OHA Guidance Document #6:
FIPPA and Human Resources, Labour Relations and Health and Safety
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Disclaimer

This Guidance Document was prepared for the ownership and use of the Ontario Hospital Association (OHA) as a general guide to assist hospitals in understanding and complying with their obligations under the Freedom of Information and Protection of Privacy Act (FIPPA).

The materials in this Guidance Document are for general information only and should be adapted by hospitals to suit their own individual circumstances. The Guidance Document reflects the interpretations and recommendations regarded as valid at the time of publication based on available information, and is not intended as, nor should it be construed as, legal or professional advice or opinion. Hospitals concerned about the applicability of FIPPA to their activities are advised to seek legal or professional advice. The OHA will not be held responsible or liable for any harm, damage, or other losses resulting from reliance of the use or misuse of the general information contained in this Guidance Document.

Ontario’s Office of the Information and Privacy Commissioner (IPC) is expected to provide further guidance on how FIPPA is being applied and interpreted. Hospitals should monitor both the IPC’s website at http://www.ipc.on.ca, as well as that of the Ministry of Government Services at http://www.mgs.gov.on.ca/en/infoaccessandprivacy/index.htm for further information.

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1. Introduction

The *Broader Public Sector Accountability Act, 2010* (BPSAA), which received Royal Assent on December 8, 2010, extended the *Freedom of Information and Protection of Privacy Act* (FIPPA) to hospitals effective January 1, 2012. FIPPA provides a right of access to any record that is in the custody or under the control of public sector institutions, subject to limited exclusions and exemptions. Among these exclusions to FIPPA are records relating to certain labour relations and employment matters.

The Ontario Hospital Association (OHA) has developed this guidance document to help hospitals understand their FIPPA accountabilities, and provide targeted advice on how FIPPA impacts the areas of human resources, including labour relations, disability management, and occupational health and safety. Specifically, the guidance document will:

- Provide a framework for assessing whether a record falls within the exclusion or other relevant exemptions; and
- Provide practical advice to assist hospitals with applying the exclusion and exemptions.

The target audiences of this guidance document are Chief Human Resources Officers, Directors and Managers of Human Resources, Human Resources Specialists (e.g., Health and Safety, Labour Relations, Disability Management, etc.), Freedom of Information (FOI) and Privacy Coordinators, and hospital staff responsible for processing FOI requests.

**Acknowledgements**

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2. The *Freedom of Information and Protection of Privacy Act*

There are two purposes of FIPPA:

(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 information should be reviewed independently of the hospital controlling the information; 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.

FIPPA establishes that every person potentially has the right of access to any record or part of a record in the custody or under the control of a hospital. Although the right of access is quite broad, the hospital’s obligation to provide access to records is affected by a number of limitations:

- Only records that came into the custody or under the control of the hospital on or after January 1, 2007, are subject to FIPPA;

- The hospital may refuse access to records if the request is deemed to be frivolous or vexatious;

- Certain records are excluded from FIPPA, meaning that FIPPA does not apply to them; and

- The Head of an institution must not (in the case of mandatory exemptions), or may not (in the case of discretionary exemptions), disclose certain records.

FIPPA means that every person has the right of access to records in the custody or under the control of a hospital unless such records fall within an exclusion or exemption.

*The question to be considered in this document is whether the information contained within a “human resources and health and safety record” is subject to the right of access?*

2.1 Mandatory Disclosure: Grave Environmental, Health or Safety Hazard

In the case of certain hazards, FIPPA requires the hospital to disclose a record either to the public or the affected persons if:

- A record reveals a grave environmental, health or safety hazard;

- It is in the public interest to disclose the record; and

- The Head has reasonable and probable grounds to believe that this hazard exists.

In the case of such hazards, FIPPA requires that hospitals disclose records relevant to those hazards even if an FOI request was not made. The obligations under this section override every other provision of FIPPA.
2.2 Exclusions and Exemptions for Human Resources and Health and Safety

There are two protections for human resources and health and safety records, each of which will be discussed in this guidance document:

- An exclusion for records relating to certain labour relations, employment, and appointment matters; and

- A mandatory exemption for another individual’s personal information.

2.2.1 Exclusion: Records Relating to Certain Labour Relations, Employment, and Appointment Matters (Sections 65(6)1-5 and 65(7)1-4

Section 65(6) states that FIPPA does not apply to records collected, prepared, maintained, or used by, or on behalf of a hospital in relation to any of the following labour relations and employment matters:

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 hospital;

2. Negotiations (or anticipated negotiations) between the hospital and an individual (including a bargaining agent or party to a proceeding or an anticipated proceeding) relating to labour relations or to the hospital’s employment of an individual; or

3. Meetings, consultations, discussions or communications about:

   - Labour relations or employment-related matters in which the hospital has an interest; or

   - The appointment or placement of an individual by a church or religious organization within a hospital.

The exclusion relating to labour relations and employment matters is not new. It has been applied to the records of other institutions under FIPPA prior to the expansion of the Act to hospitals and there is significant IPC interpretation and case law. Likely, the intention of the exclusion was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own employees.¹ When a record is excluded, not only is there no right of access under FIPPA, but the privacy rules under Part III of the Act do not apply.

Despite these exclusions, section 65(7) outlines exceptions, meaning that these types of records are subject to FIPPA and if the hospital receives a request for the access to these types of records, the hospital must process the request and determine if any other exclusions or exemptions apply. These exceptions are:

1. An agreement between a hospital and a union;

2. An agreement between a hospital and one or more hospital employees which ends in a proceeding before a court, tribunal (e.g., the Human Rights Tribunal of Ontario), or other entity (e.g., a labour arbitrator) relating to labour relations or to employment-related matters;

3. An agreement between a hospital and one or more employees resulting from negotiations about employment-related matters; or

¹ Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner) (2001), 55 O.R. (3d) 355
4. An expense account submitted by an employee of a hospital for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

If section 65(6) applies to the record, and none of the exceptions in 65(7) apply, the record is excluded from the scope of FIPPA.

What does the term “in relation to” mean?

The Courts have interpreted “relate” or “in relation to” to mean for the purpose of, as a result of, or connected to.2

What does the term “labour relations” mean?

The IPC and Courts have interpreted “labour relations” to refer to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships.3

What do the terms “employment of a person” and “employment-related matters” mean?

The IPC has interpreted “employment of a person” to refer to the relationship between an employer and an employee. Additionally, “employment-related matters” refers to human resources or staff relations issues arising from the relationship between employers and employees that do not arise out of a collective bargaining relationship.4

Examples of records that the term “labour relations and employment-related matters” have been found to apply to include:

- A job competition;
- An employee’s dismissal;
- A grievance under a collective agreement;
- A voluntary exit program; and
- A review of workload and working relationships.

What does “matters in which the institution has an interest” mean?

The Courts have taken a very broad interpretation of the term “interest”, which means that most human resources and health and safety records are excluded. The Courts have interpreted this phrase to mean more than a “mere curiosity or concern” and refers to matters involving the institution’s own workforce. The IPC has determined that for this to apply, the institution must establish three things: (1) the records were collected, prepared, maintained or used by the institution; (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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3 Order PO-2157, Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner), [2005] O.J. No. 4123 (C.A.)
4 Order PO-2157
2.2.2 Mandatory Exemption: Another Individual’s Personal Information (Section 21)

This exemption addresses personal privacy and the hospital must refuse to disclose personal information to any person other than the individual to whom the information relates, except in specific circumstances.

In the course of operations, a hospital will acquire considerable information about individuals, such as employees, that will be considered personal information (e.g., name, address, education, employment history). If the hospital determines a record contains the personal information of an individual (other than the requester), the hospital must determine if the personal information exemption applies. There are two tests, both of which must be present for the exemption to apply:

- Test 1: information about an identifiable individual.
- Test 2: information must be personal.

Unless the information revealed something that is “inherently personal” in nature about the individual, generally, if the information is about an individual acting in a professional or business context (or some other formal capacity), it would generally not meet Test 2, and therefore not be considered personal.\(^5\)

Example: Information generated by or associated with an individual in the normal course of performing his or her professional or employment responsibilities is not considered that individual’s personal information under FIPPA. Therefore, information that identifies a name, title, contact information, or designation would not be personal, and therefore would not be subject to the personal privacy exemption and the privacy protections in FIPPA.

\(^5\) Orders P-257; P-427, P-1412; P-1621; R-980015; MO-1550-F; PO-22225; P-1409; MO-2344
3. Human Resources and Health and Safety-Related Records

FIPPA applies to records. An FOI request can seek access to one or more records. A record is information that is recorded by any means including in printed form, film, electronic form or something that can be produced from databases or machine-readable records.

Human resources and health and safety records generally fall into one of the following “classes”, each of which will be discussed in greater detail:

- Personnel file records;
- Supervisory records;
- Payroll records;
- Disability management records;
- Human resources and labour relations records; and
- Health and safety records.

Some expense records (e.g., expense claim and approval forms) may also be administered by human resources and are an important class of records about individual employees that is subject to public access under FIPPA.

3.1 Personnel Files

Personnel files are the main source of information about an employment relationship. They typically contain the following records:

- An employee profile record (typically includes the name, home address, position title, start date, regular work week hours, current salary or wage rate, emergency contact information, bank account and sometimes date of birth)\(^6\);
- Application materials (cover letters and résumés);
- Background check records;
- Employment agreements;
- Change in status records;
- Formal employment-related correspondence;
- Routine performance evaluation records;
- Training records;
- Progression and review records (e.g., 360 reviews);
- Disciplinary records and discharge letters; and
- Severance agreements.

How does FIPPA impact personnel files?

Personnel files should not contain any records that are unrelated to the administration of an individual’s employment. In such files, the only information likely to be subject to the access rights in FIPPA are employment agreements and severance agreements. If formally requested under FIPPA, employment agreements and severance agreements (executed

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\(^6\) The Employment Standards Act, 2000 requires employers to record the date of birth of employees who are students under 18 years of age.
versions, not drafts) must be processed, though some information in the agreements will often need to be withheld to protect personal privacy.

Though the contents of a typical personnel file are largely excluded from FIPPA, many hospitals provide access to employees to all or part of their personnel file under a collective agreement or under policy. Hospitals should be careful not to grant access to personnel files in a manner that compromises their entitlement to keep certain sensitive information confidential. In general, hospitals should refrain from giving employees a right of access to:

- Confidential performance feedback; and
- Managers’ working notes and informal communications between managers about employees.

The hospital should adopt an access and privacy/security policy based on FIPPA principles, to ensure sensitive human resources information is managed appropriately, and also limit any policy-based right of access to current employees. See sample policy language in Appendix 1.

3.2 Supervisory Records

Supervisory records include managers’ working notes and informal communications between managers about employees. Such notes and communications are typically kept informally and outside of personnel files. They are likely to be excluded from FIPPA under the labour and employment-related records exclusion.

Managers should be aware, however, that the form in which they communicate and keep notes in managing employees may have an affect on their ability to do so in confidence. Consider, for example, a manager that keeps a manager’s “daytimer” that intermingles notes about employee management and other hospital administration. Though some parts of an entry in the daytimer may be clearly related to labour relations and employment, the excluded status of a “mixed entry” in the daytimer is unclear. In light of FIPPA application, it is best that notes and communications made in the course of managing employees are kept separate from other notes and communications about hospital business.

3.3 Payroll Records

“Payroll records” are records about how individual employees are paid. For example:

- Records of hours worked;
- Records of sickness, leaves;
- Records of vacation time and vacation pay entitlement; and
- Records of pay and deductions from pay.

How does FIPPA impact payroll records?

These kinds of records are related to employment and will ordinarily be excluded from the access rights granted by FIPPA. Hospitals are required, however, to provide regular payroll statements to employees under the Employment Standards Act, 2000.

Note that “payroll records” – generally understood as records about individual employees – may be subject to different treatment under FIPPA than more general records about payroll costs. For example, human resources may create a record that summarizes payroll costs and headcount by department for the purpose of planning a restructuring – a record that is related to both hospital finance and administration and human
resources and labour relations management. Though the context in which such a planning record is created will make a difference, the case for exclusion of such planning records from FIPPA, in some circumstances might be limited.

3.4 Disability Management Records

Medical information received from hospital employees is generally kept outside of the personnel file, either by a hospital department responsible for disability management or by a third-party, external disability manager. This file is often referred to as a “disability management file.”

Disability management files are kept for the purpose of managing absences from work, determining entitlement to self-administered disability benefits and providing accommodation. They typically contain:

- Information received from employee health care providers (e.g., medical certificates, attending physician statements, test results and related correspondence);
- Information received from external medical assessors (including reports, tests and the like); and
- Case notes and correspondence generated by hospital disability management staff.

How does FIPPA impact disability management records?

Records in disability management files are employment-related and therefore are not ordinarily subject to the rights of access granted by FIPPA. Therefore, employees who wish to challenge hospital decisions about the administration and management of medical conditions and disabilities will generally not be able to use FIPPA to seek access to sensitive correspondence and other information that would normally not be made available in the course of existing dispute resolution procedures. This is the case whether the disability management function operates internally or through an external disability management provider.

Hospitals should carefully limit the records contained in a disability management file to records created for the purpose of disability management; a disability management file should not contain records of health care provided by an employer to an employee.

For example, if an employee attends his employer hospital for emergency care, the record of care provided to the employee has nothing to do with employment and should be kept as a medical record that is fully-regulated by the *Personal Health Information Protection Act* (PHIPA).

It is more difficult to deal with records pertaining to services provided by hospital disability management departments to hospital employees that are not clearly and exclusively done for an employment-related purpose – e.g., vaccination records. Hospitals should
either take steps to put employees on clear notice that services such as vaccination services are provided by an employer (and not a health care provider) for an employment-related purpose. Provided a hospital does so and otherwise ensures that its disability management files are devoid of records of health care, employees should have no statutory right of access to records in a disability management file under FIPPA or PHIPA. As with the personnel file, hospitals often provide access as required by a collective agreement or voluntarily, based on hospital policy.

3.5 Human Resources and Labour Relations Records

Hospitals keep a range of other records that support the human resources and labour relations functions. This class of records may vary from hospital to hospital, but the following types of records are common.

**Human Resources Records**

- Investigation Files (*instructions, notes, statements, findings*)

- Recruitment Files (*postings, applications, notes and score sheets, candidate communications*)

- Job Evaluation Files (*plans, committee minutes, correspondence, position description forms, position questionnaires, records of research and analysis, decisions and orders under the Pay Equity Act, negotiated settlements*)

- Planning Files (*e.g., workforce statistics, workforce or “headcount” planning, restructuring planning*)

- Employee Surveys (*e.g., engagement and satisfaction surveys and compensation and benefit surveys, including draft questionnaires, final questionnaires, completed questionnaires, response databases, working reports, formal/final reports*)

**Labour Relations Records**

- Collective Bargaining Files (*research and analysis, mandates, notes*)

- Grievance Administration Files (*evidence, notes, solicitor-client communications, union communications*)

- Labour-Management Committee Files (*minutes, related correspondence, confidential notes*)

- General Union Correspondence Files (*formal and informal*)

**How does FIPPA impact human resources and labour relations records?**

Given the range of records that fall within this class of human resources and labour relations records, it is difficult to generalize about FIPPA application; hospitals should always conduct a record-by-record analysis. To facilitate this analysis, the table below describes the analysis invited by requests for records in each of file types we have listed above.
### FIPPA Implications for Human Resources and Labour Relations Records

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<tr>
<th>Records</th>
<th>FIPPA Implications:</th>
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<tbody>
<tr>
<td>Investigation Files</td>
<td><strong>Exclusion analysis</strong>&lt;br&gt;There will be a case for the exclusion of all records generated by an investigation that is constituted under an employment-related policy – e.g., a workplace harassment policy or a workplace violence policy. The treatment of records generated in the course of resolving complaints made by patients about employees, though such investigations may have employment-related consequences, is less certain and will depend on a record-by-record analysis to determine what records, if any, are excluded as related to employment.&lt;br&gt;Though there may be circumstances in which investigation records are not related strongly enough to employment to justify exclusion, any personal health information in such records will nonetheless be excluded under the provision of PHIPA that deems personal health information to be excluded from FIPPA.</td>
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<tr>
<td>Recruitment Files</td>
<td><strong>Exclusion analysis</strong>&lt;br&gt;Records in a typical recruitment file are likely to be related to employment and therefore excluded from FIPPA even though some records will be related to unsuccessful candidates who do not become employees.</td>
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<tr>
<td>Job Evaluation Files</td>
<td><strong>Exclusion analysis</strong>&lt;br&gt;Records gathered in order to understand position responsibilities, working notes made in rating a job and the record of an assigned job rating itself should ordinarily be excluded from FIPPA. Final settlement agreements (as opposed to communications made in the course of negotiations) that are related to job evaluation or <em>Pay Equity Act</em> disputes are not excluded from FIPPA.</td>
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<td></td>
<td><strong>Relevant exemptions</strong>&lt;br&gt;Parts of final settlement agreements related to individual employees are likely to be exempt under section 21 (unjustified invasion of privacy). Hospitals should also consider whether any parts of a final settlement agreement are exempt because their disclosure could reasonably be expected to cause economic prejudice (under section 18(1)(c)). Absent unique circumstances, however, it may be difficult to prove the kind of economic harm required to support an exemption on this ground.</td>
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<tr>
<td>Records</td>
<td>FIPPA Implications:</td>
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<tr>
<td><strong>Planning Files</strong></td>
<td><strong>Exclusion analysis</strong>&lt;br&gt;Planning records may or may not be excluded. (See discussion under “Payroll” in 3.3 of this guidance document.)**&lt;br&gt;**Relevant exemptions&lt;br&gt;If FIPPA does apply to a particular planning record, hospitals may claim that all or part of its content is exempt based on section 18. Although hospitals may raise any subpart of section 18 (economic interest) in dealing with a request for a planning record that is not excluded, subsection 18(1)(e) (which protects against interference with current or anticipated negotiations) and subsection 18(1)(f) (which protects against premature disclosure of plans relating to management of personnel) are particularly relevant.</td>
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<tr>
<td><strong>Employee and Physician Surveys</strong></td>
<td><strong>Exclusion analysis</strong>&lt;br&gt;Records related to the administration of an employee survey will ordinarily be excluded. There may be rare occasions when the purpose of conducting an employee survey is more related to general hospital operations than labour relations and employee relations makes exclusion more tenuous.**&lt;br&gt;**Relevant exemptions&lt;br&gt;In the unlikely event the exclusion does not apply, hospitals should, in particular consider the exemptions in section 18(1)(a) (which protects proprietary information), section 18(1)(c) (which protects generally against economic harm) and 18(1)(g) (which protects against harm from premature disclosure of proposed plans, policies and projects). Requests for records related to surveys prepared by third-parties may raise the possible application of the exemption in section 17 (third-party).</td>
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<tr>
<td><strong>Collective Bargaining Files</strong></td>
<td><strong>Exclusion analysis</strong>&lt;br&gt;Hospitals and their collective bargaining agents collect, prepare and use a range of confidential records in the course of collective bargaining, all of which are strongly related to labour relations and should ordinarily be excluded from FIPPA. Unions may request other records containing financial information about hospital administration and finance that are subject to public access under to FIPPA (a right that is separate from any union right of access to information under collective bargaining law). The final terms of a memorandum of settlement and the final consolidated terms of a collective agreement are also subject to public access under FIPPA.**&lt;br&gt;**Relevant exemptions&lt;br&gt;Unions (and all members of the public) will have a broad range of access to financial information about hospital administration. The main exemption for protecting hospitals’ interest in keeping such information private and confidential is the exemption in section 18 (economic interest). In general, final collectively bargained agreements (both memoranda and consolidations) are publically accessible.</td>
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### FIPPA Implications for Human Resources and Labour Relations Records

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<th>Records</th>
<th>FIPPA Implications:</th>
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<tr>
<td><strong>Grievance Administration Files</strong></td>
<td>Exclusion analysis</td>
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<td></td>
<td>Records collected, prepared and used in the course of grievance administration are strongly related to labour relations and should ordinarily be excluded from FIPPA. Final settlement agreements (not proposals) are subject to public access under FIPPA.</td>
</tr>
<tr>
<td><strong>Relevant exemptions</strong></td>
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<td></td>
<td>All or part of a settlement agreement relating to individual grievers may be exempt pursuant to section 21 (personal privacy). The section 21 analysis is similar to that applied to employment contracts (as discussed in this guidance document). Settlements of policy issues are more likely to be accessible to the public. Though hospitals should consider the application of the exemption in section 18 (economic interest) when faced with requests for settlement agreements, the circumstances in which hospitals can prove the harms required by section 18 may be limited. The mere fact an agreement has a confidentiality clause or a &quot;without precedent&quot; clause is not grounds for exemption, and the IPC has often rejected exemption claims based on the negative precedential effect that may flow from disclosure of settlement agreements.</td>
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<tr>
<td><strong>Labour-Management Committee Files</strong></td>
<td>Exclusion analysis</td>
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<td>Records related to participation in labour-management committees, including confidential management communications related to participation in labour-management committees, are strongly related to labour relations and should ordinarily be excluded.</td>
</tr>
<tr>
<td><strong>General Union Correspondence</strong></td>
<td>Exclusion analysis</td>
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<td>Formal or informal communications between management and a union about collective agreement administration will ordinarily be excluded from the right of access in FIPPA.</td>
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### 3.6 Occupational Health and Safety Records

Every hospital has a health and safety program that generates and uses important records to maintain and promote worker safety. The following is a list of typical health and safety records relating to program administration:

- Governing documents for the health and safety program, including policies and procedures;
- Accident reports, violence and harassment complaints and other records that identify workplace hazards or perceived hazards;
- Periodic risk assessment records;
- Equipment inspection and test records;
- Accident investigation records;
- Records of interaction with the provincial Ministry of Labour;
- Records of interaction with the Workplace Safety and Insurance Board (regarding general administration); and
- Joint Health and Safety Committee Records (including minutes, correspondence and confidential notes).
Health and safety departments also often keep the following records about individuals:

- Records that identify persons (employee, contractor, physician, patient or visitor) as having a “history of violent behaviour”;
- Personal biological and chemical agent exposure records;
- Personal dosimetry records and radiographic exposure records; and
- Claim files (e.g., Workplace Safety and Insurance Board, long-term disability).

How does FIPPA impact occupational health and safety records?

FIPPA application to health and safety records must be determined on a record-by-record basis. Some health and safety records are likely to be excluded because they are related to the management of individual employees and physicians. For example, the IPC has held that records related to specific work refusals and records collected in the course of managing a threat of violence to individual employees are subject to exclusion as being related to employment. Joint Health and Safety Committee (JHSC) records are also arguably excluded as related to labour relations given the Occupational Health and Safety Act establishes a JHSC as a worker-management committee. Other records – routine risk assessments conducted by hospital management, for example – have a more tenuous connection to labour relations and employment. The application of FIPPA to such records is uncertain and will require a close examination of each requested record.

Records that identify persons as having a “history of violent behaviour” are highly sensitive. Given they are generated and used in order to meet hospitals’ express statutory duty to manage the risk of physical injury to workers under occupational health and safety legislation, records that identify persons as having a history of violent behaviour are arguably excluded as related to communications about employment-related matters. This is especially the case, given the duty to manage the risk of physical injury to workers is framed in the Occupational Health and Safety Act as a duty to inform – the contemplated warning being a “communication about [an] employment-related matter.” Though this exclusion claim is yet to the subject of an IPC order, in the event it is not accepted by the IPC, hospitals will nonetheless have a strong exemption claim under section 21 (personal privacy) in responding to requests for these records.

7 The committee (and its union members) has a broad right of access to information about workplace hazards and an employer’s assessment of workplace hazards under the Occupational Health and Safety Act. In light of this right, union requests for general health and safety records under FIPPA may be rare.

8 Section 32.0.5(3) of the Occupational Health and Safety Act imposes a duty to provide information, including personal information, to workers who can be expected to encounter individuals with a history of violent behaviour in the course of their work.

The Obligation to Make a Public Disclosure

Hospitals should be aware that FIPPA contains a statutory duty to warn that is broader than the duty to inform in the Occupational Health and Safety Act because it addresses threats to the public at-large. Section 11 of FIPPA reads:

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.

(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.

(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.

(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.
4. Analyzing FOI Requests for Human Resources and Health and Safety Records

An FOI request is a written request for a record that is in the custody or under the control of the hospital. With regards to requests for human resources and health and safety records, these will generally fall into two categories: employee requests for their own records; and third-party requests for another individual’s or group of individual’s information.


The Hospital FOI and Privacy Office should flag a request from the outset if, on its face, the FOI request concerns records or information that came under its custody or under its control before January 1, 2007, or relates to records that are excluded from FIPPA.

Though FIPPA applies to records and has exclusions that apply to records, it bears noting that many requesters ask for information. The FOI and Privacy Coordinator should identify all records that contain the requested information before conducting the analysis described in this section.

### Steps to Processing a Request

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4.1 Custody or Control of the Records

When a hospital receives an FOI request it will need to consider whether the relevant records are within the hospital’s custody or under its control. Generally, records that are in the hospital’s possession are considered to be in its custody. When considering control, there may be records that the hospital does not “physically” possess, because they are held by an outside entity on the behalf of the hospital, but that entity is acting as an agent of the hospital, and such records are said to be under its control.

4.2 On or After January 1, 2007

FIPPA only applies to records that came into the hospital’s custody or under its control on or after January 1, 2007. If an FOI request involves records that came into the custody or under the control of the hospital before January 1, 2007, the hospital should advise the requester that the records came into the custody or under the control of the hospital prior to 2007 and are not subject to FIPPA. Should the hospital wish to process such a request, it could:

• Treat the FOI request as an informal request;

• Treat the FOI request as a formal request in respect to those records that came into the custody or under the control of the hospital after January 1, 2007.

4.3 Proactive Disclosure

Except in the case of a third-party request for personal information and a request for certain confidential information of third parties, FIPPA does not prevent hospitals from disclosing records outside of the FOI process and in the absence of a request. By adopting proactive disclosure strategies, a hospital can enhance its transparency and accountability to the public, while reducing the time and resources needed to respond to certain types of FOI requests. Proactive disclosure strategies include:

• Active Dissemination: the proactive release of information in the absence of a request. The information can be posted on the hospital website, or issued in connection with a news release or newsletter.

• Routine Disclosure: The release of certain types of information routinely and automatically upon request. This sort of disclosure is proactive because the records are processed in advance of a request, ensuring that the disclosure of records can be automatic and prompt.

4.4 Applying the Exclusions and Exemptions

Once the hospital has completed the preliminary analysis and the record is determined to be within its custody or under its control, is not limited by the January 1, 2007 date, one of the next steps is to consider whether any of the exclusions or exemptions are applicable.

10 Refer to the OHA Guidance Document #5: Proactive Disclosure and IPC’s Access by Design www.ipc.on.ca
While the application of FIPPA to personnel files, supervisory, payroll, disability management, human resources and labour relations, and occupational health and safety records is greatly limited by the employment-related records exclusion in section 65(6), there are two steps to determining whether the exclusion applies:

**Step 1:** Assess whether the record is related enough to human resources management or labour relations to be excluded.

**Step 2:** Assess whether an exception to the exclusion applies.

**Question:** How might the Hospital FOI and Privacy Office deal with an FOI request for an investigation file that deals with a complaint from a patient about an employee?

**Consider:** Does it relate to patient safety and security? Or does it relate to misconduct by an employee?

**Action:** A hospital FOI and Privacy Coordinator faced with a request should examine the context. Potential questions to ask:

- What hospital or department is responsible for the policy?
- What policy was the investigation initiated under?
- What was the investigators’ mandate?

The answers to these and other similar questions should help determine whether the records in the investigation file can be fairly characterized as employment-related.
**Step 1: Does the labour and employment exclusion apply?**

The exclusion will apply if the requested record relates to one of the three labour and employment-related activities set out in section 65(6):

1. labour and employment related proceedings;
2. labour and employment related negotiations; and
3. labour and employment related meetings, discussions, consultations or communications.

For the exclusion to apply, the record in question must “relate to” one or more of the three listed activities. See definition of “relate to” or relating to” above. If the record relates to one or more of these activities, it is excluded from FIPPA unless it is one of the special kinds of records listed in section 65(7).

**Step 2: Does the labour and employment exception apply?**

The next step in administering requests for employment-related records is to determine if one of the three “carve outs”, or exceptions listed in section 65(7) to the labour and employment exclusion applies. To simplify, this makes negotiated and final employment-related agreements and expense-related records subject to the public right of access. Commonly requested records that are carved out of the labour and employment exclusion include, formal employment contracts, other documents that establish the terms and conditions of employment (e.g., hire letters for non-union employees), collective agreements, grievance settlement agreements, and settlement agreements pertaining to current or former employees.

**Step 3: Does the exemption for another individual’s personal information apply?**

Although final employment agreements and employment-related settlements will ordinarily be included in FIPPA, the next step is to consider whether any of the exemptions from the right of access apply. Disclosure of certain information in employment contracts and settlement agreements is most often denied based on the mandatory exemption for disclosure of personal information, which constitutes an unjustified invasion of personal privacy in section 21 of FIPPA.

An FOI and Privacy Coordinator faced with a request of an employment contract or settlement agreement will generally consider four questions:

**Question 1:** Does basic employment information not constitute an unjustified invasion of privacy?

**Question 2:** Is employment history and other sensitive information presumed an unjustified invasion of privacy?

**Question 3:** In balancing interests and other factors, would disclosure lead to an unjustified invasion of privacy?

**Question 4:** Does the public interest override provision apply?
Questions to Consider for Final Employment Agreements and Employment Related Settlements

**Question 1**: Are the circumstances such that FIPPA deems that there is no unjustified invasion of privacy (section 21(4))?  

- **YES**  
  - **Personal information exemption does not apply.** Personal information should be disclosed (unless another exemption or exclusion applies).

- **NO**  
  - **Question 2**: Are the circumstances such that FIPPA presumes an unjustified invasion of privacy (section 21(3))?  
    - **NO**  
      - **Question 3**: After considering certain factors set out in FIPPA (per section 21(2)) and all relevant circumstances surrounding the case, would the disclosure of the personal information lead to an unjustified invasion of privacy?  
        - **NO**  
          - **Personal information exemption does not apply.** Personal information should be disclosed (unless another exemption or exclusion applies).
        - **YES**  
          - **Personal information exemption does not apply.** Personal information should be disclosed (unless another exemption or exclusion applies).

**Question 4**: Does the public interest override provision apply?
Question 1 - Does basic employment information not constitute an unjustified invasion of privacy?

The first stage is to assess whether the disclosure is permitted by section 21(4), which permits the disclosure of basic and non-sensitive personal information about employees.

To fit within the language of section 21(4) (a), the disclosure must reveal information about salary range \textit{during employment} or benefits enjoyed \textit{while employed}. Benefits means entitlements that an employee receives in addition to base salary as a result of employment, which can include insurance-related benefits, sick leave, vacation, leaves of absence, termination allowances, death and pension benefits, reimbursement of expenses, and signing bonuses.

The terms of an employment-related settlement do not come within the language of section 21(4) (a) unless they are derived from the employment contract (and are not negotiated as an incident of its termination).

Section 21(4) (b) is similar in purpose to section 21(4) (a), but applies only to independent contractor relationships.

**Limitation**

Section 21(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; or

(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 one 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 one per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario.
Did You Know? Disclosing the classification, salary range, and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution does not constitute an unjustified invasion of personal privacy. The IPC has interpreted benefits to include entitlements that an employee receives as a result of being employed by the institution. The following records have been found to qualify as benefits:

- Insurance-related benefits;
- Sick leave, vacation;
- Leaves of absences;
- Termination allowances;
- Death and pension benefits;
- Right to reimbursement for moving expenses; and
- Incentives and assistance given as inducements to enter into a contract of employment.

11 Benefits is a broader, more general term than the term "perquisites" as featured in the Broader Public Sector Accountability Act, 2010 and its directive.

12 Orders M-23 and PO-1885

Information that reveals annual salaries of less than $100,000 is presumed to be exempt under section 23(3)(f). The IPC has held that section 3(1) of the Public Sector Salary Disclosure Act expressly authorizes the disclosure of specific salary entitlements for employees who are paid at least $100,000 in salary. Based on section 21(1)(d) of FIPPA, the disclosure of such information is not restricted at all by section 21. The IPC’s position has not yet been tested on judicial review.

The IPC has given effect to the phrase “employment history” in section 21(3)(d) and has held that the terms of an employment-related settlement (which are about the post-employment state of affairs) are not protected from disclosure. It has also consistently held that one-time payments do not reveal the personal financial circumstances contemplated by section 21(3)(f).

Based on this interpretation, the following types of information commonly contained in employment-related settlements are not protected from disclosure by virtue of the section 21(3) presumption:

- one-time lump sum payments and severance entitlements (unless structured in a manner which would reveal the individual’s actual salary while employed);
- a payment made in respect of legal fees;

13 Under the Public Sector Salary Disclosure Act, “salary” means the total of each amount received by an employee that is (a) an amount required by section 5 of the Income Tax Act (ITA) (Canada) to be included in the employee’s income from an office or employment, b) an amount deemed by subsection 6 (3) of the ITA to be remuneration of the employee for the purposes of section 5 of that Act, or (c) an amount received by the employee by reason of his or her right to receive a deferred amount under a salary deferral arrangement referred to in subsection 6 (11) of the ITA.
• the terms of a release; and

• agreements about the potential availability of early retirement.

To the contrary, more sensitive types of information commonly contained in employment-related settlements are subject to redaction based on the section 21(3) presumption:

• information (e.g. contained in an acknowledgement) relating to a person’s disability – section 21(3) (a);

• start and end dates of employment – section 21(3) (d);

• start and finish dates of a salary continuation arrangement – section 21(3) (d);

• number of sick days used during employment – section 21(3) (d);

• date of eligibility for early retirement or pension benefits – section 21(3) (d);

• the terms of a restrictive covenant and other obligations arising from previous employment – section 21(3) (d);

• attached letters of reference – section 21(3) (d); and

• references to a specific severance amount to be paid to an individual over a period of time, including pension contributions to be made – section 21(3) (f).

Presumed invasion of privacy

Section 21(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.
Question 3 – In balancing interests and other factors would disclosure lead to an unjustified invasion of privacy?

If neither section 21(4) nor section 21(3) applies, a hospital must assess whether disclosure would constitute an unjustified invasion of privacy based on an analysis of the factors in section 21(2).

Criteria re: invasion of privacy

Section 21(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;

(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;

(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.

The IPC, in hearing an appeal, usually engages in a fresh, contextual balancing of the interest in access versus the interest in privacy by referring to the listed factors.

Notably, the “harm” subsections (“e”, “f” and “i”) will be given weight if a party resisting disclosure meets an evidentiary burden. Even though section 21(2)(i) uses the word “may,” the IPC has said that potential harm to reputation must be more than merely speculative. The IPC has read a similar evidentiary burden into section 21(2)(f) by holding that information will only be considered to be highly sensitive if disclosure is “reasonably expected to cause significant personal distress.”

Question 4 – Does the public interest override apply?

Although a requester may argue that the interest in protecting an individual against an unjustified invasion of personal privacy may be overridden based on a “compelling public interest”.

See Appendix 4 which outlines the strength of the link to the employment and labour relations exclusion.

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14 Order PO-2518
15 M-710; P-984
**5. Sample Scenarios**

**Scenario 1 – Personnel File Request**

Your hospital receives a request from a former employee that asks for (a) all e-mails between his former supervisor and other managers of the hospital that discuss his performance between 2008-2011 when he was employed at the hospital, and (b) all records in his personnel file. Assume the personnel file contains four kinds of records:

- disciplinary letters;
- hire letters and status change forms;
- performance evaluations; and
- criminal background check information.

**Analyzing this FOI Request**

Refer to Appendix 3, which outlines the 14 steps a hospital would take to process a request. Specific to this scenario a key question is raised: “Should a hospital conduct a search for records when the request itself asks for records that are excluded?”

In general, hospitals should take a pragmatic approach when deciding whether to search for excluded records. Factors to consider include the likelihood of dispute, the cost of search and retrieval and the sensitivity of the records.

A hospital might reasonably forgo searching for records that are responsive to Part (a) of this request. By Part (a), the requester seeks a set of records that is defined by a purpose that is completely covered by the labour and employment records exclusion. There is, therefore, minimal risk in addressing part a without conducting a search, the cost of which would likely be significant.

The IPC will expect a hospital to have examined responsive records in making a determination that they are excluded, and in the event of an appeal to the IPC, may require the hospital to produce the requested record for their review.

Hospitals should be more inclined to conduct a search for records in response to Part (b) of this request. By Part (b), the requester seeks a set of records based on their inclusion in a “personnel file.” A hospital could answer this request by making an assumption about the records that are actually in the former employee’s personnel file. How safe would such an assumption be? Is there a real reason not to obtain a copy of the personnel file for a quick review?

You issue the following letter to the former employee in response to his request:
Dear [Requester],

I am writing in response to your March 1, 2012 request for the following records of personal information:

(a) all e-mails between [your] supervisor and other managers of the hospital that discuss my performance and (b) all records in [your] personnel file.

The e-mails you have requested, and almost all records in your personnel file, are excluded from the right of public access in FIPPA based on the employment-related records exclusion in section 65(6). I have appended a copy of section 65 to this letter.

The only record in your personnel file that is not excluded from FIPPA is an employment contract dated October 2, 2008, which I have attached to this letter.

You may request that this decision be reviewed by the Information and Privacy Commissioner. The Commissioner can be reached at:

Registrar
Information and Privacy Commissioner/Ontario
1400-2 Bloor Street East
Toronto, Ontario
M4W 1A8

Please note that you have 30 days from the receipt of this letter to request a review by the Commissioner.

Please contact [name, title and phone number of person responsible] if you have any questions.

We would appreciate you using the request number assigned to your request in any further correspondence.

Sincerely,

---

Scenario 2 – Request for Employment Contract

Consider the following employment contract. Provision-by-provision, what do you think will be exempt from access under the unjustified invasion of privacy exemption in section 21? (Hint: Some information will be deemed to be accessible pursuant to section 21(4), some deemed to be exempt pursuant to section 21(3) and some subject to a balancing of competing factors under section 21(2).)
Mary Smith  
123 Avenue Road  
Bigtown, ON  

May 15, 2007  

Welcome to the hospital Mary! You will start as Director of Human Resources/Labour Relations on June 1st on the condition you sign back this letter before the end of May. Your terms and conditions of employment will be as follows:  

1. You must complete a probationary period of three months.  
2. You will receive a $500 signing bonus.  
3. You will abide by your non-solicitation agreement with your former employer, Private Healthco.  
4. You will perform the duties and responsibilities set out in the job posting at Schedule A as well as other duties assigned from time to time. We may change your job duties from time to time.  
5. You will receive an annual salary of $75,000, subject to review on an annual basis.  
6. You will be eligible to participate in the following benefit plans:  
   a. Extended health and dental  
   b. Life insurance  
   c. Short-term and long-term disability coverage  
7. Participation in these plans will be subject to the terms contained in our Benefit Guide, a copy of which you have been provided. We may change the terms from time-to-time, in which case we will advise you of changes.  
8. You are entitled to 4 weeks of vacation time in each calendar year. Vacation pay is included in your salary. Vacation shall be taken at mutually convenient times.  
9. You may carry over your vacation entitlement into the next calendar year to a maximum of 10 days, subject to obtaining our prior approval.  
10. We may terminate this agreement without notice or pay in lieu of notice (i) at any time during your probationary period for any reason or (ii) at any time for cause.  
11. We may terminate this agreement at any time for any reason by providing you with the minimum amount of written notice or termination pay in lieu of notice required under the Employment Standards Act. In addition to the above, we will pay any outstanding severance pay or other amounts owing under this agreement or the Employment Standards Act.  
12. All amounts payable under this agreement will be subject to deductions required by law.  
13. This agreement is the entire agreement between us and replaces all prior agreements or understandings.  
14. You acknowledge that you have read and understood this agreement, and have been given an opportunity to seek independent advise with respect to its terms.  

By signing below you acknowledge that you have read and understood this letter and agree that your employment is subject to the terms and conditions described above.  

Yours truly,  
Andy Administrator  
Bigtown GH
First, identify the privacy issue

This is a request for information about an identifiable individual – Mary Smith – that raises the mandatory exemption in section 21 of FIPPA (unjustified invasion of personal privacy).

Not all information in this record is Mary’s personal information. Mary’s position title, for example, is not her personal information. It is also questionable whether the fact Mary has an employment contract that includes the boilerplate provisions in paragraphs 12 to 14 is personal information. Personal information in Mary’s contract: home address, information about start date of employment, information about employment status, information about annual salary, information about benefits.

Second, work through section 21

Remember to work backwards through section 21, starting with section 21(4), then move to sections 21(3) and 21(2) in order.

Section 21(4) deems information that “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” to be accessible notwithstanding the mandatory exemption in section 21. This section arguably applies to paragraphs 2, 4, 6, 7 and 8 of Mary’s letter.

Section 21(3) deems the disclosure of certain information to constitute an unjustified invasion of privacy, including information that relates to “employment history” and information that “describes an individual’s finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.” Paragraph 3 arguably reveals employment history information. The specific annual salary in paragraph 5 is presumed to be exempt as information that describes an individual’s income.

Paragraphs 1, 10, 11, 12, 13 and 14 are not addressed by either presumption, so their treatment must be determined based on a balancing of the factors listed in section 21(2). A case could be made to withhold paragraphs 1, 10 and 11, but disclosure of the boilerplate in paragraphs 12, 13 and 14 would not likely constitute an unjustified invasion of privacy.

Mary consents to the release of all information that is subject to section 21(4) as well as the information in paragraphs 12, 13 and 14. You issue a letter that indicates all redactions are made based on the mandatory exemption in section 21 and attach the following redacted letter.
Mary Smith  
Bigtown, ON  
May 15, 2007  
Welcome to the hospital Mary! You will start as Director of HR/LR on [date] on the condition you sign back this letter before the end of May. Your terms and conditions of employment will be as follows:

1. [Confidential Information]
2. You will receive a $500 signing bonus.
3. [Confidential Information]
4. You will perform the duties and responsibilities set out in the job posting at Schedule A as well as other duties assigned from time to time. We may change your job duties from time to time.
5. You will receive an annual salary of $[Confidential Information], subject to review on an annual basis.
6. You will be eligible to participate in the following benefit plans:
   a. Extended health and dental
   b. Life insurance
   c. Short-term and long-term disability coverage
7. Participation in these plans will be subject to the terms contained in our Benefit Guide, a copy of which you have been provided. We may change the terms from time-to-time, in which case we will advise you of changes.
8. You are entitled to 4 weeks of vacation time in each calendar year. Vacation pay is included in your salary. Vacation shall be taken at mutually convenient times.
9. You may carry over your vacation entitlement into the next calendar year to a maximum of 10 days, subject to obtaining our prior approval.
10. [Confidential Information]
11. [Confidential Information]
12. All amounts payable under this agreement will be subject to deductions required by law.
13. This agreement is the entire agreement between us and replaces all prior agreements or understandings.
14. You acknowledge that you have read and understood this agreement, and have been given an opportunity to seek independent advise with respect to its terms.

By signing below you acknowledge that you have read and understood this letter and agree that your employment is subject to the terms and conditions described above.

Yours truly,
Andy Administrator
Bigtown GH

Note: If Mary had a salary (as defined in the Public Sector Salary Disclosure Act (PSSDA)) of $100,000 or more, section 21 does not apply. The IPC has held that the PSSDA authorizes institutions to disclose specific salary amounts and that this precludes use of the exemption in section 21 of FIPPA.
With the extension of FIPPA to hospitals effective January 1, 2007, hospitals will need to examine their programs and processes to consider how FIPPA will apply to various types of records. Previously, there was limited prospect for disclosure of records such as, final labour relations and employment-related agreements. To prepare for FOI requests, hospital human resources and health and safety departments should consider the following:

6.1 Ensure human resources and health and safety participation on both the Senior Leadership and Hospital FOI and Privacy Implementation Committee.

Although not required by FIPPA, the OHA Primer: A Practical Guide for Hospitals Preparing for FIPPA Implementation, has recommended that hospitals establish a committee with oversight over FIPPA implementation activities. Ensuring functional expertise on both committees can ensure that key issues related to human resources and health and safety are flagged and addressed as part of the hospital implementation plan.

6.2 Delegation of authority for human resources and health and safety records.

Delegation means empowering an officer so that he or she has control over whether a power is exercised and how a power is exercised or duty undertaken. It is common for the Head to delegate some or all of the decision-making powers to one or more senior leaders and it is important that the delegation suit the needs and structure of the hospital.

Effective FIPPA implementation will necessitate the development of close and effective working relationships between the FOI and Privacy Coordinators and the persons accountable for human resources, labour relations, disability management and occupational health and safety, especially given the short turnaround timelines for responding to requests. Hospitals should consider how to effectively engage staff.

6.3 Designate FIPPA Department Leads.

The OHA Hospital Freedom of Information Toolkit and Guidance Document #4: Information/Records Management an Establishing an Inventory of Records has recommended that hospitals designate department personnel from key programs and departments to help process FOI requests and access key records. The FIPPA department leads are responsible for promoting and maintaining FIPPA awareness within their departments, implementing the hospital’s records management policies and procedures in their departments, and for overseeing the search for records within the department relevant to FOI requests.

6.4 Establish an inventory of records for all hospital personnel, payroll, disability management, labour and employment-related, and occupational health and safety records.

As part of general preparation for FIPPA, one of the recommended tasks is completing an inventory of records. Generally, a hospital will categorize the records as either general records or personal information banks.
The inventory should be updated on an annual basis. The hospital must provide the Ontario Ministry of Government Services with list of the types of records within a hospital’s custody or under its control, otherwise referred to as a Directory of Records.

6.5 Review records management and retention schedules.

To support FIPPA administration, hospitals should review their records management systems and consider consolidation or organization of their records. For instance, hospital human resources and labour relations departments that have not yet done so should consider formalizing how they keep records by:

- Categorizing human resources and labour relations into a file structure resembling the one outlined in section 3.5 of this guidance document;
- Defining each file by its purpose and its contents;
- Designating certain files as sensitive (e.g., investigation files and collective bargaining files);
- Assigning retention periods to each file;
- Consolidating or reorganizing records to support request administration; and
- Identifying and rectifying other information management issues (e.g., lost records, problems with retrieving records, information technology resources).

The OHA’s Records Retention Toolkit (2006) outlines both statutory and suggested retention schedules for records related to human resources and health and safety. See Appendix 2 for a list of human resources and health and safety retention schedules.

6.6 Identify records that might be routinely requested and consider proactive disclosure.

While FIPPA does not require proactive disclosure, a hospital can enhance accountability and transparency by adopting proactive disclosure strategies and identifying records that might be routinely requested.

Engage and work with the hospital communications or public affairs department.

6.7 Create or amend forms to ensure appropriate notice of collection (of personal information).

Since most human resources and health and safety records are excluded, there is no obligation to include a collection notice (as required under section 39(2) of FIPPA) on human resources forms.

For records that fall back under FIPPA, hospitals should consider establishing standards and procedures related to privacy protection, including collecting personal information. See Appendix 5 for a sample Notice of Collection template.

6.8 Develop and deliver an education and training program for management and all staff.

To ensure an effective and coordinated response to FOI requests, hospitals must clearly set out how the hospital will handle the processing of an FOI request and what is expected of hospital personnel.
Appendix 1: Sample Personnel File Access Policy

The Hospital maintains a formal record of employment for each of its employees. This “personnel file” typically includes contractual documentation, performance evaluations, training records, disciplinary notes and other similar records. The personnel file is deemed not to include records of day-to-day communications related to an employee (including e-mails), notes about employees that are made in the course of day-to-day supervision, payroll records, medical records and records related to internal investigations.

**Current Employees**

Every current hospital employee may ask human resources to review a copy of his or her personnel file. Human Resources will facilitate the review by presenting a physical file after removing all communications received by the Hospital based on an assumption of confidence (e.g., confidential reference letters, confidential peer feedback, etc.). Employees must return all records provided, but the Hospital will make a reasonable number of photocopies as a courtesy.

Employees should first raise any concerns about the content of their file with their immediate supervisors unless there is a reason to raise concerns directly with Human Resources.

**Former Employees**

Former Hospital employees do not have a right of access to personnel files under this policy.

**Prevailing Rights**

The applicable terms of any collective agreement and all rights granted under the *Freedom of Information and Protection of Privacy Act* (which includes an employment-related records exclusion) prevail over this policy.
Appendix 2: Record Retention Requirements

<table>
<thead>
<tr>
<th>Federal Tax Statutes*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum Retention Requirements</td>
</tr>
<tr>
<td>General requirement to keep records and books of account to demonstrate proper administration of Income Tax Act obligations pertaining to payroll</td>
</tr>
<tr>
<td>Requirement to keep records and books of account (and supporting vouchers) as will enable the determination of any premiums payable under the Employment Insurance Act or any premiums or other amounts that should have been deducted or paid</td>
</tr>
<tr>
<td>Requirement to keep records and books of account containing such information as will enable any contributions payable under the Canada Pension Plan Act or any contributions or other amounts that should have been deducted or paid to be determined</td>
</tr>
</tbody>
</table>

*The CRA specifies that records should include time worked by employees and deductions and should file copies of form TD1.

How long should personnel files be retained?

Personnel files should be retained for the life of employment and for a period of time after employment ends. Retention for three years from the end of employment is common and acceptable. If periodic or pre-employment background check records are kept in personnel files, they should be subject to a special, longer retention period because they may be relevant to legal claims with very lengthy limitation periods. Twenty-five years from the end of employment is a reasonable period to retain background check records. 16

How long should payroll records be retained?

Payroll records must be retained in accordance with the Employment Standards Act and federal tax legislation.

How long should human resources and labour relations records be retained?

The period of retention of human resources and labour relations management records is generally within a hospital’s discretion. Hospitals should set reasonable retention periods for each type of record by considering each type’s operational, legal, fiscal and historical value.

For records that fall back under FIPPA:

16 Note that hospital patients may claim for sexual assault a very long time after circumstances giving rise to such claims occur based on the current terms of the Limitations Act, 2002.
<table>
<thead>
<tr>
<th>Type of Record</th>
<th>Retention Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Record of name and start date</td>
<td>At least three years from termination</td>
</tr>
<tr>
<td>Record of age (for students under 18)</td>
<td>At least three years from 18th birthday or three years from termination</td>
</tr>
<tr>
<td>Record of hours of work</td>
<td>At least three years from the day or week to which the information relates</td>
</tr>
<tr>
<td>Pay statement records</td>
<td>At least three years from when statement provided to employee</td>
</tr>
<tr>
<td>Records related to job protected leaves</td>
<td>At least three years after the day on which the leave expired</td>
</tr>
<tr>
<td>Excess hours and averaging agreements</td>
<td>At least three years from the day work was last performed under the agreement</td>
</tr>
<tr>
<td>Vacation time and pay records</td>
<td>At least three years from the date the record is made</td>
</tr>
</tbody>
</table>

How long should disability management records be retained?

Disability management files should be retained for the same period as personnel files so that information is available in the event of post-employment litigation.

How long should occupational health and safety records be retained?

Retention periods for health and safety records should be set with an understanding that the most are retained for the purpose of proving compliance and, more generally, due diligence. The *Occupational Health and Safety Act* also establishes minimum retention requirements for a number of specific health and safety records. See Appendix 3 below for a table of relevant retention periods.
### Occupational Health and Safety Act

**Minimum Retention Requirements**

<table>
<thead>
<tr>
<th>Records of non-reportable accidents, fires, explosions</th>
<th>At least one year or such longer period as is necessary to ensure that the two most recent reports or records are on file</th>
</tr>
</thead>
<tbody>
<tr>
<td>Post-repair inspection records for lifting or self-propelled mobile equipment</td>
<td>At least one year or such longer period as is necessary to ensure that the two most recent reports or records are on file</td>
</tr>
<tr>
<td>Testing records for an autoclave or sterilization machine</td>
<td>At least one year or such longer period as is necessary to ensure that the two most recent reports or records are on file</td>
</tr>
<tr>
<td>Lifting equipment examination records</td>
<td>For as long as the equipment remains on the premises and for one year after the equipment is removed</td>
</tr>
<tr>
<td>Records required to be kept by Confined Spaces regulation</td>
<td>At least one year or such longer period as is necessary to ensure that the two most recent reports or records are on file</td>
</tr>
<tr>
<td>Personal exposure (to designated substance) records not provided to a physician for keeping</td>
<td>At least until the latter of the later of the 40th anniversary of the date the first record was created in the personal exposure record or the 20th anniversary of the date the last record was added to the personal exposure record</td>
</tr>
<tr>
<td>Personal and direct reading dosimeter records</td>
<td>At least three years from creation</td>
</tr>
<tr>
<td>Radiographic exposure records</td>
<td>At least one year</td>
</tr>
</tbody>
</table>

*This table excludes requirements related to construction projects and building maintenance.*

### Commentary

Aside from statutory minimum and maximum retention requirements, a hospital has a discretion to set how long a record will be retained. Hospitals should exercise this discretion with a view to a record’s operational, legal, fiscal and historical value.

- **Operational value.** Value that is derived from a record’s function in supporting operations.
- **Legal value.** Value as evidence of meeting hospital legal obligations – e.g., evidence of compliance, due diligence, meeting or exceeding the standard of care.
- **Fiscal value.** Value in supporting financial accountability to inside and outside auditors, board members and others.
- **Historical value.** The long-term value of records in documenting significant past events.
The OHA Hospital Freedom of Information Toolkit: A Guide to the Freedom of Information and Protection of Privacy Act outlines a 14-step process for responding to FIPPA requests and this Appendix will consider that process as it relates to human resources and health and safety records.

### Appendix 3: Processing an FOI Request

#### Steps to Processing a Request

<table>
<thead>
<tr>
<th>Threshold Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Open a file</td>
</tr>
<tr>
<td>2. Is the request complete and clear?</td>
</tr>
<tr>
<td>3. Is the request frivolous or vexatious?</td>
</tr>
<tr>
<td>4. Is the request contentious?</td>
</tr>
<tr>
<td>5. Are the relevant records in the hospital’s custody or control?</td>
</tr>
<tr>
<td>6. Forward / transfer the request to another institution?</td>
</tr>
<tr>
<td>7. Is it obvious that relevant records are entirely excluded?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Search Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Conduct reasonable search for records</td>
</tr>
<tr>
<td>9. Consider exemptions and exclusions</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. Notify affected parties, consider submissions</td>
</tr>
<tr>
<td>11. Sever excluded or exempt information from records</td>
</tr>
<tr>
<td>12. Provide decision letter</td>
</tr>
<tr>
<td>13. Any release of records (subject to payment of any fees)?</td>
</tr>
<tr>
<td>14. Consider publicly posting the request</td>
</tr>
</tbody>
</table>
Step 1: Open the file

When the Hospital FOI and Privacy Office receives the FOI request, it will be tasked with completing a number of procedures.

The FOI and Privacy Office should flag from the outset whether, on its face, the FOI request concerns information that is not subject to FIPPA. Specifically, if the record came into the custody or under the control of the hospital before January 1, 2007, or the records requested are excluded from FIPPA or another basis. Generally, the FOI and Privacy Office has 30 days from receiving an FOI request to complete the following steps and issue a decision letter.

Step 2: Is the request complete and clear?

In the event that the FOI request is incomplete or is broadly worded, the FOI and Privacy Office is expected to work with the requester to clarify and narrow the FOI request before proceeding further.

Very broad requests (e.g., for all of the employment contracts of the hospital) should be clarified or narrowed before proceeding further. Requesters may not know how to properly describe the information that they are seeking, or may be overly inclusive as a precaution.

Step 3: Is the request frivolous or vexatious?

In general a hospital must process an FOI request regardless of any processing difficulties or the intentions behind the requester’s request. However if the FOI request is frivolous or vexatious, then a hospital is not required to process it. The threshold to determine whether a request is of this nature is high.

Step 4: Is the request contentious?

Some FOI requests for records may involve a sensitive matter or might have been submitted by an individual or group that will disseminate the record(s) and/or publish a story. Where requests have the potential to be contentious, the FOI and Privacy Office can take additional steps to provide a “head’s up” process to key hospital personnel. The hospital is still required to respond to the request and issue a decision letter within the required timelines.

Step 5: Are the relevant records in the hospital’s custody or control?

Most records for human resources and health and safety will be in the hospital’s custody. While some hospital records may not be in the physical possession of the hospital because they are held by an outside entity on its behalf, these records are still likely under its control. For instance, where a hospital has a third-party provider (e.g., disability management provider) that is acting as an agent of the hospital the relevant records are still under the control of the hospital.

Step 6: Forward/transfer request to another institution

This is not likely to apply to the majority of human resources and health and safety records. Even in situations where a hospital is utilizing a shared service model, for instance another hospital provides all of the human resources support and collects, prepares, maintains such records on behalf of the hospital, when that hospital receives an FOI request it would engage the other hospital in completing the record search, but still process the FOI request.
Step 7: Is it obvious that relevant records are entirely excluded?

Generally, the application of FIPPA to human resources and health and safety records such as personnel files, supervisory, payroll, disability management, human resources and labour relations, and occupational health and safety records is greatly limited by the employment related records exclusion in section 65(6). Of importance are the exceptions that make negotiated and final employment-related agreements and expense-related records subject to the public right of access.

Step 8: Consider reasonable search for records

In most cases, depending upon the nature of the request for human resources and health and safety type information there will only be one area of the hospital where the relevant records are kept (e.g., personnel files in Human Resources Departments). Assuming that the hospital has formalized how they categorize and store records, the search process should not be difficult.

The IPC will expect a hospital to have examined responsive records in making a determination that they are excluded, and in the event of an appeal to the IPC, may require the hospital to produce the requested record for their review.

For records that fall back under FIPPA, a hospital may wish to consider a fee estimate depending upon the nature of the FOI request.

Step 9: Consider exclusions and exemptions

See Appendix 4 for a table that outlines the strength of the link to the labour and employment matters exclusion.

Step 10: Notify affected parties

If the hospital intends to disclose a record containing personal information, because the hospital believes it might not constitute an unjustified invasion of privacy, then the hospital must notify the affected party (e.g., individual whose personal information is contained in the record). This allows the affected individual to make representations as to whether the record (or parts of the record) should be exempt.

In addition the hospital needs to address section 17 interests (third party).

If the hospital rejects the individual’s representations and intends to disclose the record, the individual will still have a right to appeal to the Information and Privacy Commissioner of Ontario (IPC) before the hospital can disclose the record to the requester.

Step 11: Sever excluded or exempt information from the records

A record may be excluded in whole or parts of a record may be severed, for instance by blacking out parts of it, where a particular exclusion or exemption applies. Refer to discussion under step 9 and scenario 2 in this guidance document.

Step 12: Provide a decision letter

The hospital FOI and Privacy Office will provide the requester with a decision letter explaining any exclusions and exemptions.
Step 13: Any release of records (subject to payment of any fees?)

FIPPA incorporates a user pay principle, meaning that the requester will bear some of the costs of processing the FOI request.

The specific fees are set out in the regulations of FIPPA, with considerations for general records and personal information records requests.

Assuming the hospital does not issue an interim decision letter with a fee estimate, the release of records would be subject to the hospital receiving payment of fees.

Step 14: Consider publicly posting the request

Any information that is released as part of an FOI request can be used by the requester in whatever manner he or she wishes (subject to copyright restrictions disclosed to the requester at the time that the records are released). Hospitals may wish to consider publicly posting a list of general records requests that it has received, and determine whether the records could be proactively disclosed.
With reference to various types of records that make up personnel files, supervisory, payroll, disability management, human resources management, and occupational health and safety records, the following comments are offered with respect to the strength of the link to the labour and employment matters exclusion set out in section 65(6) of FIPPA.

While general comments are made about each type of record each FOI Request must be considered individually.

<table>
<thead>
<tr>
<th>Record class and record</th>
<th>Strength of link to employment and labour-relations exclusion (s.65(6))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Personnel File</strong></td>
<td></td>
</tr>
<tr>
<td>Employee profile record</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Application materials</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Pre-employment and periodic background check records</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Employment agreements</td>
<td>Expressly included in FIPPA</td>
</tr>
<tr>
<td>Change in status records</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Formal employment-related correspondence</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Routine performance evaluation records</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Training records of an individual employee*</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Progression and review records (e.g., 360 reviews)</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Disciplinary records and discharge letters</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Severance agreements</td>
<td>Expressly included in FIPPA</td>
</tr>
<tr>
<td><strong>Supervisory Records</strong></td>
<td></td>
</tr>
<tr>
<td>Communications</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Notes</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td><strong>Payroll Records (for individual employees)</strong></td>
<td></td>
</tr>
<tr>
<td>Records of hours worked</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Records of sickness, leaves</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Records of vacation time and vacation pay</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Records of pay and deductions from pay</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td><strong>Disability Management Records</strong></td>
<td></td>
</tr>
<tr>
<td>Information received from health care providers</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Information received from medical assessors</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Case notes and correspondence</td>
<td>Strong link to exclusion</td>
</tr>
</tbody>
</table>

* Exclusion generally does not apply to more generic group training (PO-2913).
<table>
<thead>
<tr>
<th>Record class and record</th>
<th>Strength of link to employment and labour-relations exclusion (s.65(6))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>HR Management Records</strong></td>
<td></td>
</tr>
<tr>
<td>Investigation files</td>
<td>Depends on investigation</td>
</tr>
<tr>
<td>Recruitment files</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Job evaluation files – records supporting evaluation</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Job evaluation files – agreements</td>
<td>Expressly included in FIPPA</td>
</tr>
<tr>
<td>Planning files</td>
<td>Very record-specific analysis</td>
</tr>
<tr>
<td>Employee surveys</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td><strong>Labour Relations Management Records</strong></td>
<td></td>
</tr>
<tr>
<td>Collective bargaining files – records supporting bargaining</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Collective bargaining files – financial administrative records</td>
<td>Weak, consider Section 13 or 18</td>
</tr>
<tr>
<td>Collective bargaining files – agreements</td>
<td>Expressly included in FIPPA</td>
</tr>
<tr>
<td>Grievance administration files – records supporting admin.</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Grievance administration files – agreements</td>
<td>Expressly included in FIPPA</td>
</tr>
<tr>
<td>Labour-management committee files</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>General union correspondence</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td><strong>Health and Safety Records</strong></td>
<td></td>
</tr>
<tr>
<td>Governing documents for health and safety program</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Records that identify workplace hazards</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Periodic risk assessment records</td>
<td>Moderate*</td>
</tr>
<tr>
<td>Equipment inspection and test records</td>
<td>Moderate*</td>
</tr>
<tr>
<td>Accident investigation records</td>
<td>Moderate*</td>
</tr>
<tr>
<td>Records of interaction with the MOL</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Records of interaction with the WSIB</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>JHSC records</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>“History of violent behaviour records”</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Personal biological and chemical agent exposure records</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>Personal dosimetry records and radiographic exposure records</td>
<td>Strong link to exclusion</td>
</tr>
<tr>
<td>WSIB claim files</td>
<td>Strong link to exclusion</td>
</tr>
</tbody>
</table>

*Note that union members of a Joint Health and Safety Committee (JHSC) have a right of access to these records under the *Occupational Health and Safety Act*. In the event of a FIPPA request for these records, each record should be assessed individually for exclusion. It is arguable that any records collected under a program designed for the protection of workers and to facilitate JHSC discussions are excluded.
Appendix 5: Sample Notice of Collection and Employment-Related Matters

When hospitals collect personal information for employment-related purposes, they are not subject to the formal requirement to give “notice of collection” under FIPPA nor should they give notice of collection in a manner that suggests the employment-related records in which employee personal information is contained are subject to FIPPA. Giving notice to employees about how their personal information will be used is nonetheless a good, privacy-protective practice.

The following is a notice statement that would be appropriate to use for recruitment and hiring purposes.

We may use and disclose the personal information collected on this application form for the purpose of determining your suitability for employment. If we hire you, this information will be incorporated into your personnel file and used and disclosed for the purpose of administering your employment.

OR (on a posting or in a hiring guide for candidates)

We collect a range of personal information in the course of our hiring process. We may use and disclose all such information for the purpose of determining your suitability for employment. If we hire you, some of the information we collect in the course of our hiring process will be incorporated into your personnel file and used and disclosed for the purpose of administering your employment.

The following notice statement captures the typical purposes for collecting personal information that is incorporated into a disability management file.

We will use the personal information we receive from your personal physician to:

- assess the validity of your absence from work and your entitlement to sick pay [or short term disability benefits]; and
- ensure your safe return to work and develop an accommodation plan.

These purposes may also be incorporated into a formal consent document. Note that labour arbitrators have recently demanded that consent language used by employers in the process of disability management be very limited in the scope so not to authorize the use and disclosure of employee medical information beyond what is immediately necessary for disability management purposes.
Appendix 6: Frequently Asked Questions

1. Does FIPPA apply to letters that offer employment? What about side letters? Are they accessible under FIPPA?

FIPPA applies to final, executed “agreements.” Both formally recorded and informally recorded agreements (e.g., letter offers) are subject to the Act. Formal and informal agreements often incorporate ancillary documents or side letters by reference – e.g., a letter offer may specify that an employee is bound by the terms of an attached confidentiality pledge. These kinds of ancillary documents are arguably accessible under FIPPA as agreements.

2. What if an employment contract predates January 1, 2007? Is it accessible under FIPPA given it has been retained?

FIPPA excludes all records, including employment contracts, that came into the custody or under the control of a hospital before January 1, 2007.

3. Are employee severance agreements excluded from FIPPA or treated the same as employment contracts?

Generally, all final, executed agreements between a hospital and an employee are subject to FIPPA. Requests for severance agreements are administered in a similar manner as requests for employment contracts.

4. What do we do if we receive a request for a severance agreement in which we have promised to keep the terms of settlement confidential? What if we made confidentiality promise was made before FIPPA came into force?

A confidentiality provision in a severance agreement does not override FIPPA whether or not it was entered into before FIPPA came into force. A hospital that receives a general records request for any severance agreement should notify the affected employee before disclosing any personal information in the severance agreement.

5. Why does consistent treatment of confidential information matter?

It is very important to consistently treat sensitive information as confidential. Consider a salary survey that contains a substantial amount of primary salary data gathered by a hospital human resources department based on hours of work. Assuming FIPPA applies, are the records containing the raw data and final analysis accessible to the public? The answer to this question will depend, in part, on how the information is treated.

The relevant exemptions are section 18(1)(a) and section 18(1)(c) and (d). They read as follows:
Section 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;

(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;

Each claim will be prejudiced if the raw data and analysis has not been consistently treated as confidential. Section 18(1) (a) requires proof that information has a “quality of confidence,” often established by adducing evidence of protection and limited distribution. Sections 18(1) (c) and (d) require proof of harm – a claim that is difficult to make regarding information that has not been kept secure.