Etc.
- Hospital records – on or after January 1, 2007

7

## Collection of Personal Information

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- When:
  - Authorized by statute
  - Used for law enforcement purposes
  - Used to administer “lawfully authorized activity”
- How:
  - Directly, unless exemption met, i.e. among others
    - Consent to indirect
    - Law enforcement
    - Statutory authority
- Give notice (Authority, Purpose, Contact Person)

8

## Use of Personal Information

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- Only with Consent – Written, identifies:
  - PI in question
  - Intended use for PI
  - Date consent given
  - Institution to which consent given
- OR Use for Purpose for which Collected
  - Or “consistent purpose”

## Retention of Personal Information

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- Minimum 1 year retention period following last date of use
  - Individual can consent to earlier disposal
  - Other legal and administrative factors may lead to longer retention
- Reasonable steps to ensure accurate, up to date

## **Disposal of Personal Information**

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- Governed by O. Reg. 459
- Establishes certain requirements for disposal
  - Transfer to Archives of Ontario or destruction
  - Authorization of head
  - Steps to protect security and confidentiality
  - Record of disposal

## **Disclosure of Personal Information**

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- In accordance with FIPPA access provisions
- OR, i.e.:
- Consent
  - Same or consistent purpose
  - Law enforcement
  - Health and safety
  - Bargaining agent

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## **FIPPA: ACCESS TO INFORMATION**

**Porter Heffernan**

## **Fundamental Principles**

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- Information should generally be public
- Exemptions should be specific and limited
- Independent review of Hospital decisions
  - Information and Privacy Commissioner/Ontario
  - Also supervises PHIPA decisions

## Access: What can be Requested?

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- Any Existing Record in Custody and Control of Hospital
  - “Record”
  - “Existing”
  - “Custody and Control”
- Subject to Specific Exemptions/Exclusions

## Access to Own PI

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- Individual has right of access to own PI
- Separate process from general access
  - File written request
  - Minimal fees
  - Fewer exemptions (i.e.: 3<sup>rd</sup> Party Info, Evaluations)
- Once access granted, right to correct
  - If Hospital refuses, right to file “notice of disagreement”



## How is a General Request Made?

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- Written
- With 5\$ Fee
- Clear
  - Sufficiently identifies records sought so that search can begin
- Time starts when these steps are met!

17

## Access Request – How to Respond?

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- Key Concepts
  - Document all Actions in Response
  - Watch the Clock: Tight Time Limits
  - Communicate:
    - Requester
    - 3<sup>rd</sup> Party
    - Internal
- Walk through the compliance steps

18

## Step 1 – Receipt and Review

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- Request arrives
- Acknowledgement letter to Requester
- Coordinator advises affected departments
  - Opens file
  - Begins tracking steps taken
- Review request:
  - Voluminous? Overbroad?
  - 3<sup>rd</sup> Party Info?

## Timelines – Watch the Clock!

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- Basic: 30 days to respond
  - + 20 days where 3<sup>rd</sup> Party info
  - + 10 days after 3<sup>rd</sup> Party input
  - = 60 days max
- Extension:
  - Once – within first 30 days!
  - If:
    - Large request, interferes with operations
    - Outside consultations needed (i.e. between Institutions)

## Fees and Deposits

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- User-Pay System
- Allows Institution to charge:
  - Copying
  - Search time
  - Preparation and review time
- Voluminous requests
  - Estimate before conducting search
  - If over \$100, charge 50% deposit
  - Clock stops until deposit paid

21

## Step 2 – Interim Decision

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- Broad Requests
- Issue Interim Decision Letter stating:
  - Extension (if necessary)
  - Fee estimate, and requires deposit
  - Anticipated exemptions, if any (optional)
- At this time, if desired:
  - Contact requester – offer to narrow
- Remember: Document!

22

## Step 3 – Reasonable Search

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- Contacts search for responsive records
  - With assistance of Coordinator if needed
- Even if certain that exemptions apply
- Standard: “Reasonable Search”:
  - Reasonable effort to locate and identify responsive records
  - Ask responsible employees, search specified places, and alternative media i.e. emails
- Affidavits on Appeal

23

## Step 3 – Reasonable Search

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- Contacts advise of possible exemptions
- Records returned to Coordinator
  - Coordinator reviews for exemptions
  - Determines if 3<sup>rd</sup> Party notice needed
  - Applies exemptions to sever/withhold records
- Seek advice if unsure

24

## 3<sup>rd</sup> Party Notice

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- Where 3<sup>rd</sup> Party/Personal information at issue
- Coordinator notifies, seeks representations
  - 3<sup>rd</sup> Party object/consent to release
- Extensions:
  - 20 days for representations
  - 10 days after representations
- 3<sup>rd</sup> Party right of appeal

25

## Severing records

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- FIPPA section 25
  - Duty to withhold the minimum possible
- Means severing the exempt information
- Better in some cases than others
  - Feasible:
    - 3<sup>rd</sup> Party Info, PI
  - Not Feasible:
    - Solicitor-Client Privilege

26

## Step 4 – Grant/Refuse Access

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- Decision Letter
  - Within timelines above (30, 60, more if extended)
- Advise if access granted
- If not, provide:
  - Index of records
  - Exemptions applied
  - Rationale
  - Notice of right of appeal

27

## Step 4 – Grant/Refuse Access

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- Fees:
  - Require balance before access
  - Refund deposit if denied in full
- Notice:
  - 3<sup>rd</sup> Party object, disclose nonetheless
  - Notice to 3<sup>rd</sup> Party, including notice of right to appeal
- Document:
  - Retain copies of records, complete file

28

## Step 5 – Appeal

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- IPC/Ontario
  - Upon complaint/appeal
  - Mediation → Inquiry
  - Paper process
  - Results in Dismissal or Order
- Can Appeal:
  - Requester: refusal, fees, search, time extension
  - 3<sup>rd</sup> Party: disclosure

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## General Exemptions from Access

**Karine LeBlanc**

## Mandatory or Discretionary Exemptions

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- Mandatory v. Discretionary = “Shall” v. “May”
- Mandatory
  - Cabinet Records
  - 3<sup>rd</sup> Party Records
  - Personal Information
- Discretionary – 2 Step Process
  - Does the record fit the exemption?
  - Coordinator exercises discretion – should record be withheld?

31

## Discretionary Exemptions

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- Discretionary:
  - Advice to Government
  - Law enforcement
  - Relations with other government
  - Defense
  - Economic and other interests of the Institution
  - Information with respect to closed meeting
  - Solicitor-client information
  - Danger to safety or health
  - Personal privacy
  - Information soon to be published

32



## **Mandatory: 3<sup>rd</sup> Party Information**

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- Protects 3<sup>rd</sup> Parties from harm from disclosure
- Threshold test:
  - Must fit within specified categories of 3<sup>rd</sup> Party information
  - Must have been supplied in confidence (implicit or explicit)
  - Reasonable expectation of harm from disclosure

33

## **Mandatory: Personal Information**

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- Protects personal information (of a 3<sup>rd</sup> Party) – Privacy
- Mandatory: Must withhold, unless:
  - Consent
  - Threat to health and safety
  - Public records
  - Disclosure expressly authorized by statute
  - Research agreements
  - Disclosure not unjustified invasion of privacy
- “Not unjustified invasion of privacy” – Complex

34

## Discretionary: Hospital's Interests

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- Discretionary protection for Institution
  - Protects from harms resulting from disclosure
- What kind of information is covered?
  - Commercial information
  - Employee research
  - Economic & Financial interests
  - Negotiating strategies
  - Personnel or Administration Plans
  - Policy decisions
- Different tests in each case
  - And Coordinator must exercise discretion

35

## Discretionary: Solicitor/Client Privilege

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- What is covered?
  - Anything related to solicitor/client privilege (legal advice)
  - Records prepared in contemplation of /for use in litigation (litigation records)
- When does solicitor/client privilege apply?
  - written or oral communication;
  - of a confidential nature;
  - between an Institution and a legal advisor; and
  - directly related to seeking, formulating or giving legal advice

36

## Final Points

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- “Public Interest” Override
- Redact/black out
- Multiple exemptions to one record
- Case by case analysis
- Court can order disclosure of documents

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## Bill 122 – Hospital-Specific Issues

**Steven Williams**

## PHIPA v. FIPPA

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- FIPPA
  - Right of access to Hospital records
  - Privacy protection for Personal Information (PI) held by Hospitals
- PHIPA
  - Protection of Personal Health Information (PHI)
  - Individual access to own PHI records
  - Rules regarding collection, use and disclosure of PHI

## PHIPA v. FIPPA

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- Impact on regulation of PHI
  - Continues to fall under PHIPA
  - Right of access in FIPPA does not apply unless PHI can be severed
  - Interaction issues
  - PHI v. PI, “mixed” records, severing information
- Where conflict, PHIPA prevails

## QCIPA v. FIPPA

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- *Quality of Care Information Protection Act* (QCIPA)
  - “quality of care information” (QCI) as defined in the QCIPA is excluded from the application of FIPPA
- What is QCI?
- What is not QCI?

## FIPPA Will Not Apply to Certain Hospital Records

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- Ecclesiastical records
  - operational, administrative or theological records of a church or religious organization affiliated with a Hospital
- Hospital foundation operational records
- Records of charitable donations made to a Hospital
- Administrative records of a health professional
  - Schedule 1 of the *Regulated Health Professions Act*
  - 21 self governing health professions; additional 5 not yet in force
- Records of provision of abortion services

## FIPPA Will Not Apply to Certain Hospital Records

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- Meetings, consultations, discussions, communications related to:
  - **appointment** or placement of any individual by a church or religious organization (within Hospital or church/religious organization)
  - applications for hospital appointments or the appointment or **privileges** of persons who have Hospital privileges, and anything that forms part of the personnel files of those persons

## FIPPA Will Not Apply to Certain Hospital Records

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- Research, including clinical trials
  - Can disclose subject matter and amount of funding
- Teaching materials
  - Collected, prepared or maintained by employee or associated person for use at Hospital

## Existing FIPPA Exemptions Extended to Hospitals

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- “Closed meeting”
  - Deliberations
  - Statute authorizes holding meeting in absence of public
  - Subject matter – draft of by-law, resolution or legislation, litigation or possible litigation
- Solicitor-client privilege
  - Counsel employed or engaged by Hospitals to provide legal advice or in contemplation of or for use in litigation

45

## Existing FIPPA Exemptions Extended to Hospitals

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- May refuse to disclose records that relate to:
  - **Assessing** teaching materials or research of a Hospital employee (or person associated with the Hospital)
  - Determining suitability, eligibility or qualifications for **admission** to a Hospital’s academic program

46

## **Further Rules Regarding Fundraising**

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- **Use** of personal information
  - Permitted for fund raising activities – “reasonably necessary”
    - Hospital or associated foundation
  - Periodic notice to individual
- **Disclosure** of personal information
  - Written fundraising agreement
    - Specific requirements
  - Periodic notice to individual

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## **Operational and HR/LR Challenges**

**Steven Williams**



## **Operational Concerns – Access**

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- Records Management
- Staffing and Resources
- Delegation and Roles
- Duty to Assist

## **Operational Concerns – Privacy**

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- Collect only what is necessary for particular task
- Establish protocols and safeguards for PI
  - Retention and destruction policies
- Consider technology implications
- Do periodic audits

## Labour Relations Implications

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- Major Requesters
  - Media
  - Unions
  - Disgruntled Employees
- Tactical Requests
  - Bargaining
  - Labour Board/Arbitration
- Strategies
  - Resources, Link between Coord. and LR/HR

51

## Labour Relations Records

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- Labour Relations Exclusion
- Excluded from both access and privacy
- Record based – still need to conduct search, go through process
- But requests for, i.e., records re: harassment investigation likely excluded

52

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***Questions?***