Formalizing Privacy Protection: FIPPA, Ontario Universities, and Unsupervised Records Management

By: Tim Neufeldt

Tim Neufeldt (Ph.D.) is working toward his MIS at the Faculty of Information, University of Toronto. Dr. Neufeldt is also a part-time library technician and a sessional lecturer at the university’s own Faculty of Music. After he graduates in winter, 2010, he would like to combine his interests in music and information studies by becoming an academic Music Librarian and teach courses in both musicology and music librarianship.

Introduction

Universities are incessant collectors of personal information. The names, addresses, social security numbers, and other privileged data about a constantly changing group of faculty, staff, students, and alumni is continuously gathered as a necessary part of doing business. To ensure that the educational institutions in Ontario are legally accountable for the type and methods of data they collect, the universities were included in the province’s Freedom of Information and Protection of Privacy Act (FIPPA) effective June, 2006. What follows is a review of the effects of FIPPA on Ontario universities in the two years since their inclusion. The review focuses on the changes required to the universities’ records management policies to accommodate the new legislation, with an emphasis on how personal information is collected and stored by those who are given the least oversight in maintaining this data: The faculty and sessional instructors.
Background: FIPPA and Ontario Universities

When FIPPA first came into law in Ontario in 1988, it granted the general public the right to request access to information held about them by the various provincial ministries, agencies, health councils, and institutions (Freedom of Information and Protection of Privacy Act 2000, 1). It is based on the principle that protecting personal information is integral to maintaining the dignity of the individual, and that the institutions collecting and maintaining this data need to be held publicly accountable. To that end, FIPPA requires that the government protect an individual’s privacy with respect to their personal information in government records, and also provide individuals the right to request access to records containing such information. In 2005 the Act was extended to include Ontario universities.

The schools responded positively to their inclusion, as they considered themselves already sensitive and accountable for personal records and information requests. As the University of Toronto FIPPA director Rafael Eskenazi stated in early 2007, “to a certain extent, what FIPPA does is formalize the privacy protection and accountability policies we already have in place” (Lighthall 2002). The FIPPA guidelines for Queen’s University suggest a similar attitude of business as usual: “We do not anticipate a significant change in our operations. We will continue to share records that we have traditionally shared without a formal request. We remain committed to protecting the privacy of those who work and study here and to operating in an open and accountable manner” (“Freedom of Information and Privacy Guidelines,” 2006).

York University only identified a handful of differences between its then-existing privacy-sensitive policy Access to Information and Protection of Privacy (2004) and FIPPA (Stueart and Moran 2007, 3).

Freedom of Information Requests before FIPPA

If some of the biggest universities in Ontario proudly proclaimed their openness to freedom of information (FOI) requests prior to the introduction of FIPPA, the extent of their willingness to comply was by no means uniform or satisfactory. Prior to the legislation’s introduction there was no standardized policy on how they should respond. What did exist was a proposal authored by the Council of Ontario Universities (COU) in the early
1990s designed to be consistent with the “animating spirit” of FIPPA legislation but tailored to the universities’ unique needs.

The council encouraged the schools to adopt its proposal; however, the responses by the institutions to the COU’s guidelines were anything but consistent. Although most Ontario universities established voluntary measures of dealing with freedom of information requests in 1995 as part of an attempt to conform in some capacity to the Council of Ontario Universities’ plan (“Restricted Entry: Access to Information at Ontario Universities” 2004, 3), the proposed guidelines to regulate the institutions’ responses to FOI requests were neither effective nor enforceable. The reactions by the universities to information requests were uneven at best, and at other times completely ignored.

A study published by the Ontario Confederation of University Faculty Associations (OCUFA) ten years after the COU revised their guidelines on freedom of information requests highlights the range of typical responses from Ontario universities before their inclusion under FIPPA. The OCUFA requested data for the number of full-time tenure stream, full-time sessional, and part-time appointments of each university according to discipline, as well as a copy of faculty hiring plans (ibid). While some universities such as York, Guelph, Western, and Wilfred Laurier attempted to provide the information requested, others such as Toronto and Queen’s referred the OCUFA to outdated and incomplete information from Statistics Canada. The universities of Algoma, Carleton, Lakehead and McMaster acknowledged the requests but never responded, and Laurentian, Nipissing, and Waterloo ignored the requests entirely.

The OCUFA’s concluding opinion was that Ontario universities needed to be brought in under FIPPA legislation, as there was no unbiased appeals process or legal recourse to access this information if the universities chose not to disclose it.

At least one early report suggests that not all institutions are fully prepared to respond to freedom of information requests in the three years since the study was published and more than two years after the universities were included under FIPPA legislation. The OCUFA published an institutional summary in 2007. While all of the 19 organizations that are included under the Act have Privacy Office coordinators, four have yet to adopt policies (Brock, Carleton, Laurentian, OCAD) and three more are relying on policies created before FIPPA became law (Lakehead, Ottawa, and Wilfred Laurier) (“FIPPA Institutional
Summary 2007” 2007, 1-5). The 12 remaining schools are in various states of readiness, and have at least some information posted on their websites explaining the information request process.

**FIPPA and Personal Information Storage**

Under FIPPA legislation, universities are required to create and publish a directory of the types of personal information records held by them. As universities collect data on a wide range of people, including faculty, staff, students, and alumni, the various types of information collected must be organized in an easily accessible manner via a Directory of Records. The directory itemizes the number and types of Personal Information Banks (PIBs) an institution holds (FIPPA, S.35, 44-46). Information banks are organized collections of personal information that can be retrieved through unique identifiers such as a name, employee number, or address, and are maintained and accessed in paper, electronic, or hybrid formats.

These directories list the various classifications of personal data held by the universities, such as academic, student, alumni, or administrative records. Within these categories, universities are required to reveal the physical location of the records, the legal authority for maintaining them, the type of information held, the uses for the information and who has access to it, along with the type of people whose names might be contained in it and the record’s retention and disposition schedule.

PIBs are entirely new for universities, and although the systems that collect and store the data have existed within the organizations for years, most institutions do not currently have their directories of information banks available online. Some of the few exceptions include the University of Guelph, Queen’s University, and King’s College at the University of Western Ontario. Curiously, a number of university FOI request forms ask those querying to specify in which PIB the information they seek is in order to expedite their request. This is rather difficult, given the lack of easily accessible published directories.

**Records Management at Ontario Universities**

Like any complex institution, universities create records at all levels of their administration and operation and therefore absolute
adherence to guidelines can be difficult. This problem is compounded by the number of staff and faculty who access others’ personal information on a daily basis. Some university employees – particularly those in administration – are provided with formal records management training, disposition schedules, and oversight. The types of records they deal with are often standardized, and are easily categorized into normal file management schemes. To this end, registrars and administrators work directly with their university’s archival division and are expected to be aware of the details and lifespan of the records their offices generate. To help follow their university’s records management plan, these offices usually include a contact person who liaises with the archives and records management programme. This person’s function is to ensure that the office follows practices in keeping with the university’s guidelines.

Various policies are in place for departments to handle documents that do not have a clearly determined retention schedule. Some institutions, such as Queen’s University, appoint heads within each division or faculty to authorize retention and disposition schedules. Others, such as the University of Toronto and York University, require divisional representatives to contact the university archivist or Information and Privacy Office to determine the appropriate course of action ("Queen's University: Records Management Policy" 2003, 3; "Managing Records: General Procedures" 2007, 6). It is worth noting that while FIPPA allows for the president of the university to cede their power of authority to make privacy-related decisions and records retention schedules, the legal responsibility still resides in their hands.

Records Management for Instructors

The records management practices of teaching faculty and instructors follow a substantially different pattern. Teaching faculty must cope with a variety of idiosyncratic administrative and operational records. Personal communiqués, grade sheets and books, assignment feedback and other formal and informal exchanges with students and departmental representatives make for a loose collection of course-related documents stored in a number of disparate locations. To make matters worse, there is very little explicit help offered to them; instructors are often only given general records management guidelines if they are supplied with any information at all.
Once FIPPA law officially included universities, Information and Privacy Offices addressed this lacuna by releasing best practices guidelines for faculty and instructors in order to acquaint them with the way it affected their jobs. The reason for this is clear: There are a wide variety of record types that the institutions do not maintain on behalf of the instructors, nor do they check to see whether the instructors are following protocol. Rather, universities rely on the faculty to maintain their own records, as they are the ones most familiar with the types, function, and quantities of records generated. While this approach is a typical records management strategy (Shepherd & Yeo 2003, 30), the teaching faculty are supported – in theory if not in practice – by representatives assigned to every department or division within larger institutions like the University of Toronto, York University, and Queen’s University (Sossin & Goldberg 2006, 11; "Implementing FIPPA at York University" 2007, 8; "Freedom of Information and Privacy Guidelines" 2006, 7, 37). Their role is to facilitate the FOI requests and assist in educating instructors as to their responsibilities under the new legislation.

The support documents offered by privacy offices focus predominantly on two central ideas. The first is positive reinforcement of past practices: The method in which instructors previously handled student information and their classroom privacy etiquette prior to the introduction of FIPPA is in keeping with the legislated standards. The second goal is informative and modestly undermines the premise of the first: There are areas of records management that need to be watched much more carefully. As with most records management programmes, these areas of concern relate to administrative and operational records (Bennick 2000, chapters 6-7).

Student grades and related materials are the primary form of administrative records that professors and lecturers generate. A number of potential pitfalls can arise when managing class lists, attendance sheets, grade spreadsheets, or saving and transporting data-sensitive files with student-related information. To avoid the possibility of information loss or security breach, universities like Carleton encourage instructors to save their files to local network drives rather than transferring them to portable memory devices or personal computers (Harper, 2008). If data must be transported on a portable device, best practices promote the use of encrypted formats to prevent any potential privacy breaches should the device get lost or stolen. Instructors are further told that failures or oversights in man-
aging privacy concerns should be reported immediately to one’s departmental FOI representative. As the director of University of Toronto’s FIPP office Rafael Eskenazi summarizes:

I like to tell people that privacy breaches are a little bit like car accidents: they have legal repercussions later on. The biggest mistake is not necessarily the privacy breach — although, like a car accident, we do our best to avoid them — the really big mistake is not reporting it immediately so that we can address any harm and prevent the breach from continuing or recurring (MacArthur 2007, 2).

The formal operational records generated through interactions and communications exchanged between students and professors, such as collecting and returning tests and assignments, responding to student email, taking attendance, and posting grade results, are potentially available for request under FIPPA legislation. Therefore their management is of significant concern to the universities. As with the administrative records, instructors are not given official oversight in dealing with the records, but are provided with best practices to follow and conform to. For example, instructors are encouraged to make sure assignments are returned only to the student who submitted them with their grade hidden from external view, preferably by discreetly including the grade on the inside of the assignment. Teachers are encouraged to make sure that class lists and attendance sheets do not reveal one’s personal information to others. While implementing these practices on a day-to-day basis seems of little consequence, it is particularly problematic at exam times, when students are often required to sign attendance sheets, formally acknowledging their name and student number in the presence of the instructor. And while no consistent best practices have arisen to compensate for this scenario across multiple universities, the most likely new approach is to have students sign individual identity cards to be collected during exams.

Responding to email is another area of concern for instructors under FIPPA. As email is an electronic record, the universities’ Privacy Office recommendations looked at in this study are unanimous in suggesting that faculty use and accept email only from university-provided accounts, based on the assumption that university servers are more secure than those used for general public access, which route mail through unknown locations. Furthermore, instructors are reminded that under the new legislation all email sent from their university account is the property of the university, and can potentially be requested and possibly disclosed. For this reason, pri-
Privacy offices remind instructors that university email accounts should be used exclusively for business purposes; personal views or off-hand remarks are especially discouraged. Including highly sensitive or personal information in email is equally disapproved of, as FIPPA requests cannot be denied based on potential embarrassment to an instructor or an institution (Blaikie 2006, 8; Sossin & Goldberg 2006, 11).

While the new legislation may not prevent potential embarrassment, there are some important exemptions built into the Act to help protect instructors from overly probing requests for information, particularly in regards to their intellectual property. Academic research records and teaching materials are excluded from FIPPA, so long as they are collected, maintained, or prepared by an employee of the institution (FIPPA, S.65 [8.1]). Although this does not block potential access to the subject matter of one’s research or the amount of funding they receive, people cannot request records related to one’s employment or labour relations negotiations. Other notable teaching-related exemptions from the legislation include questions used for tests or examinations, especially if the university decides that disclosing the information may prejudice the results of the test.

Just how protective the exemptions are with respect to one’s research has yet to be tested by the Privacy Commissioner or the courts, nor are there precedents from other jurisdictions to provide guidance. In the opinion of the OCUFA’s lawyer, the wording of the Act is broad enough to protect records created in the early stages of one’s research (Spitzer 2007). To alleviate any concerns with regards to the exemption status of records created for research purposes, instructors are advised to make a note on research-related records that their documents are created for personal research. Faculty members should also document their proposed research ideas as supporting evidence of the research process (ibid).

Retention and disposition periods for instructors’ records are another matter. While some paper-based documents get turned into the department’s registrar for the university to maintain and dispose of – such as authorized exam attendance sheets and final grade submission forms – the vast majority of records created in the process of teaching are left up to the faculty to retain and terminate themselves. The best practices recommended by all universities agree that course-related documents such as un-claimed essays or tests be retained for a minimum period of one year,
after which they should be disposed of. This allows the people interested in accessing their records a reasonable amount of time in which to do so ("Freedom of Information and Privacy Guidelines" 2006, 28).

Interestingly, there are disparities between universities on the exact duration of the retention period. Carleton University suggests records should be kept for a period of only one year before being destroyed, while the University of Toronto and York University leave the option open to extend this period further by telling its instructors that all records potentially subject to retrieval under FIPPA must be kept for “at least one year” after the last use. The open-ended retention policy is curious, given that no further published guidance is given. Rather, instructors are encouraged to contact their local FIPPA representative to determine whether they should be retaining records for longer durations, or consult their universities’ privacy office or file plan.

If the exact duration of the retention period is ambiguous, published guidelines are much clearer about appropriate methods of disposition. Faculty are instructed to shred, burn, or pulp all records promptly. Instructors who do not have the means to properly dispose of their paper-based records are encouraged to bring them to the appropriate facility in their faculty for proper disposition. There is no suggestion in any of the guides for suitable termination methods of electronic documents, though archive divisions of larger universities give a general reminder to all staff that electronic records must be managed alongside paper-based records and should be purged of all routine administrative or personal messages, redrafts of documents, or duplicates of paper copies (“Electronic Records” 2008).

**Conclusions**

It is clear from this review of FIPPA’s impact on Ontario universities that their inclusion under the Act was necessary, and that the institutions are still adjusting to the demands of the new legislation. A number of elements required under FIPPA have yet to be fully accounted for. Best practices for instructors and staff are still in their early stages of development and, although solid models are for the most part in place to deal with records management for administrative departments and teaching faculty, guidelines for operational records and electronic documents are much more ambiguous or have yet to be developed. Moreover, detailed records management re-
attention and disposition guidelines for instructors are not yet readily available.

The lack of full compliance with the legislation is not surprising, given that the Act is relatively new and that universities are large, heavily bureaucratic organizations and thus slow to change. Undoubtedly all the institutions continue to have a belief in the “animating spirit of the legislation,” as stated by the Council of Ontario Universities ("Council of Ontario Universities Guidelines" 1994, 11). It is also equally clear that FIPPA was necessary for the institution’s accountability and credibility. Despite overzealous claims from certain universities that they were always ready to respond to freedom of information requests, it is apparent from the literature that a legal push was necessary to make them more publicly accountable.

References


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