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Extending Access To Information Obligations To Ontario Hospitals: What Would It Mean?

Date: January 5, 2010

In late October of last year, the Ontario Hospital Association asked the provincial government to extend coverage of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to hospitals as a means of promoting transparency and public accountability. This bulletin outlines the basic features of Ontario's access to information regime and raises questions about how it may eventually apply to hospitals.

WHAT IS FIPPA ABOUT?

In 1988, the Ontario Government and approximately 200 other public institutions became subject to FIPPA, which is designed to promote access to information and protection of individual privacy. Municipalities, school boards and other local government institutions became subject to their own access and privacy legislation ("MFIPPA"), in 1991.

FIPPA and MFIPPA did not initially provide for universal coverage. A number of public institutions who receive government funding, including hospitals and universities, were not subject to either Act. Over the past 20 years, a number of institutions have been added to or deleted from coverage under one or the other of the Acts.

FIPPA has two parts – a part that promotes the protection of privacy and an access to information part. The access to information part, which will likely be the focus on any hospital sector amendment, has the following key features:

- a presumptive 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/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* in 2004, which only gives individuals a right of access to their own personal health information. FIPPA grants a right of access to *all recorded information* in an institution's custody or control that is not specifically excluded. Most employment-related records, for example, are excluded from the right of public access.

Whether an additional exclusion is necessary and warranted 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.

HOSPITALS AND FIPPA

The means by which hospitals might be made subject to FIPPA's access to information regime is highly uncertain. For one, 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 arising from both the *Personal Health Information Protection Act* and the *Quality of Care Information Protection Act.* There are also other unique features of hospital administration – practice

plans in teaching hospitals, for example – that may raise unique issues in applying FIPPA's pre-existing provisions. These questions and others mean that the incorporation of hospitals into FIPPA might be associated with significant amendments. Though not contemplated by the OHA recommendation, it is also possible that hospitals be made subject to their own access to information legislation. It is too early to tell.

HICKS MORLEY'S ACCESS TO INFORMATION PRACTICE

Hicks Morley has advised and represented Ontario public sector institutions on matters related to freedom of information since FIPPA first came into force in the late 1980s. We have now built a leading provincial access to information practice based on this long-term public sector experience. Our current practice involves representing institutions in access appeals, advising on access requests and assisting with proactive matters such as records management procedure and policy. Given this experience with Ontario freedom of information law, and our equally long history in supporting hospital administrators, we believe we are well suited to help hospitals meet the challenges associated with coming under the purview of FIPPA.

We will follow and provide regular updates on hospital sector access to information developments. We have also prepared an information practices for hospitals looking for early input on access to information law and practice. If you would like a copy of the package or have any questions about FIPPA, please do not hesitate to contact Scott Williams (416.864.7325), Paul Broad (519.931.5604) or your regular Hicks Morley lawyer.

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