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ONTARIO HOSPITAL ASSOCIATION REQUESTS A FREEDOM OF INFORMATION REGIME FOR ONTARIO HOSPITALS

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INTRODUCTION

The Ontario Hospital Association ("OHA") took a big leap forward on October 27, 2009, with the aim of improving public transparency and accountability. The association requested that the *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c.F.31 [*FIPPA*], be extended to the hospital sector in order to strengthen public trust and confidence in Ontario hospitals. The OHA's Board of Directors unanimously agreed to this proposal and sent letters to the Ontario Minister of Health and Long Term Care Deb Matthews, and Information and Privacy Commissioner Ann Cavoukian to inform them of this proposal and to request meetings to discuss further steps.

The OHA, which was founded in 1924, represents 155 public hospitals across the province. The association uses advocacy, education and partnerships to build an innovative and sustainable health care system for all Ontarians. The province's hospitals are already considered the most transparent and accountable in Canada. They accomplish this because they participate in accreditation processes, are subject to Hospital Service Accountability Agreements, and are audited on a regular basis by Ontario's Auditor General. They also provide extensive public data on their finances, patient safety performance and patient satisfaction through consumer-oriented websites like <myhospitalcare.ca>.

While this development has received both acceptance and rejection, it is important that stakeholders consider some of the legal issues that may arise should this change be implemented. This article is intended to contribute to stakeholder awareness, and to suggest some strategies for hospitals to consider in order to make the transition as smooth and efficient as possible.

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT – FIPPA

FIPPA came into effect on January 1, 1988 which provided individuals with a right of access to certain records and personal information under the custody or control of institutions covered by the Acts. The underlying purpose of *FIPPA* is to ensure that Ontarians have the information necessary for democratic participation and to ensure that government personnel remain accountable for their actions. Approximately 200 public institutions and the Ontario Government became subject to the act whereas municipalities, school boards and other local government institutions became subject to

their own access and privacy legislation. This legislation is called the *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c.M.56 [*MFIPPA*] which came into effect three years later in 1991.

The main purposes of these Acts are:

- To provide a right of access to information under the control of institutions in accordance with the principals that:
    - Information should be available to the public;
    - Necessary exemptions from the right of access should be limited and specific;
    - Decisions on the disclosure of information should be reviewed independently of the institution controlling information.

- To protect the privacy of individuals with respect to persona information about themselves held by institutions and to provide individuals with a right of access to that information.

The access to information part is the portion that will likely be the focus of any hospital sector amendment. It has the following key features:

- An obligation to provide the public with access to all records in a hospital's custody or control that are not specifically excluded from coverage;
- Various procedural obligations dealing with how to receive and respond to access requests;
- A right to refuse access to records and information subject to a number of specific discretionary exemptions;
- A requirement to refuse access to records and information subject to mandatory exemptions;
- Oversight by the Information and Privacy Commissioner of Ontario, who hears appeals of access decisions and has a power to order the disclosure of records.

This kind of regime features a much broader right of access than that brought in by the *Personal Health Information Protection Act,* 2004, S.O. 2004, c.3, Schedule A, which only gives individuals a right of access to their own personal health information. *FIPPA* grants a right to all individuals to request access to any records held by government organizations unless the information falls under an exemption or is otherwise excluded from that Act. Whether an additional exclusion is necessary to ensure that hospitals and their patients have a sufficient "zone of privacy" within which to receive, deliver and improve the delivery of health care is likely to be a key question for policy-makers who address hospital sector coverage.

EXEMPTIONS

Exemptions are necessary to achieve a balance between democratic values, on one hand, and control over certain aspects of hospital operations and confidential

information/records, on the other. A record is any record of information however recorded, whether in printed form, on film, by electronic means or otherwise. The definition of a record is very broad and includes virtually every form of information held in some recorded form by an institution. The definition is not restricted to actual physical documents, but includes records that can be created from existing data in a computer bank. Even documents such as electronic mail, or working copies and drafts of reports and letters are considered to be records. Under *FIPPA* there are two main kinds of exemptions: mandatory and discretionary.

Mandatory exemptions are those which require that the information be withheld from disclosure. Mandatory exemptions include s. 12 Cabinet records, draft legislation, advice to Ministers and s.21 personal privacy. There is also a mandatory exemption for third party information (s.17) if the information satisfies a thorough confidentiality test. Only if the third party can establish that the information was supplied to the government entity on a confidential basis and otherwise meets a strict harm analysis can the information be withheld from disclosure. It is important to note that, in Ontario, it is difficult to shelter contracts with government organizations under this exemption.

Hospitals, and those who enter into contracts with hospitals, may find that their agreements are generally disclosable unless another exemption is applicable – regardless of any confidentiality clause or agreement. If grounds for a mandatory exemption exist, the head must refuse access unless strong public interest outweighs the purpose of the exemption.

All other exemptions are discretionary exemptions which are those that the government organization can choose whether or not to invoke and thereby withhold applicable information. These types of exemptions require a two-stage process in order to determine whether a discretionary exemption is to be applied. First, the head must determine whether the facts exist or may exist which bring the record requested within the exemption. Second, the head must decide whether he/she is willing to release the record, despite the existence of grounds for the exemption. Generally, discretionary exemptions under *FIPPA* include law enforcement information, information that is subject to solicitor-client privilege and information that is already published or will be published within 90 days.

The most notable discretionary exemptions from the perspective of hospitals includes information that would be a danger to safety or health, advice given by employees or consultants, and information that may harm the economic interests or competitive position of an institution.

FIPPA REGIME IMPACTS ON HOSPITALS

The means by which hospitals might be made subject to *FIPPA*'s access to information regime is highly uncertain. It is possible that a FOI regime could be enacted in new legislation that is specific to hospitals. However, the likely course of action (because it is the one suggested by the OHA) is to extend the FOI regime to hospitals through

amendments to Ontario's already existing legislation *(FIPPA).* The drafters of any amendments to *FIPPA* will need to examine the interplay between a newly imposed access-to-information regime and the pre-existing rights, obligations and privileges included in both the *Personal Health Information Protection Act* and the *Quality of Care Information Protection Act*, 2004, S.O. 2004, c.3, Schedule B.

If extended to hospitals, an FOI regime is likely to impose the following obligations:

1. A basic obligation that the hospital provide the public with access to all records not specifically exempted or excluded by law;

2. A set of administrative obligations outlining how a hospital must handle a request for access (including a timeline to respond to the requestor);

3. Oversight of the FOI process by the Commissioner, who can hear and resolve appeals from affected parties.

An FOI regime will involve changes at both the operational and administrative level, and will require, at minimum, personnel training, potentially increased staffing, dedicated personnel and proper, standard procedures for retrieving and locating requested information. There are a number of operational impacts that hospitals should expect with the implementation of the *Freedom of Information Act*.

The first impact is an increased volume of requests to see information, which will likely be highest in the first few years of the regime. Hospitals can expect to receive requests that focus on:

- Procurement;
- Major initiatives;
- Ex-employees looking for their employee files;
- Patients inquiring about their medical file or decisions related to their care; and
- Budgets.

Hospitals will also need to implement FOI policies and processes that standardize the legal requirements. The FOI process generally involves the following elements:

- Establishing which office or personnel will handle requests and communicate with the requestor;
- Developing a record search and retrieval process, so that responsive records are gathered from across the organization;
- Consulting internally about the disclosure of responsive records;
- Consulting externally about the disclosure of responsive records that involve third parties;
- Consulting with management or with legal advisors to determine whether there are discretionary or mandatory exemptions that must be considered;

- Replying to the requestor and disclosing the responsive records within the timeline set out by the law;
- "severing" or "removing" any parts of the record that are subject to an exemption.

The process may also involve estimating costs, where the law or its regulations permits the recovery of costs. Under *FIPPA*, there are a number of set costs that can be recovered, for example, costs for copying records or for search time.

Another important aspect is establishing the FOI regime in hospitals will involve training and education of all personnel. Training helps to ensure that the hospital effectively searches its records, consults affected parties, and assists senior members of the FOI team to make accurate determinations of whether information should be exempted from disclosure. All personnel need to be aware of how to refer to an access request within the organization, how to properly retain and store records to facilitate responding to an access request, and to remember that records can take a variety of unexpected forms (e.g. emails, expense claims). Personnel that are already trained in personal health information and/or records management will likely make smoother transition and will require less extensive training.

RECOMMENDATIONS

Pending the extension of the FOI laws to hospitals, hospitals would benefit by initiating voluntary disclosure practices. This serves to indoctrinate a standard method of access (along with the corresponding sensitivity to preparing, circulating and storing records) in advance of any legislation. It also provides knowledge that would allow hospitals to make meaningful contributions to any consultation process that may be held prior to enacting the legislation.

It is also recommended that hospitals triage the disclosure process into informal and formal streams. There is no requirement under *FIPPA* that every request for information be handled in a formal way, and by triaging disclosure, hospitals can avoid putting basic requests through the formal access process. This results in a faster response time for the requestor, and conserves hospital resources by reducing the number of requests that require FOI resources to resolve. Triaging the disclosure process would require hospitals to create separate processes for automatic, routine and non-routine disclosure.

- Automatic disclosure (active dissemination) involves releasing certain information or records periodically without any specific requests. This would be a continuation of any voluntary disclosure set up prior to the enactment of FOI legislation for hospitals. Active dissemination could involve setting up a section on the hospital website for information such as board and management composition, policies and by-laws, reports and plans. This anticipates basic requests and improves pubic transparency.

- Routine disclosure involves establishing a specified list of records that can be disclosed without any internal consultation. This helps to simplify requests and frees FOI personnel to handle the non-routine requests.

- For non-routine (formal) disclosure, FOI staff would ensure that the necessary consultations are made, both internally and externally. These requests would be handled formally under whatever legal regime is imposed.

CONCLUSION

It is important that hospitals and other stakeholders begin to consider how an FOI regime would affect them and what operational requirements would be imposed upon them if the legislation were to be enforced. At the moment, no draft legislation has been proposed, providing ample opportunity for hospitals and stakeholders to voice their concerns and opinions in order to help shape any legislative developments as they progress.

[*Editor's Note*: Hayley Valleau is a summer student at the firm Graham Partners LLP and will be attending her 2nd year at Wilfrid Laurier University this Fall with a major in Communication Studies and a minor in Environmental Studies, with aspirations to attend law school. Shari Elliott is a Partner with Graham Partners LLP (formerly Graham Wilson & Green) in Barrie, Ontario. Her legal practice focuses on Environmental, Municipal and Real Estate Law. Shari is well-versed in freedom of information laws and how to manage and respond to access requests for information.]

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