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## Will my Securities Investigation Evidence be Subject to *FIPPA*?

It is generally safe to assume that records given to government institutions will be subject to freedom of information/access to information legislation. There are exceptions, of course. For example, Ontario's *Freedom of Information and Protection of Privacy Act*<sup>1</sup> lists the institutions that it governs<sup>2</sup> and carve-outs from its applicability<sup>3</sup>.

After receiving a request pursuant to *FIPPA*, institutions may decide to withhold records from requesters. Some jurisdictions possess an administrative tribunal, which decides whether such withholding is appropriate or not.<sup>4</sup> Part of the usual appeal procedure involves the administrative tribunal reviewing the records to determine if withholding is appropriate.

What if an institution does not want to give its records to the freedom of information-related administrative tribunal for consideration?

In *X.X. (Re)*<sup>5</sup>, a Commissioner of the Ontario Securities Commission ("**Commission**") considered a request by Staff of the Commission to provide records to Ontario's Information and Privacy Commissioner ("**IPC**"). The Commissioner ultimately ordered that most of the

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<sup>1</sup> R.S.O. 1990, c. F.31 [*FIPPA*].

<sup>2</sup> R.R.O. 1990, Reg. 460.

<sup>3</sup> *FIPPA*, s. 65.

<sup>4</sup> In contrast to the Canadian federal process outlined in the *Access to Information Act*, where institutions are the final adjudicators subject only to court review.

<sup>5</sup> 2018 ONSEC 45.

records be provided, but copies of a transcript in the Commission's possession not be provided unless further steps were taken.

### The Matters in Issue

The requester (X.X.) sought records about himself in the possession of the Commission. The Commission initially refused access to thirty-three records. Within the thirty-three records were four copies in various formats of a transcript of evidence given by Y.Y.

The requester appealed, seeking access to the records.

As is customary in Ontario's freedom of information regime, the appeal began with mediation. As is also customary, the IPC sought copies of the records at issue for the purpose of responding to the appeal and participating in the mediation.

### Statutory Regimes at Issue

The IPC may compel production of records for examination when adjudicating an appeal through its "notice of inquiry".<sup>6</sup>

The thirty-three records were the product of a formal investigation, commenced by an investigation order under the *Securities Act*. The confidentiality of such records is protected by section 16 of the *Securities Act*, which prevents any person from disclosing information regarding produced documents or testimony. This is subject to the Commission's ability to order that records be produced if it is in the public interest.<sup>7</sup> Where practicable, people who give evidence pursuant to section 13 are entitled to reasonable notice of the application and an opportunity to be heard before the Commission orders disclosure.<sup>8</sup> The *Securities Act* may permit disclosure without notice when that disclosure is to be made to a governmental authority.<sup>9</sup>

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<sup>6</sup> *FIPPA*, s. 52(4).

<sup>7</sup> *Securities Act*, R.S.O. 1990, c. S.5 [*Securities Act*], s. 17(1)(b).

<sup>8</sup> *Securities Act*, s. 17(2).

<sup>9</sup> *Securities Act*, ss. 17(2.1), 153(3).

*FIPPA* provides that sections 16 and 17 of the *Securities Act* prevail over it.<sup>10</sup>

Past case law has held that an IPC adjudicator may see the records at issue before deciding whether or not carve outs from *FIPPA* apply.<sup>11</sup> The Ontario Court of Appeal, when considering a different issue, stated that “[i]t is our opinion that s.52(4) [the provision permitting the IPC to request records] must be construed as being applicable to all inquiries conducted pursuant to the Act”.

### Why the Commission Did Not Release All Records to the IPC

The Commissioner held that it was not in the public interest to release Y.Y.’s transcript to the IPC without notice to Y.Y. The Commissioner relied on three arguments that he felt would be available to Y.Y. to make, including whether production the IPC was legally required. The Commissioner reasoned that the application of the confidentiality of section 16 of the *Securities Act*, and thereby an overriding right to confidentiality, could be argued to apply without the IPC having possession of the record itself.

The Commissioner’s order was made without prejudice to the right of any party to bring a further application to the Commission seeking production of Y.Y.’s transcripts. In other words, production to the IPC could again be sought after notice to Y.Y.

### Why is *X.X. (Re)* Notable?

The decision in *X.X. (Re)* is notable for several reasons. First, it is exceptional when a government institution refuses to provide records to the IPC upon request. When there are sensitivities about reproduction of documents, the IPC has sometimes permitted documents to be reviewed confidentially in their location rather than copied outright.<sup>12</sup> But in *X.X. (Re)*, the Commission is expressly

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<sup>10</sup> *FIPPA*, s. 67(2)(9).

<sup>11</sup> *Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII 512 (Ont. C.A.).

<sup>12</sup> In fact, *FIPPA* provides that an Ontario institution may insist on this: ss. 52(4)-(7).

refusing to give the IPC access to Y.Y.'s transcript (aside from a redacted cover page). That is not to say that the Commissioner erred in making his order, but it is uncommon to see such a refusal rather than confidentiality or issues about the application of *FIPPA* dealt with within the IPC appeal process.

Second, it is also uncommon for the public to have access to institutional decision-making about disclosure of information to the IPC leading up to the notice of inquiry stage of an appeal. While it was undoubtedly proper for the Commission to release the *X.X. (Re)* decision to the public, it is unique.

Third, the Commission relied on the public interest in protecting the privacy interests of Y.Y. when refusing to produce his transcripts to the IPC. Another, as important, public interest was not mentioned: the general public interest in protecting the evidence given by witnesses during confidential securities-related investigations. This interest certainly aligns with an individual's privacy interests but is broader in nature. Nonetheless, it would have been difficult for the Commissioner to rely on this interest because it does not appear that it was raised by Commission Staff (who sought the disclosure to the IPC).

The substantive result of the *X.X. (Re)* decision is that a person who gave evidence during a confidential Commission investigation is likely to be provided with notice of disclosure of that evidence before it is released to the IPC. This is the *real* take-away from *X.X. (Re)* for many who work in the securities field and for persons who may be summonsed to give evidence to Commission Staff as part of an investigation. The Commission may provide you with an opportunity to object to disclosure of your evidence to the IPC before it occurs, although such an outcome remains discretionary on the part of the Commission.

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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.

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