



Strategies on How to Document in the FIPPA Era

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Strategies on How to Document in the FIPPA Era

Overview

Documentation Strategies:

1. Risk and Quality
2. Board Documents
3. Procurement Documents
4. Labour and Employment

Overview – Access to documents

- Access under PHIPA
- Public documents
- Voluntary
- Production obligations (legal proceedings)

Now under FIPPA

- General right of access to information to records (freedom of information)
- Access under FIPPA (personal information)

Production Obligations

- Legal proceedings – civil claims, criminal proceedings, tribunals, commissions, health colleges and inquests
 - Civil proceedings – must disclose every document relevant to any matter in issue ... that is or has been in the possession, control or power of a party
- Risk managed approach to documentation

General Documentation Strategies - FIPPA

- Document with a purpose
- Be deliberate
 - understand exclusion or exemption criteria
 - identify and mark documents
 - support through policies, practices, terms of reference
- Be professional
- Risk managed approach – balance

General Documentation Strategies - FIPPA

- Standardize record keeping procedures through the development of policies and guidelines
- Handwritten notes or notations form part of a record
- Working copies and drafts of reports and letters are also records

Risk and Quality Documentation

- Right of access, unless subject to exception or exclusion:
 - QCIPA
 - quality of care information prepared for a designated quality of care committee (exclusion)
 - Quality of care in a hospital
 - confidential information provided to or prepared by a committee to assess or evaluate, so as to improve the quality of health care and related programs and services (exemption)
 - Legal privilege (exemption)
 - Solicitor and client or litigation privilege (specific tests must be met)

Risk and Quality Documentation

- Survey various quality and risk activities being undertaken (formal and informal)
- Review terms of reference for committees
- Build language of exemptions into policies, terms of reference and communications
- Use templates, standardized communication systems, and label information so that protected documentation stays protected

2. Board Documents

- Consider public access to board minutes and agendas
- No general exemption for in camera minutes, however, look at the rationale for closed session
- Consider language of exemptions/exclusions when preparing minutes
- Create *in camera* policy

Procurement and FIPPA

- Principles
- Disclosure Obligations and Exemptions
- Examples
 - Contracts
 - Negotiation strategy/advice
 - Unsuccessful Responses to RFP
- How to Prepare/Document

Principles

- Tension between public sector transparency and protection of sensitive third party information

Disclosure Obligations

- Every person has right to access record in the custody or control of institution
- Unless
 - Exemption
 - Frivolous/vexatious access request

Exemptions

- Section 17 – Third Party Information
- Section 18 – Economic and Other Interests

Section 17 – Third Party Information

- Mandatory exemption from disclosure for certain third party information where disclosure could reasonably be expected to cause certain harms
- Third party must be notified and given opportunity to make representations before access decision is made

Section 17 – Third Party Information

- Three threshold tests, ALL must be met:

Test #1:

Record must contain one or more of the following types of info:

- Trade Secret
- Scientific Information
- Technical Information
- Commercial Information
- Financial Information
- Labour Relations

Section 17 – Third Party Information

Test #2:

Information supplied in confidence to the hospital by a third party

- “Supplied”
- “In confidence”

Section 17 – Third Party Information

Test #3:

Disclosure of information must give rise to harm as follows:

- Prejudice significantly competitive position or interfere significantly with contractual or other negotiations
- Result in similar info no longer being supplied
- Result in undue loss or gain
- Reveal info supplied to resolve labour relations dispute

Section 18 – Economic and Other Interests

- Discretionary exemption for certain info as follows:
 - Trade secrets or financial, commercial, scientific or technical information belonging to the hospital
 - Employee research
 - Prejudice to economic interest/competitive position
 - Negotiating strategy
 - Personnel or administrative plans
 - Policy decisions/undue financial benefit or loss
 - Examination or test question
 - Quality of health care in the hospital

Example – Contract

- IPC view is terms of contracts that are result of negotiations (or could have been negotiated) are not “supplied” by one party to the other
- Contract will meet the third party exemption “supplied” test only where
 - Information provided is not susceptible to change or is relatively immutable
 - Info supplied will allow outside person to make accurate inferences about underlying non-negotiated info

Example – Negotiation Strategy and Advice

- May refuse to disclose positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of the hospital
- May refuse to disclose advice or recommendations of officers, employees or consultants retained by the hospital made in the course of deliberative process of decision-making and policy making and communicated

Example – Unsuccessful Response to RFP

- Info in an unsuccessful response would be considered to have been “supplied” (vs negotiated contract)
- Proposals likely submitted with expectation of confidentiality
- Competitive position of unsuccessful proponent could be prejudiced if competitors become aware of terms proponent was willing to offer
- Third party exemption could apply

How to Prepare/Document

- Contracts
 - State that confidentiality obligations are always subject to your disclosure obligations under law
 - State that hospital will be (or later is) subject to FIPPA and will comply with terms of FIPPA in respect of any disclosure
 - Could consider including a consent to disclosure

How to Prepare/Document

- RFP
 - Include clauses:
 - For proponent to acknowledge Hospitals FIPPA obligations
 - requiring proponent to specifically identify info submitted for which confidentiality should be preserved
 - For proponent to acknowledge that info provided in proposal may need to be disclosed where required by law even if identified as confidential

How to Prepare/Document

- Be clear and informative about your FIPPA obligations with third parties
- When a request is received
 - Each request will require independent assessment whether or not exemptions apply
 - Important for procurement team to remain involved in process and work closely with your FOI team

Labour and Employment

- Important to note that there is a general exemption that excludes most labour/employment records (s.65(6))
- Thus, the impact of FIPPA in world of labour and employment will be limited

Section 65(6) General Exemptions:

- Records relating to proceeding or anticipated proceeding that relate to labour relations or the employment of a person
- Records relating to negotiations or anticipated negotiations that relate to labour relations or employment of a person
- Records relating to meetings, consultations, discussions or communications about labour relations or employment-related matters

Documentation Strategies

- Even if largely exempt, still worthwhile to have consistent practices across organization
- Document with an eye to facilitating the application of FIPPA
 - identify the nature/purpose of the document (ex. notes from investigation meeting; interview with job candidate; performance evaluation; etc.)
- For employees/potential employees providing information:
 - Notify of possibility that information provided may be subject to disclosure under FIPPA;
 - Indicate purpose as to why personal information is being collected and how it will be used

Documentation Strategies

- If record going to be sensitive and possibility of access, think about ways to protect the record at the outset
- Watch out for e-mail
- Remember – documents and records still subject to production through litigation processes

Questions?

Thank you!