FOI & PRIVACY LAW UPDATE

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THE NEW FIPPA LANDSCAPE

- REGULATORY UPDATES
  - Privacy Impact Assessments (“PIAs”)
  - Privacy Management Programs (“PMPs”)
  - Application Fees
  - Storage/Disclosure of Personal Information Outside of Canada

- CASELAW UPDATES
  - Section 43
  - Judicial Reviews

Privacy Impact Assessments

- What is a PIA?
  - Internal assessment to evaluate any risks to personal information due to actions taken by a local public body

- FIPPA provides at section 69(5.3):
  - The “head of a public body that is not a ministry must conduct a privacy impact assessment and must do so in accordance with the directions of the minister responsible for this Act”.

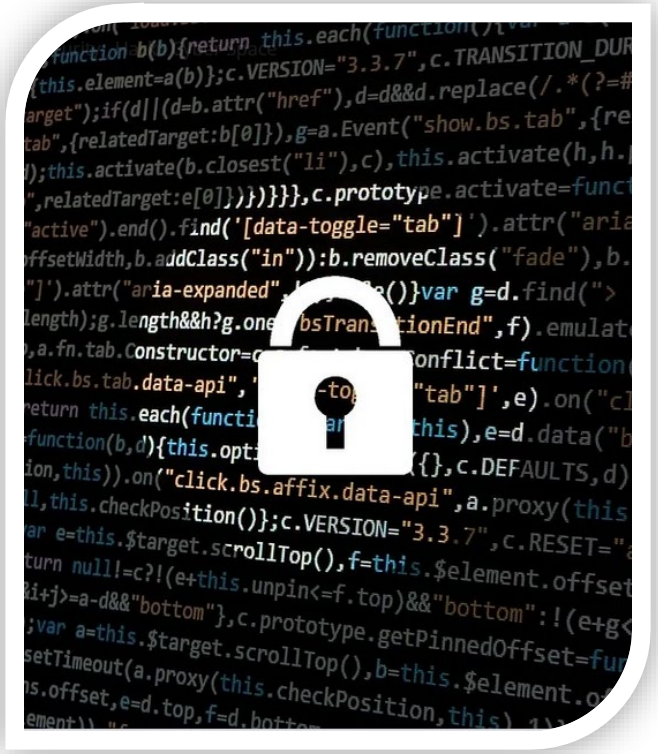
PIAs Continued

- Ministerial Direction 2/21 – Directions to Heads of Public Bodies that are Not Ministries issued under Section 69 (5.3) of the *Freedom of Information and Protection of Privacy Act*

- A public body must conduct a PIA "on a new initiative for which no PIA has previously been conducted" and "before implementing a significant change to an existing initiative, including but not limited to a change to the location in which sensitive personal information is stored, when it is stored outside of Canada"

Privacy Management Programs

- What is a PMP?
  - A high-level holistic plan to manage privacy and security of personal information within the public body's custody or control



- Section 36.2 of FIPPA requires local governments to develop a PMP in accordance with the provincial directive

PMPs Continued

- Directive provides broad and scalable directions as to what a PMP requires

- Some mandatory components:
  - designating a privacy officer
  - clear and documented privacy procedures
  - educational and informative elements

Application Fees

- Section 13(2) of the FIPPA Regulation sets the application fee for an access request at $10
- Section 75(1)(a) of FIPPA allows local governments to opt in or out of the fee
- Application fee is separate from section 75(1)(b) service fees

Storage/Disclosure of PI Outside of Canada

- Bill 22 removed longstanding requirement that public bodies ensure that any personal information in their custody or control was stored and accessed solely in Canada
- Must be in accordance with FIPPA and the *Personal Information Disclosure for Storage Outside of Canada Regulation*, B.C. Reg. 294/2021

Systematic and Vexatious Requestors

- Under section 43 of FIPPA, public bodies may apply to the OIPC to disregard an access request if certain grounds apply

- Section 43 new grounds:
  - 1) where the request is for a record that has already been disclosed to the applicant, or is available to the applicant from another source;
  - 2) where the request is so excessively broad in scope that it would unreasonably interfere with public body's operation

Case Law Update

Section 43: Order F23-37 – TransLink

- TransLink applied to OIPC to disregard 18 outstanding access requests, and permission to disregard any future access requests (in excess of two requests per month) from the applicant for two years

Order F23-37 – TransLink continued

- **OIPC holding**: section 43 not applied
  - The requests were found not to be vexatious, and were not so repetitive or systematic as to unreasonably interfere with TransLink's operations
  - "in the absence of a clear motive, mode, plan or pattern, the volume and frequency of these requests alone do not meet the threshold for a finding that they are systematic … to be systematic, there must be a system involved"

Section 43:
Order F22-61 – New Westminster

- The City applied to the OIPC to disregard nine outstanding access requests, and permission to disregard any future access requests (in excess of one request at a time)

Order F22-61 – New Westminster Continued

- Adjudicator granted the City authority to disregard nine outstanding access requests, finding that the requests were vexatious under section 43(a)
  - Adjudicator found that four factors in particular indicated that the applicant had an ulterior motive in making his requests: (1) the type of information the applicant was requesting; (2) the timing of the applicant's requests; (3) the repetitiveness of the requests; and (4) an absence of a genuine interest by the applicant in the records

Section 43:
Order F23-61 – Attorney General

- The Ministry of the Attorney General applied to the OIPC to disregard an applicant's outstanding access request, and permission to disregard certain future access requests made by the applicant

Order F23-61 – Attorney General Continued

- Ministry had previously made a section 43 application in 2021, and while OIPC found the applicant's requests were systematic, it was not satisfied that the outstanding request would unreasonably interfere with the Ministry's operations
  - Adjudicator held that the applicant's own response submission indicated the improper purpose of his access request, and the applicant's request was systematic in light of his history of access requests

Judicial Reviews

- Presumptive standard of review is reasonableness
  - Court should have regard to both the outcome and the decision-maker's reasoning process

- However, no deference is owed with respect to an allegation of procedural fairness (triggered when an administrative body's decision affects the rights, privileges or interests of an individual)

Burnaby (City) v. British Columbia (Information and Privacy Commissioner), 2023 BCSC 948

- Request was for "a list of all properties owned by [the City] in Burnaby and any properties that it may own in the province of BC, Canada."
  - City responded with a 66-page spreadsheet
  - Some municipal addresses and/or property identifiers were redacted – properties that were the subject of land acquisition projects where the City had targeted adjacent or proximate properties for acquisition and land assembly

Burnaby Judicial Review Continued

- Records withheld under section 17 – financial/economic interests
- OIPC found that City had not met its burden of proof to establish that s. 17(1) applied to the information in dispute
- Court agreed with the City, finding that the Adjudicator misapprehended the City's evidence and the import of that evidence – held that the OIPC Decision was unreasonable and should be set aside

Airbnb Ireland UC v. Vancouver (City), 2023 BCSC 1137

- Applicant sought Airbnb hosts' names, licence numbers and addresses, as well as information in relation to all short-term rentals in the City in addition to those on the Airbnb platform
  - City refused the requests on the basis of sections:
    - 15 – disclosure harmful to security of any property
    - 19 – disclosure harmful to individual or public safety
    - 21 – disclosure could reasonably be expected to harm the business interests of a third party
    - 22 – if it involves personal information, the release of which would unreasonably invade a person's privacy

Airbnb Judicial Review Continued

1. OIPC's determination that records not subject to sections 15 and 19 was unreasonable because it misapplied the provisions by requiring the parties to demonstrate a greater risk of harm than is legally necessary **– NO**
2. OIPC's determination that records not subject to section 22 was unreasonable **– YES**
3. OIPC breached its duty of procedural fairness by failing to provide the Airbnb hosts with notice and an opportunity to participate in the hearing **– YES**

Conclusion

- Still waiting on decisions for other newly introduced sections:
  - Section 3(5) – the exclusion of the right to access certain forms of information
  - Section 18.1 – the new mandatory exception for disclosure where the disclosure is harmful to the interest of an Indigenous people

Questions?