



Office of Legal Counsel

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Words of Caution in a FIPPA World

“Fred creeps me out”; “Jennie is crazy”. Those thoughts may have crossed our minds about someone we deal with in our everyday work-life. Often, those thoughts are kept private or maybe shared in-person over coffee. In those circumstances, there may be an expectation that Fred or Jennie may not have access to those private feelings. But, if that same message is conveyed by email or through a voicemail message, the expectation of privacy no longer exists. Emails and voicemails fall within the definition of a “record” and under provincial privacy legislation, may be accessed by Fred or Jennie. Perhaps that should give us pause about how we communicate those matters we wish to keep private.

Since June 2006, universities in Ontario have been subject to the *Freedom of Information and Protection of Privacy Act* (“Act” or “FIPPA”). The purpose of this Act is to provide an opportunity for individuals to access records held by institutions subject to limited and specific exceptions. Although transparency and openness may be considered to be laudable goals, individuals working in universities should be aware of how the Act impacts ‘business as usual’. Under the Act, a “record” is more than just records of an official or semi-official nature. A “record” is defined as:

“ any record however recorded, whether in printed form, on film, by electronic means or otherwise”.

In practical terms, a record can include voicemail messages, pictures, letters and ...**email**. The test of whether something constitutes a “record” is not whether it is business or personal in nature or whether it was sent to 50 people or just one. The definition of a record identifies its physical qualities and whether it exists in a machine readable format.

Once a record exists, the next question is who can access the record? The answer to that depends on the kind of information contained in the record. Under the Act, a person can request any kind of information subject to express exceptions. For example, a person can request records containing their own personal information. Common examples of personal information are an address, telephone number and date of birth. However under the Act, the definition of “personal information” can also include someone else’s views or opinions of the requester. So, the statements “Fred creeps me out” or “Jennie is crazy” are personal information of Fred or Jennie. The fact that those statements were never intended to be seen or shared with Fred or Jennie does not change how those statements are viewed under the Act. Those statements would be considered to be Fred or Jennie’s personal information and might be released, if requested.

That said, there are a number of provisions under the Act which exclude the disclosure of certain kinds of records. For example, an institution may refuse to disclose records where the information was supplied:

- by a third party under the expectation of confidentiality;
- as part of an ongoing police investigation, or
- relating to labour relations or employment.

But the exceptions are narrowly interpreted.

So how does one carry on ‘business as usual’ in the age of FIPPA? Write emails and memos as if the world will see them. Don’t leave voicemails you would not want shared. If you knew these emails or voicemail messages might be shared, would you send them?

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