

Freedom of Information? But I'm a Corporation!

Corporations may be surprised to find that they have received a notice concerning a request made under Ontario's *Freedom of Information and Protection of Privacy Act*¹ ("FIPPA") or other analogous pieces of provincial legislation. After all, the purpose behind such legislation relates to government institutions, including ministries, agencies, boards, commissions or corporations of the Government of Ontario. How could it relate to a private corporation?

FIPPA establishes a process for access to government documents through a freedom of information request ("access request"). Generally speaking, pursuant to *FIPPA*², a person³ may make a request to an institution for records in the institution's custody or control, along with payment of a \$5.00 fee. The head of the institution then makes a decision with respect to disclosure of the records. The party making the request may appeal a decision of the head of an institution by way of an appeal to the Information and Privacy Commissioner through the Office of the Information and Privacy Commissioner ("IPC").

Corporation A may find that its information is in the custody or control of a government institution and is responsive to a request made by a party (the "requestor"), even if they have been dealing with a government institution at arm's length. It may be intuitive to think that if Corporation A has received a grant, concluded an

¹ R.S.O. 1990, c. F.31 [*FIPPA*].

² *FIPPA*, ss.10 and 24.

³ It is the opinion of the writer that the term "person" should be given a narrow and legally informed definition.

agreement, or even sent a letter to an institution, its information may become subject to an access request.

However, even where particular third-party "information" that "affects the interest" of the third party is responsive to an access request, such third party is entitled to notice that their information is at issue. As such, even if Corporation A's information is contained in a less conspicuous form of government record, Corporation A may receive a third-party notice from the government institution.

Corporation A's counsel may be caught off guard if they receive a third-party notice if they do not often deal with *FIPPA* requests. This is especially true if Corporation A is headquartered in a jurisdiction outside of Ontario or does not often work in the public sector space. Notably, the third-party notice does not come from the IPC, but rather from the head of the government institution. Nonetheless, the third-party notice is required by *FIPPA*⁴, and the fact that the notice originates from the institution (and not the IPC) should not cause Corporation A to devalue or ignore the third-party notice.

In order to be compliant with *FIPPA*, the third-party notice shall contain: (a) a statement that the head intends to release a record or part thereof that may affect the interests of the person; (b) a description of the contents of the record or part thereof that relates to the person; and (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.⁵

There is no express requirement in Ontario that the head of a government institution provide a copy of the record which is responsive to the access request to the third party, although it often is. This means that Corporation A may be advised that its information is contained in a record responsive to the requestor's request without seeing the actual record at issue. The IPC has refused to order a government institution to produce a record containing a corporation's own information to the corporation itself,

⁴ *FIPPA*, s.28(1).

⁵ *FIPPA*, s.28(2).

on the basis that harm would result from disclosure of the record to the corporation.

Corporation A has twenty days after notice is given to make representations to the head of the institution which sent the third-party notice as to why the record containing its information or part thereof should not be disclosed to the requestor.⁶

By default, every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless an exemption to disclosure applies.⁷ That is, only if the institution successfully argues that an exemption applies, will the record be withheld from production in response to an access request. In order for Corporation A to substantiate the withholding of a record containing its information, it must respond to receipt of the third-party notice with arguments as to why the record should be withheld as being exempt from disclosure.⁸

The primary exemption relied upon by third parties is located in section 17(1) of FIPPA, which provides that a head of an institution shall refuse to disclose a record if:

- it reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly; and
- disclosure could reasonably be expected to,
 - prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
 - result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

⁶ FIPPA, s.28(2),(5).

⁷ FIPPA, s.10.

⁸ In fact, past IPC decisions related to some exemptions from disclosure require detailed and compelling evidence.

- o result in undue loss or gain to any person, group, committee or financial institution or agency; or
- o reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.⁹

Notably, the language in the third-party information exemption in *FIPPA* is mandatory, meaning that the head of an institution does not retain discretion to produce the record if the exemption applies and if the third party does not consent to disclosure.

Additionally, Corporation A may object to disclosure of the record or part thereof if the record contains personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy.¹⁰

The head of an institution is also required to seek consent if it intends to disclose information on records or information obtained from Corporation A's tax return or gathered for the purpose of determining tax liability or collecting a tax.¹¹

The head of an institution is not obligated to provide third-party notice to Corporation A unless the head believes that disclosure of the record relates to one of the above-noted exemptions. However, upon receipt of notice, there is no express limitation on Corporation A preventing it from objecting to disclosure of the record on the basis of other relevant exemptions contained in *FIPPA*.

After Corporation A provides its representations in response to the third-party notice (in writing¹²), the head of the institution to which the access request was made shall decide whether or not to disclose the record or part thereof and give written notice of the decision to

⁹ *FIPPA*, s.17(1).

¹⁰ *FIPPA*, s.21(1)(f).

¹¹ *FIPPA*, s.17(2).

¹² *FIPPA*, s.28(6).

the person to whom the information relates and the person who made the request.¹³

Where the head of the institution intends to disclose a record or part thereof, Corporation A will have thirty days after receiving notice to appeal the institution's decision to the IPC.¹⁴ If the institution decides to produce the record, and no appeal is taken by Corporation A, it will be produced to the party who made the request.¹⁵

However, if the head of the institution agrees that an exemption applies – including any third-party exemption argued by Corporation A -- then the institution may deny the requestor access to the record. All of the exemptions which the head of the institution may claim are beyond the scope of this article. However, the party requesting access has its own appeal process available if it disagrees with the government institution's decision.

In summary: Corporation A has twenty days to respond to a third-party notice received from a government institution and express its views to the head of the government institution. If Corporation A intends to oppose disclosure of records or part thereof, it will have to meet the statutory conditions in FIPPA, and will have to do so in a way consonant with past IPC decisions. Clearly, if Corporation A is considering withholding a record from disclosure, it should contact counsel early to ensure that its interests are adequately protected. Are you Corporation A?

by Adam D.H. Chisholm

¹³ FIPPA, s.28(6).

¹⁴ FIPPA, s.28(7).

¹⁵ FIPPA, s.28(9).

For more information on this topic please contact:

Toronto [Adam D.H. Chisholm](#) 416.307.4209 adam.chisholm@mcmillan.ca

[a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2011