

KEY TIPS ON FOI & PRIVACY

July 2017

Important Note: These are selected tips on complying with the *Freedom of Information and Protection of Privacy Act* (FIPPA). They are for general information only and do not cover all issues. Public servants are responsible for FIPPA compliance by ministries and other public bodies. Always consider FIPPA, and consider obtaining expert advice, in the circumstances of each case.

History and Overview of FIPPA

- Access to information is a quasi-constitutional right with *Charter* dimensions. The courts have repeatedly affirmed its importance in keeping governments accountable and informing the public.
- FIPPA allows anyone to request access to government records. Protections exist for policy advice, Cabinet confidences, government's financial interests, legal privilege, law enforcement matters, inter-governmental confidences, individual privacy, and confidential business information. These protect a broad range of public interests.
- FIPPA also regulates the collection, use and disclosure of citizens' personal information. These rules protect individual interests while enabling government to do its work.

Creating records

- FIPPA is silent about what records should be created. It is good public administration to document government decisions and actions. Public servants generally should do this, but if you have a legitimate role in the matter, consider what records you should create to document your role.
- But always think carefully about what you write. Use the "Vaughn Palmer" test: how would you feel if you read your email or other written communication in the media? How would your colleagues or constituents react? Bottom line, *always* assume that every word you write will become public.
- This is especially important with email, which is often conversational and invites off-hand remarks, ambiguous tone or meaning.

- Note that FIPPA does not apply to the constituency records of MLAs. Only records in the “custody or under the control” of a “public body”, including a government ministry, are covered.
- Be careful, therefore, about mingling your constituency records with your ministerial records. Keep them as separate as you can, including in separate filing systems.
- Remember also that if an MLA sends a letter or email to a minister, or to a ministry official or another public body, their copy will almost certainly be covered by FIPPA and therefore possibly disclosed entirely under an FOI request.
- Even though FIPPA doesn’t apply, always assume it might when you write things down. It is also good practice to protect constituents’ privacy as best you can. Treat their personal information as you would wish yours to be treated, including their health information and other sensitive information.

Managing records

- FIPPA is silent on records management and archiving. Follow government policy in deciding what records to keep and what to destroy.
- There is an appropriate place for ‘transitory records’ such as ‘personal working notes’. There is also nothing wrong with face-to-face meetings or phone calls.
- But as a rule of thumb, if it is the public’s business then, consistent with the openness goal of FIPPA, you should record information that documents official actions and decisions.
- One clear point is that email or other electronic records are not transitory because they are electronic. The content and context of a record are the key considerations, not its format.
- The government policy on what is a ‘transitory’ record is detailed and lengthy. These questions may help you decide if a record is ‘transitory’, but always defer to existing government policy before you act:
 - Is the function or activity for which the record was produced significant?
 - Is the record significant in relation to the function or activity for which it was produced?

- Does the information in the record, in relation to other records (or records to be created) records, best document the function or activity for which the record was produced?

Destroying records

- Never destroy permanent records. That is the job of public servants.
- You may destroy 'transitory' records, but, if in doubt, get advice from expert public servants before you do so. Remember the 'triple delete' scandal and the political grief it caused.
- Never destroy records, not even 'transitory' records, to which an FOI request applies. Once an FOI request applies to a record, destroying the record is a breach of FIPPA. You have to turn it over for FOI request processing.

Responding to FOI requests

- If public servants ask whether you have records that respond to an FOI request, search diligently for any records. Remember that requests must be interpreted generously. Do not try to play games and read the request down, narrow its scope. Document your search steps, so you can show what you did to search for records.
- Turn over all responsive records for processing. Provide details of your search steps if asked. Do not try to influence public servants in doing their job. Do not stall or delay your response.
- FOI can be challenging. You might be worried that a disclosure will be embarrassing, but always let public servants decide what to release, regardless of how sensitive the matter is. Uninvited involvement in decisions by MLAs, ministers or political staff will make it worse, leading to severe public criticism.
- Unless you are formally asked by public servants, be very cautious about expressing your view about how an FOI request should be answered. Your unsolicited opinion can easily look like an attempt to inappropriately influence the decision, especially where the request has nothing to do with your office.
- Never ask who made the FOI request. Doing so too easily looks like interference.

- Labelling a record 'confidential' or 'protected' will not on its own protect it from disclosure. Confidentiality can be relevant to whether some FIPPA exemptions apply, but it is not a magic shield that protects records.
- Nor do labels like 'advice to minister' or 'privileged and confidential' necessarily protect a record's contents.

Privacy

- Be careful to follow FIPPA's rules on collection, use and disclosure of personal information.
- Being a minister does not mean you are authorized to routinely access the personal information your ministry holds. Personal information about private individuals is operational information and you only should get access on a need-to-know basis in the ordinary course of operations.
- Never disclose personal information without ensuring you are authorized to do so and get advice before doing so.
- This includes in the House. Cabinet ministers in New Brunswick and in Ontario have resigned because they breached someone's privacy in the House.
- This can be frustrating if a private individual has made inaccurate allegations. The desire to set the record straight publicly can be overwhelming. But just because the individual put privacy in play does not mean you can respond by disclosing their personal information.
- *At most* you might consider assuring the House that "the facts are not as this person is claiming", which is itself a risky strategy from a communications perspective.
