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Records Retention now an Access Issue

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The *Freedom of Information and Protection of Privacy Act*[2] ("***FIPPA***") and *Municipal Freedom of Information and Protection of Privacy Act*[3] ("***MFIPPA***") have unprecedented amendments coming into force. These amendments impart record retention requirements not found in any other federal or provincial access to information statute.

The Amendments Requiring Record Retention

The newly passed section 10.1 of FIPPA reads:

> 10.1 Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.[4]

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[2] RSO 1990, c F.31 [*FIPPA*].

[3] RSO 1990, c M.56 [*MFIPPA*].

[4] *FIPPA*, *supra* note 2, s 10.1.

A similar amendment has been passed for inclusion in *MFIPPA*.[5]

These amendments will come into force on a future date.

The existing *FIPPA* regime requires institutions to take "reasonable measures" to prevent inadvertent destruction or damage of records. For example, section 4(3) of *FIPPA* Regulation 460 provides that "every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place".[6] However, the new section 10.1 explicitly requires compliance with any applicable records retention policy.

The Amendments against Destruction of Records

FIPPA and *MFIPPA* are also being amended to add an offence for intentional destruction of records. No person shall:

> alter, conceal or destroy a record, or cause any other person to do so, with the intention of denying a right under this Act to access the record or the information contained in the record;[7]

This intentional destruction offence contains a *mens rea* component related to denial of access. Destruction of records otherwise would not be captured by the offence.

The existing regime in *FIPPA* arguably did not provide the Information and Privacy Commissioner ("**Commissioner**") recourse if documents were destroyed. Past requestors seeking documents that had been destroyed have appealed access decisions to the Commissioner, only to be told such appeals were moot. New paragraph 61(1)(c.1) arguably permits the Commissioner the ability

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[5] *MFIPPA*, *supra* note 3, s 4.1.

[6] RRO 1990, Reg 460, s 4(3).

[7] *FIPPA*, *supra* note 2, s 61(1)(c.1); see also *MFIPPA*, *supra* note 3, s 48(1)(c.1).

to take further steps if he feels that there has been an intentional destruction of records.

Interplay Between the Amendments

The records retention and intentional destruction amendments (together, the "**Amendments**") buttress each other. The requirement of intent contained in the new offence against destruction of records may be difficult for the Commissioner to satisfy. By forcing institutions to have applicable records retention policies in place, presumably there is a greater chance that the Commissioner will have an objective measure against which to judge an institution's deletion of information in any particular instance. That is, the records retention policy requirement creates a "baseline" against which to judge the intent behind the destruction of records.

History of the Amendments

Both of the Amendments were implemented through Bill 179, "An Act to promote public sector and MPP accountability and transparency by enacting the Broader Public Sector Executive Compensation Act, 2014 and amending various Acts".[8]

The Amendments were proposed in response to an investigation report by the Commissioner issued in June 2013 ("**Report**"), which was primarily focused on the conduct of a staff member of the Ministry of Energy.[9]

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[8] Bill 179, *An Act to promote public sector and MPP accountability and transparency by enacting the Broader Public Sector Executive Compensation Act, 2014 and amending various Acts*, 2nd Sess, 40th Parl, Ontario, 2014.

[9] Information and Privacy Commissioner Ontario, "*Deleting Accountability: Record Management Practices of Political Staff*", by Commissioner Ann Cavoukian (Toronto: IPC, 5 June 2013), [*IPC Report*].

Consequence of the Amendments

In some ways, the Amendments are reliant on existing provisions of the *Archives and Recordkeeping Act, 2006*. Interestingly, *FIPPA* and *MFIPPA* do not expressly require the creation of a records retention policy, instead relying on an institution's compliance with records retention requirements "whether established under and Act or otherwise, that apply to the institution". This appears to be a nod to the *Archives and Recordkeeping Act, 2006*,[10] which already requires the development of a "records schedule".[11] A records schedule is required for every "public body" including the Executive Council or a committee of the Executive Council, a minister of the Crown, a ministry of the Government of Ontario, a commission under the *Public Inquiries Act, 2009*, or an agency, board, commission, corporation or other entity designated as a public body by regulation.

Notably, the Commissioner stated in the Report, "I learned that there was little, if any, knowledge" of the application and requirements of the *Archives and Recordkeeping Act, 2006*.[12]

In any instance, the Amendments contain a new offence not already found in the offences section of the *Archives and Recordkeeping Act, 2006*.[13] To the extent that institutions formerly ignored the *Archives and Recordkeeping Act, 2006* and its document retention requirements, they may have to reconsider as the Commissioner may now interpret such ignorance as intent to avoid access.

Because of the political and administrative background behind the Amendments, it may not be a surprise that there are no analogous provisions Federally or in any other Province. There is therefore little domestic precedent about if, how and when the Amendments will be

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[10] SO 2006, c 34, Sch A [*ARA*].

[11] *Ibid*, s 11(2).

[12] *IPC Report*, *supra* note 9 at 9.

[13] *ARA*, *supra* note 10, s 20(8).

enforced. Government institutions may want to re-examine their records retention policies, entities dealing with government may want to explore what those policies are before providing institutions with information and those requesting information may use these new provisions in arguing for access to information. It will be interesting to observe whether the Amendments are actually used, or instead by providing an outcome for the Report, have already served their purpose.

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a cautionary note