CITATION: Toronto Star v. AG Ontario, 2018 ONSC 2586
COURT FILE NO.: CV-17-569061
DATE: 20180427

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Toronto Star Newspapers Ltd.	*Paul Schabas, Iris Fischer and Jessica Lam,* for the Applicant
Applicant	
– and –	
Attorney General of Ontario	*Daniel Guttman, Yashoda Ranganathan and Audra Ranalli,* for the Respondent
Respondent	
– and –	
ARCH Disability Law Centre, HIV & AIDS Legal Clinic Ontario, Income Security Advocacy Centre, Laborers' International Union of North America, LIUNA Local 183, Information and Privacy Commissioner of Ontario, Canadian Journalists for Free Expression, Ontario Judicial Counsel, and Justice for Children and Youth	*Niiti Simmonds, Mariam Shanouda and Marie Chen,* for HIV and AIDS Legal Clinic Ontario, ARCH Disability Law Centre, and Income Security Advocacy Centre
	Paul Cavalluzzo, Adrienne Telford and Tyler Boggs, for Laborers' International Union of North America and LIUNA Local 183
	William Challis, for the Information and Privacy Commissioner of Ontario
Intervenors	*Julia Lefebvre and Abbas Kassam,* for Canadian Journalists for Free Expression
	Linda Rothstein and Andrew Lokan, for the Ontario Judicial Council
HEARD: April 4-6, 2018	*Mary Birdsell and Jesse Mark,* for Justice for Children and Youth

E.M. MORGAN J.

I. The constitutional challenge

[1] This case challenges the application of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*")[1] to 14 administrative tribunals,[2] all of which are designated as "institutions" in the Schedule to the *FIPPA* General Regulation.[3] Among other things, *FIPPA* sets out terms on which access is granted to documents held by government and wider public sector institutions. The Toronto Star contends that by applying to tribunals that preside over adversarial processes, adjudicate disputes, and act judicially or quasi-judicially, *FIPPA* violates the open courts principle embedded in s. 2(b) of the Canadian Charter of Rights and Freedoms (the "*Charter*").[4]

[2] The venerability of the open courts, or openness principle is not in doubt. In the 13th century, *Magna Carta* confirmed the prohibition against selling writs, or admission tickets to trials, in favour of open public access to court proceedings.[5] The openness principle was reiterated by Sir Matthew Hale in the 17th century, who noted that witnesses must be examined "in the open court, and in the presence of the parties, their attorneys, counsel and all bystanders."[6] In the 18th century, William Blackstone understatedly observed that, "the open examination of witnesses…is much more conducive to the clearing up of the truth."[7]

[3] The concept of open justice easily made the crossing from England; accordingly, Canadian courts have historically recognized that, "it is of vast importance to the public that the proceedings of courts of justice should be universally known."[8] This has been reinforced in the post-*Charter* era, with the Supreme Court of Canada emphasizing that public access to legal proceedings includes access by the press:

> Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in

[1] RSO 1990, c. F.31.
[2] The tribunals named in the Notice of Application are: Ontario Securities Commission ("OSC"), Environmental Review Tribunal ("ERT"), Ontario Civilian Police Commission ("OCPC"), Human Rights Tribunal of Ontario ("HRTO"), Ontario Municipal Board ("OMB"), Financial Services Tribunal ("FST"), Health Professions Appeal and Review Board ("HPARB"), Landlord and Tenant Board ("LTB"), Criminal Injuries Compensation Board ("CICB"), License Appeal Tribunal ("LAT"), Ontario Energy Board ("OEB"), Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), Ontario Mining and Lands Commissioner ("OMLC"), Ontario Labour Relations Board ("OLRB"), and Pay Equity Hearings Tribunal ("PEHT").
[3] RRO 1990, Reg 460.
[4] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[5] William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (2d ed. 1914) 395 (citing *Magna Carta*, 1215, ch. 40).
[6] Matthew Hale, *The History of the Common Law of England* (Charles M. Gray, ed., Univ. Chicago Press 1971) (1670), ch. 12.
[7] 3 William Blackstone, *Commentaries On the Laws of England* 396.
[8] *Gazette Printing Co. v Shallow* (1909), 41 SCR 339, 359.

> court. Practically speaking, this information can only be obtained from the newspapers or other media.[9]

[4] The question in this Application is whether and how this judicial principle applies to contemporary administrative law proceedings. In many ways the 14 tribunals at issue here are stand-ins for a large number of adjudicative tribunals across the province.[10] As former Chief Justice McLachlin describes it, "vast and unlimited stretches of law and conduct that formerly fell under the jurisdiction of common law courts were swallowed up ty these new schemes…more and more, administrative tribunals regulated the problems created by modern society.[11]

[5] All parties acknowledge that administrative hearings governed by the *Statutory Powers Procedure Act* ("*SPPA*") are required to be open to the public.[12] In principle, therefore, it is uncontroversial that "[t]he 'open court' principle" – at least in *some* version – "is a cornerstone of accountability for decision-making tribunals and courts."[13]

[6] The present controversy arises with respect to documents filed with administrative tribunals that hold adjudicative hearings. More specifically, the issue posed in this Application challenges the means by which such documents are accessed by the press outside of the adjudicative hearing itself.

[7] The Application is restricted even further to those documents that qualify as records of tribunal proceedings. The *SPPA* contains a list of "records" for the purposes of hearings by tribunals covered by that Act. This list provides a ready definition of the documents to which the present Application applies ("Adjudicative Records"). These include:

> (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
> (b) the notice of any hearing;
> (c) any interlocutory orders made by the tribunal;
> (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
> (e) the transcript, if any, of the oral evidence given at the hearing; and

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[9] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, para 85.
[10] Ministry of the Attorney General, "Guidelines for Administrative Tribunals" (October 29, 2015), online: <https://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french language services/services/administrative_ tribunals.php>.
[11] Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Administrative Tribunals and the Courts: An Evolutionary Relationship", available at https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx.
[12] RSO 1990, c. S.22, section 9(1).
[13] *Stepanova v Human Rights Tribunal of Ontario*, 2017 ONSC 2386, para 36 (Div Ct).

> (f) the decision of the tribunal and the reasons therefor, where reasons have been given.[14]

[8] To this definition I would add tribunal dockets or schedules of hearings and registers of actions or proceedings kept by the adjudicative tribunals. These are included in a similar list of Adjudicative Records published by the Canadian Judicial Council. That list is accompanied by an advisory, which is equally applicable here, as to a number of items that are not included as Adjudicative Records, as follows:

> This definition does not include other records that might be maintained by court staff, but that are not connected with court proceedings, such as license and public land records. It does not include any information that merely pertains to management and administration of the court, such as judicial training programs, scheduling of judges and trials and statistics of judicial activity. Neither does it include any personal note, memorandum, draft and similar document or information that is prepared and used by judges, court officials and other court personnel.[15]

[9] I would also clarify that Adjudicative Records do not include documents exchanged between the parties to a hearing and filed with the tribunal in the pre-hearing stage of proceedings. Counsel for the Attorney General and a number of the intervenors advise that some adjudicative tribunals require parties to file with the tribunal all relevant documents in their possession prior to the hearing. In those situations, the tribunal's file in the given matter may resemble the full pre-trial documentary discovery in civil litigation.

[10] Counsel for the Toronto Star states that the challenge posed here is for access to Adjudicative Records that are part of the actual record of the tribunal hearing. It does not include documents that were part of pre-hearing discovery but that did not get introduced at the hearing itself. The open court principle includes access to "anything that has been made part of the record",[16] but it does not cover documents that did not make it to open court.

[11] While most of the tribunals in issue hold open hearings and make their Adjudicative Records available for inspection during the hearing itself, the Toronto Star has documented the difficulties in obtaining access to tribunal schedules before the hearing has taken place and inspecting or copying Adjudicative Records after the hearing has ended. Many, although not all, of the tribunals in issue take the position that access to those documents is governed by *FIPPA*.

[12] The Toronto Star submits that *FIPPA*, which sets out statutory terms on which members of the press or public can obtain copies of all documents held by government, burdens the right of access and is thereby contrary to the requirement of open hearings. In response, the Attorney

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[14] *SPPA*, section 20.
[15] Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005.
[16] *R v Canadian Broadcast Corporation*, 2010 ONCA 726, para 44.

General submits that *FIPPA* is itself a tool to promote access to information held by public and administrative bodies, including tribunals, and in doing so thereby fosters openness.

[13] The Supreme Court of Canada has stated that "[a]ll law and law-makers that touch the people must conform to [the *Charter*]. Tribunals and commissions charged with deciding legal issues are no exception."[17] What needs to be determined is the effect of *FIPPA* in this regard. Do its substantive terms that weigh access to documents against privacy protection, and its procedural regime by which documents are requested, vetted, and withheld or produced, conform with or undermine the requirement of openness? As the English Court of Appeal has said in its inimitable way, "The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed?"[18]

II. The *FIPPA* process

[14] In raising its constitutional challenge, the Toronto Star identifies a series of issues that are occasioned by the terms of *FIPPA* as applied to administrative tribunals. These include procedural issues which are alleged to lead to undue delay in obtaining Adjudicative Records, and substantive issues which are alleged to exempt many Adjudicative Records (or much of the information contained in Adjudicative Records) from production at all.

a) Procedural issues in *FIPPA*

[15] The *FIPPA* process is, as counsel for the Toronto Star describes it, a bureaucratic one. To make a relatively long piece of legislation short, under s. 24 (1) a person seeking access to a record – i.e. a document or information, including an Adjudicative Record – from an applicable institution must make a formal request, pay a minimal prescribed fee, and provide sufficient information for the record to be identified.

[16] The head of the institution has authority to determine whether the request is frivolous (s. 24(1.1)), whether there is sufficient detail (s. 24(2)), forward the request to the relevant agency holding the record and give written notice thereof (s. 25). Further, the head of the institution is mandated to within 30 days advise the applicant whether or not the request will be granted, or to extend the 30-day time period if necessary (s. 27). Before making a decision, an institution head must give written notice to any person effected by the record requested (s. 28(1)) and give a copy of that notice to the requester (s. 28(4)), then allow representations to be made by each (ss. 28(2)(c), 28(4)(b)), and within 10 days make a decision about disclosing the record in issue (s. 28(4)(c)). Like all of the timelines under *FIPPA*, this period can also be extended as the head of the institution deems necessary (s. 28(8.1)).

[17] A person requesting the record or a person affected by the disclosure has a right of appeal to the Information and Privacy Commission ("IPC") (s. 50(1)). The IPC then provides notice of

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[17] *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, para 70 (McLachlin J., dissenting), adopted by majority in *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 SCR 504, para 29.
[18] *Guardian News v Westminster Magistrates' Court*, [2012] EWCA Civ 420, para 1.

the appeal to the head of the institution from which the record was requested (s. 50(3)). There are time periods set aside for potential mediation of the dispute (s. 51) and the IPC may conduct a review of the head of institution's initial decision (s. 52). After that, the "person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal" has an opportunity to make submissions to the IPC (s. 52(13)). Finally, after receiving all applicable submissions, the IPC is authorized to make a decision disposing of the issues on appeal (s. 54(1)) and provide notice of the decision to all relevant parties (s. 54(4)).

[18] The *FIPPA* process is a potentially lengthy one when played out in full. Although the above is a capsulized summary, counsel for the Toronto Star points out that in all there are some 6 different notice periods that can become relevant in a given record request, all of which add to the time that it takes for a request to be processed and answered. The evidence in the record of the Toronto Star's specific access requests to different administrative institutions varies from a few days to many months or even years, depending on the nature of the tribunal and the records being sought.

[19] Since the timelines vary greatly from request to request, it is possible to overstate both the expediency and the delay of the process. The Toronto Star understandably stresses the journalistic imperative of timely disclosure and the newsworthiness of the documents sought. It recounts the experiences of one of its reporters, who sought Adjudicative Records from the OLRB but who gave up his appeal to the IPC after 8 months without a final decision on what would be produced. It also recounts experiences of its reporters with the CICB, in which one request for Adjudicative Records took 12 weeks to be answered.

[20] The Attorney General stresses the need to accurately balance the competing imperatives of privacy rights and public access under *FIPPA*. It emphasizes the experience related by a Toronto Star reporter in which the HRTO responded to a disclosure request within 45 days of its submission. Other incidents narrated in the affidavit material filed before the court reveal a 7-week process for a reporter to obtain Adjudicative Records from the CICB, 32 days from the PEHT, and 10 days for a reporter to be provided with Adjudicative Records from the LTB. Counsel for the Attorney General concedes that many disclosure packages come with notable redactions and withheld material, but contends that the time lines are generally significantly shorter than the more egregious delays cited by counsel for the Toronto Star.

[21] It is noteworthy that both sides agree that there are a number of tribunals included in this Application whose process entails no delay at all. As discussed further below, these tend to be the institutions that have fashioned their own method of handling document requests outside of the *FIPPA* process. Thus, for example, the OSC posts its docket lists and its unredacted decisions on its website, and allows public access to Adjudicative Records without requiring any *FIPPA* request at all. The ERT and the OMB do the same, as do the FST and the OCPC except that the names of individuals are typically anonymized (with the exception of police officers, whose names are disclosed by the OCPC).

b) Substantive issues in *FIPPA*

[22] Separate from the cumbersome procedures, the other aspect of *FIPPA* emphasized by counsel for the Toronto Star is that it contains a presumption of non-disclosure of many records. That is, it protects privacy by placing the onus on the party seeking disclosure of records, including Adjudicative Records, to justify why they should be disclosed.

[23] The *FIPPA* regime commences on a premise that simultaneously embraces openness and closure. Section 10(1) provides that "every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22…" Although the provision is phrased in terms of transparency, the exemptions are anything but minor. Counsel for the Toronto Star identifies one exemption in particular that is so broad as to swallow up the initial mandate to disclose records upon request – the personal privacy exemption: "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates" (s. 21(1)).

[24] This prohibition on disclosure of personal information is repeated in Part III of the *FIPPA*, entitled "Protection of Individual Privacy". Under that general heading, s. 42(1) provides that, "An institution shall not disclose personal information in its custody or under its control", except in accordance with a number of listed exceptions. It is fair to say that none of the exceptions to the non-disclosure of personal information exemption in s. 21(1) or s. 42(1), or any of their follow-up sections, pertain to access to Adjudicative Records as a general category.

[25] The trigger phrase "personal information" is described very broadly in s. 2(1) of *FIPPA*:

> 'personal information' means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> (c) any identifying number, symbol or other particular assigned to the individual,
> (d) the address, telephone number, fingerprints or blood type of the individual,
> (e) the personal opinions or views of the individual except where they relate to another individual,
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[26] As indicated above, there are exceptions to the exemption from disclosure of any record containing "personal information"; and, again, an institution's head at first appears to maintain wide discretion to decide whether the sought-for document falls within the exceptions to the exemption. Section 21(1)(c) provides that the record can be disclosed where it contains "personal information collected and maintained specifically for the purpose of creating a record available to the general public", while s. 21(1)(f) provides more generally that the record may be disclosed "if the disclosure does not constitute an unjustified invasion of personal privacy". This discretion, however, is circumscribed by a further list of statutory presumptions that narrow the exceptions to the personal information exemption:

> 21(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
> (d) relates to employment or educational history;
> (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[27] The evidence collected by the Toronto Star and, indeed, the reported decisions by the IPC regarding production of records, suggests that the personal information exemption is so widely invoked that it has become the rule rather than an exemption to the rule. In effect, decisions about production of records under *FIPPA* start from the s. 21(1) premise of non-production rather than from the s. 10(1) premise of production.

[28] Adjudicative Records, in particular, are likely to fall within the definition of "personal information", since they almost inevitably contain personal information identifying the parties, were most often compiled in respect of an investigation into a regulatory breach or other violation of the law, and frequently relate to either welfare benefits, employment, education finances, race or sexuality, etc. Moreover, complaints to regulators, pleadings, and other primary documents filed with tribunals invariably contain opinions by one person about the issue at hand

or the opinion of one person about another, making them "personal information" under ss. 2(1)(e) and (g). Differences of opinion are what adjudicated disputes are virtually always about, but their effect is to bring the Adjudicative Records into the s. 21 exemption.

[29] It is worth noting that one potentially important exception to the personal information exemption, s. 23 of *FIPPA*, appears to be rarely invoked. A typical comment in IPC decisions is to the effect that, "[t]he appellant has not claimed that section 23 [the public interest override] applies in this case, and in my view, it would not apply in any event."[19] That section provides that, "An exemption from disclosure of a record…does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

[30] Despite its seeming importance to the issues here, the IPC does not consider it to override the s. 21(1) exemption of personal information from disclosure. The reason for this, and presumably for the paucity of cases invoking it, is that s. 23 has been given a very strict reading and narrow ambit of operation. The Divisional Court has interpreted s. 23 as applying where the "public interest" is not only more important than the personal information found in the specific Adjudicative Record, but more important than the protection of personal information at all:

> The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called 'public interest override': there must be a *compelling* public interest in disclosure; and this compelling interest must *clearly* outweigh the *purpose* of the exemption, as distinct from the value of disclosure of the particular record in question. [emphasis in the original][20]

[31] As the IPC generally puts it, in order to fall within the s. 23 exception to the non-disclosure rule, the requester must establish that there is a "rousing strong interest and attention"[21] in the record sought – again, an interest that goes beyond an interest in reporting on a case before the administrative body but that "add[s] in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices."[22] In other words, a requester must demonstrate to the IPC's satisfaction that there is a public interest in the Adjudicative Record not simply to inform the public about the particular case, but for the larger societal purpose of aiding the public in making political choices.

[32] Even in theory this would eliminate all but the largest and most politically prominent of cases from media access to Adjudicative Records and the details contained therein; in practice it seems to have reduced the section to negligible use. The minimization of s. 23 is, of course, part and parcel of the expansion of s. 21 and its accompanying sections. Much like an expansive use of exclusionary rules in the law of evidence or deeming provisions in defining 'constructive'

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[19] Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2359, Appeal PA40163-109-451 (January 6, 2005).
[20] *John Doe v Ontario (Information and Privacy Commissioner)* (1993), 13 OR (3d) 767 (Div Ct).
[21] Ministry of the Attorney General, Information and Privacy Commission of Ontario, Order P-984, Appeal P-9400823, August 28, 1995, p. 4.
[22] *Ibid*.

liability, the "personal information" exemption stands as an adaptable device – a "legal artifice" that "brand[s] as legally irrelevant, information that might otherwise figure significantly in determining a person's [right of access]."[23] With the contraction of s. 23, many decisions under *FIPPA* embody the idea that the public almost never has a compelling interest in the records, and all that is not already public is kept private.

[33] As a result of *FIPPA*'s aversion to allowing any "personal information" to be disclosed, the LTB (and its predecessor, the Ontario Rental Housing Tribunal),[24] the HRTO,[25] and other similar institutions either refuse to produce Adjudicative Records or heavily redact them. This includes dockets and other types of agendas that would help identify the cases in advance of their being heard.[26] Furthermore, the IPC has stated that the requester does not satisfied its onus of proving that the request falls within the s. 21(1)(c) exception for documents collected for the purpose of making them available to the public where "the personal information…is collected…from the [parties] filing the form for the purpose of adjudicating disputes".[27] Thus, Adjudicative Records do not fit within any exception to the personal information exemption by virtue of having been filed in a public hearing.

[34] In other words, the presumption of non-disclosure, or the reverse onus in respect of the production of the broadly framed definition of "personal information", presents a serious obstacle to disclosure of Adjudicative Records. As counsel for the IPC acknowledged at the hearing of this Application, this statutory approach has led the HRTO and certain other of the 14 tribunals in issue here to refuse most if not all requests for production of records filed with it, including Adjudicative Records, where those records have identifying information. All that is required for a requested record to fall into the non-disclosable category is that the decision-maker – either the head of the institution in the first instance or the IPC on appeal – be satisfied that the record passes a test set at a rather low bar: "If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information."[28]

III. Application of *FIPPA*

[35] *FIPPA* applies to all branches of provincial government and to all of the 182 public institutions listed in the Schedule thereto.[29] This includes, but is obviously not limited to, a great

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[23] Simon Stern, "Legal Fictions and Exclusionary Rules", in Maksymilian Del Mar and William Twining, eds., *Legal Fictions in Theory and Practice* (New York: Springer Publishing Co., 2015) 157-73.
[24] See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2544, Appeal PA-040312-1 (January 24, 2007).
[25] See Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2923, Appeal PA09-451 (October 21, 2010).
[26] See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2019, PA-020194-1 (February 7, 2003).
[27] Ibid.
[28] *Ontario (Attorney General) v Pasco*, [2002] OJ No 4300, paras 1, 6 (Ont CA).
[29] *FIPPA*, General Regulations, RRO 1990, Reg 460, s. 1(1) and Schedule.

many adjudicative tribunals. Indeed, a cursory glance at the governing legislation and General Regulation thereunder reveals that *FIPPA* applies to an exceptionally diverse range of institutions. These span all government ministries, government service providers, universities, hospitals, agencies, boards, commissions, corporations, and tribunals. Given the variety of functions carried out by these institutions, it is little wonder that the process established under *FIPPA* functions well with some and seems dysfunctional with others.

[36] As already discussed, it is important to note that the Toronto Star challenges access to Adjudicative Records only, and not to all documents held by the institutions to which *FIPPA* applies. This distinction, of course, eliminates Ontario's many non-adjudicative bodies from the ambit of the present analysis. In this Application, the Toronto Star does not seek or challenge any records (or the process by which records can be obtained) from public institutions such as government ministries, hospitals, universities, etc. Its focus is strictly on those institutions that act in an adjudicative capacity.

[37] The very fact that on its face *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records is indicative of the difficulties inherent in fashioning an all-embracing disclosure regime. As suggested by the Canadian Judicial Council's qualification on the definition of Adjudicative Records set out earlier, there is a significant difference between granting access to documents introduced by parties to hearings and entered into the evidentiary record and granting access to a given institution's management records.

[38] To take a simple illustration, a media request for access to educational records filed by the parties in a professional negligence case must be analyzed one way, while a media request for access to the educational records of the judge presiding over that trial must be analyzed in an entirely different way. Both types of records may well be in the hands of the court or tribunal *qua* public institution, but one set of records are Adjudicative Records that form part of an open court record while the other are administrative or personnel records that ordinarily would play no role in the specific judicial process to which the request relates.

[39] This debate – i.e. whether administrative bodies are part and parcel of government and the information and documents they hold must be treated as part of government business, or are independent decision-makers and the information and documents they hold must be treated as Adjudicative Records – highlights a dichotomy that lies at the core of the issues in the Application. As the House of Lords put it some eight decades ago, openness to the public is the "authentic hallmark of judicial as distinct from administrative procedure".[30] A government personnel committee contemplating hiring a lawyer is not required by the open courts concept to meet in public; a Law Society discipline committee contemplating sanctions against a lawyer is.[31] The former is a public institution conducting its business or administration, while the latter is a public institution conducting an adjudication.

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[30] *McPherson v McPherson*, [1936] AC 177.
[31] *Law Society v Xynnis*, 2014 ONLSAP 9.

[40] The duality of being an administrative arm of the executive and an independent adjudicative body characterizes many of the institutions at issue here and poses an interpretive problem in applying *FIPPA*. Counsel for the IPC, which, as noted above, is the body to which *FIPPA* disclosure decisions can be appealed, concedes that while *FIPPA* on its face does not address the different character traits of administrative institutions, there is an open question of interpretation as to how and where its privacy mandate applies. Thus, the IPC itself has yet to determine whether the privacy protections contained in Part III of *FIPPA* apply to Adjudicative Records. That said, institution heads and the IPC routinely apply the s. 21 exemption in response to specific applications for access.

[41] The Supreme Court of Canada has observed that, "[Administrative institutions] may be seen as spanning the constitutional divide between the executive and judicial branches of government."[32] Thus, on one hand, it has been said that, "It is unrealistic to expect an administrative tribunal such as the [Ontario Labour Relations] Board to abide strictly by the rules applicable to courts of law."[33] On the other hand, it has been observed that the very same Board – the OLRB – "does not carry on any business", but has the power to "exercise certain functions of a judicial nature."[34] Former Chief Justice Lamer has pointed out that characterizing administrative bodies depends on their function in the circumstances: "the principles for judicial independence…are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties."[35]

[42] As indicated, the express terms of *FIPPA* draw no distinction between the administrative or 'business' functions of governmental bodies and the adjudicative functions of administrative tribunals. Some institutions covered by *FIPPA* conceive of themselves as part of government and thus "lack [a] constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy."[36] Others conceive of themselves as adjudicators rather than administrators and adhere to the notion that they are "expressly created as independent bodies for the purpose of being an alternative to the judicial process".[37]

[43] This distinction, then, translates into the varying approach to openness and other aspects of procedure that is discernable among the large array of institutions named in the schedule to *FIPPA*. The Supreme Court has indicated that this variety of procedures is an inevitable incident of administrative law:

> Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the

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[32] *Ocean Port Hotel Limited v British Columbia*, [2001] 2 SCR 781, para 24.
[33] *International Woodworkers of America v Consolidated Bathurst Packaging Ltd.*, [1990] 1 SCR 282, para 26.
[34] *Hollinger Bus Lines v OLRB*, [1952] 3 DLR 162, paras 15-16 (Ont CA).
[35] *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 SCR 3, para 80.
[36] *Ocean Port*, *supra*, para 24.
[37] *Rasanen v Rosemount Instruments Ltd*., [1994] OJ No 200, para 36 (Ont CA).

> spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence.[38]

[44] Of the 14 institutions specifically put in issue by the Toronto Star, 8 do not appear to use the *FIPPA* process at all.[39] That is, post-hearing requests for access to and copies of Adjudicative Records are handled directly by the tribunal itself without the mechanism of a *FIPPA* application. Those tribunals have devised their own methodology for assessing the requests. Counsel for the Attorney General and counsel for the IPC support this diversity of approaches. It is their view that *FIPPA* applies where a person has made an application thereunder, but it does not require any given institution to embrace it as the sole mechanism for access to documents.

[45] This view is similar to that taken by the Federal Court of Appeal, where the decision as to whether to apply the federal equivalent to *FIPPA*, the *Privacy Act*, has been left to the institution itself. As the court put it: "…once the Agency placed the documents on its public record…those documents became publicly available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act* was no longer applicable".[40] *FIPPA*, like the *Privacy Act*, does not explicitly state under what circumstances it applies to any given institution; the reason for this may well be that the answer eludes any overarching definition.

[46] Simply put, it is inherent to administrative law that procedures – including the procedures for accessing documents – invariably "depend upon the nature and the function of the particular tribunal".[41] It is the administrative institution itself that is left to assess not only its own overall character, but the circumstances in which the request arises.

[47] Leaving it to the institutions to determine whether a *FIPPA* application for Adjudicative Records is necessary is viewed by the Attorney General and the IPC to be in compliance with *FIPPA*. Since many agencies "act in an administrative capacity, when carrying out its…regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate",[42] the procedures for documentary access may vary not only between institutions but within them, depending on the function at play. As former Chief Justice McLachlin stated in a speech to the Council of Canadian Administrative Tribunals, "We understand…that the rule of law does not always call for one right answer in every case."[43]

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[38] *Bell Canada v Canadian Telephone Employees Association*, [2003] 1 SCR 884, para 21.
[39] The 8 tribunals that by-pass the *FIPPA* process for post-hearing access to Adjudicative Records are: OEB, ERT, OMB, OMLC, OCPC, LAT, FST, and OSC. See *supra*, n. 2.
[40] *Lukacs v Canadian Transportation Agency*, 2015 CAF 140, para 80.
[41] *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 636.
[42] *Lukacs*, *supra*, para 49.
[43] Remarks of the Right Honourable Beverley McLachlin, *supra*.

[48] Accordingly, to the extent that some of the institutions named in the Toronto Star's Notice of Application by-pass the *FIPPA* regime, there is little more to be said about them here. It is certainly the case that their ability to fashion their own mechanism for public access to Adjudicative Records, and to make their own fine-tuned determinations of the correct balance between openness and privacy, fall within the power of those adjudicative institutions to control their own processes.[44] Like other requirements of natural justice implemented by administrative tribunals, these document access procedures attract deference. This deference arises not just as an acknowledgment of legislative authority,[45] but as an acknowledgment of the constitutionally different roles assigned to courts and administrative bodies.[46]

[49] Of course, any tribunal implementing its own mechanism for access to Adjudicative Records may deny access in response to a request. In the event of a challenge, there would have to be a case-specific analysis of whether the openness principle and section 2(b) of the *Charter* was breached and whether a remedy, whether under section 24(1) of the *Charter* or otherwise, was applicable under the circumstances. However, the fact that a given tribunal ignores *FIPPA* in making such a decision on its own raises no larger issue.

[50] I note that counsel for the Attorney General makes the point that the Toronto Star's challenge is, in effect, moot with respect to the 8 tribunals that require no formal application under *FIPPA* for a request for Adjudicative Records. It is the Attorney General's position that since no *FIPPA* application was made and denied, there is no evidentiary basis for the present Application and the constitutional analysis it demands. Counsel for the Toronto Star, on the other hand, makes the point that the voluntary compliance of the 8 tribunals in the face of *FIPPA*'s apparent applicability to those tribunals is not good enough to end the case against them. It is the Toronto Star's position that its constitutional rights, and the constitutional requirement of openness, cannot turn on the discretionary choice of those who administer the specific tribunals from time to time.

[51] Neither side has got it exactly right. The Attorney General states in its factum that with respect to the 8 tribunals that by-pass *FIPPA*, "the evidence demonstrates that access to the Adjudicative Records of these tribunals was readily granted to the applicant without a formal FOI [freedom of information] request." The record before me accordingly establishes not that the controversy with respect to those tribunals is moot in the sense that there are insufficient adjudicative facts to consider the issue, and not that the conduct of those tribunals is discretionary and subject to unprompted change; rather, it shows that those tribunals are in compliance with the openness principle.

[52] The Supreme Court of Canada has left little doubt that administrative tribunals are competent to interpret and implement constitutional norms – "We do not have one *Charter* for

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[44] *Doyle v Ontario (Ministry of Municipal Affairs)*, 2017 CanLII 52705, para 71 (Ont PSGB).
[45] *CUPE v New Brunswick Liquor Corporation*, [1979] 2 SCR 227, 236.
[46] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, para 49.

courts and another for administrative tribunals".[47] Unless and until the Toronto Star's (or anyone else's) rights are infringed by the 8 non-*FIPPA* applying tribunals, there is nothing further to analyze in respect of them. One can assume that they have taken it on themselves to implement procedures which comply with their view of what the *Charter* requires. While it remains to be determined below whether the other tribunals that do apply the *FIPPA* procedure for post-hearing access to Adjudicative Records are in compliance with their constitutional obligations, there is no evidence (and no real argument) that the ready access to documents that the 8 tribunals offer amounts to a breach.

IV. Freedom of expression

[53] "The open court principle is one of the hallmarks of a democratic society…[and] is inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*."[48] The Supreme Court has declared that this principle includes "guaranteed access to the courts to gather information", and that "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press."[49] Counsel for the Toronto Star correctly indicates that this includes the presumptive right to Adjudicative Records,[50] including exhibits entered into evidence,[51] photocopies of all such records,[52] and the ability to disseminate those records by means of broadcast or other publication.[53]

[54] As discussed earlier in these reasons, these principles apply to administrative tribunals as well as to courts. While the source of administrative tribunals' authority is their enabling statute, "[t]he legitimacy of such tribunals' authority…can be effected only if their proceedings are open to the public."[54] This open access, and concomitant protection of freedom of the press, is in keeping with those tribunals' obligation "in exercising their statutory functions…[to] act consistently with the *Charter* and its values."[55] This is not optional or discretionary on the part of administrative tribunals. As the Supreme Court has stated, "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it."[56]

[55] The evidence in the record, and even a perusal of the terms of the statute itself, establishes that *FIPPA* burdens freedom of the press. In coming to this conclusion, it is important to keep in mind that freedom of expression "protects listeners as well as speakers".[57] By extension, the Supreme Court has specifically held that, "Access to exhibits is a corollary to the open court

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[47] *R v Conway*, [2010] 1 SCR 765, para 20.
[48] *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*, [1996] 3 SCR 480, para 26.
[49] *Ibid*.
[50] *R v Canadian Broadcasting Corp*., *supra*, para 44.
[51] *Canadian Broadcasting Corp. v The Queen*, [2011] 1 SCR 65, para 12.
[52] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 1338.
[53] *R v Canadian Broadcasting Corp*., 2010, *supra*, para 50.
[54] *Southam Inc. v Minister of Employment and Immigration*, [1987] 3 FC 329, para 9 (Fed Ct).
[55] *Conway*, *supra*, at para 20.
[56] *Doré v Barreau du Québec*, [2012] 1 SCR 395, para 4.
[57] *Ford v Quebec*, [1988] 2 S.C.R. 712, para 59.

principle."[58] By further logical extension, the Supreme Court has also observed that "the open court principle gains importance from its clear association with free expression…[and that] s. 2(b) [of the *Charter*] provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents'".[59] And finally, in case it wasn't already obvious, the Court of Appeal has emphasized that "the right to access exhibits includes the right to make copies."[60]

a) The reverse onus on "personal information"

[56] The very structure of the process that *FIPPA* puts in place for obtaining records from its designated institutions impinges on the openness principle and s. 2(b) of the *Charter*, as elaborated by the courts. As reviewed earlier in these reasons, s. 2(1) of *FIPPA* defines "personal information" in the broadest possible terms, while s. 21(1) (which is reiterated in s. 42(1)) sets out a presumption of non-disclosure of personal information and imposes an onus on the requesting party to justify the disclosure of the record. The IPC in its rulings on disclosure has emphasized that, "In the case of information that qualifies as "personal information" under [*FIPPA*], there is a strong assumption against disclosure".[61]

[57] As also explained above, these provisions apply not only to records held by the listed institutions as a matter of the business or administration of the institutions but to Adjudicative Records as well – including evidence filed before tribunals, complaints and other pleadings that form the originating processes before tribunals, dockets and schedules for hearings, transcripts of proceedings, etc. The upshot of these statutory provisions is that the openness principle does not apply as of right to the tribunals governed by the *FIPPA* process; rather, a person or the press that seeks access to Adjudicative Records bears the onus of establishing that an exception to the non-disclosure of personal information rule applies. Again, this is not an insubstantial onus.

[58] I pause here to note that it is the Attorney General's view that there is nothing inherently wrong with *FIPPA*'s stringent privacy protection and the reverse onus that ensures this protection. Counsel for the Attorney General submits that s. 2(b) of the *Charter* does not guarantee a general right of access to information; he observes that in *CLA*,[62] which he posits as the leading case on point, the Supreme Court held that "s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded."[63] The Attorney General cites a number of cases decided either in Superior Court[64] or by the IPC[65]

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[58] *Canadian Broadcasting Corp.*, 2011, *supra*, para 12.
[59] *Named Person v. Vancouver Sun*, [2007] 3 S.C.R 253, para 33, citing *Edmonton Journal*, *supra*, 1338.
[60] *Canadian Broadcasting Corp*., 2010, *supra*, para 33.
[61] Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2265, Appeal PA-030192-1, April 28, 2004.
[62] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815 ("*CLA*").
[63] *Ibid*., para 37.
[64] *ARPA Canada v Ontario*, 2017 ONSC 3285.
[65] *Re University of Ottawa*, 2017 CanLII 2024; *Re City of Toronto*, 2016 CanLII 31964.

that rely on *CLA* as demonstrating that the *CLA* test is now the accepted basis on which to measure government disclosure obligations.

[59] The cases cited by the Attorney General as following *CLA*, as well as *CLA* itself, illustrate that the Attorney General's position misses the mark here. In *CLA*, the records in question were not produced by the government due to a concern for, *inter alia*, personal privacy.[66] On the other hand, nothing in *CLA* contradicts the "general principle that the open court principle trumps desires for anonymity."[67] The key to unravelling this apparent contradiction is in the type of information being requested. As McLachlin CJC described it in *CLA*, the Criminal Lawyers Association applied to obtain "a 318-page report looking into alleged police misconduct"[68] which contained "records prepared in the course of law enforcement investigations." The request was denied by the Minister of Public Safety and Security partly because the content of the document contained solicitor-client privileged material and partly because it was a law enforcement investigatory record.

[60] The *CLA* case, in other words, did not deal with Adjudicative Records such as those in issue here; and since the documents were investigative and were not part of a record before an adjudicative tribunal, the open court principle did not apply. The same is true of the other cases referred to by counsel for the Attorney General in this regard. One of those cases entails a request by a university employee for a psychological report contained in his personnel records held by the university;[69] another entails a request by a reporter for an Auditor General forensic report "directed at the detection of fraud, waste and wrongdoing involving city resources;"[70] while a third entails a request for hospital records pertaining to the provision of abortion services.[71] None of them entails a request for Adjudicative Records.

[61] As already indicated, *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records. But the open court principle in s. 2(b) of the *Charter* only applies to Adjudicative Records. This very point lies at the core of the Supreme Court's reasoning in *CLA*: "Access to documents in government hands is constitutionally protected only where it is…compatible with the function of the institution concerned."[72] Government agencies and public administrative bodies that hold investigative reports, personnel records, business and accounting records, and the like other than in an Adjudicative Record, are not subject to the open court principle.[73] They are obliged under *CLA* to implement transparency only where disclosure of their records is necessary for democratic process.

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[66] *CLA*, *supra*, para 13.
[67] *Stepanova*, *supra*, para 36.
[68] *CLA*, *supra*, paras 3-4.
[69] *Re University of Ottawa*, *supra*, paras 1-2, 4.
[70] *Re City of Toronto*, *supra*, para 2.
[71] *ARPA Canada v Ontario*, *supra*, paras 8-9.
[72] *CLA*, *supra*, para 5.
[73] *In the Matter of an Application Brought by the Toronto Star and the Criminal Lawyers Association*, Ontario Judicial Council, October 14, 2015, online: < http://www.ontariocourts.ca/ocj/ojc/confidentiality/>.

[62] Adjudicative Records, on the other hand, like court records, are not only entirely compatible with transparency but require it for the sake of the integrity of the administration of justice.[74] The rationale for maintaining confidentiality over records accumulated by law enforcement and forensic examiners at the investigation stage of a complaint or dispute does not, absent some special circumstance, continue into the open hearing or post-hearing stage of proceedings.[75] Thus, while access to government business records, including the content of personnel and investigative audits, is granted or withheld subject to the *CLA* test of "meaningful public discussion", the question of access to documents filed in the Adjudicative Record before administrative tribunals must be answered in accordance with the *Charter*,[76] including s. 2(b) and the open court principle.

[63] Like most reverse onus provisions, one purpose and effect of s. 21(1) of *FIPPA* and the operation of the exceptions thereto is, simply put, to facilitate the government's case against the party arguing against it.[77] This obviously makes it more difficult for the press and other document requesters to exercise the rights which they otherwise have under the *Charter*.

[64] This statutory imposition of an onus on the requester to justify the disclosure of Adjudicative Records may or may not be justifiable, but it certainly amounts in the first instance to an infringement on the s. 2(b) *Charter* right of access to those documents. The Supreme Court has stated emphatically that when it comes to access of the press to Adjudicative Records, "covertness is the exception and openness the rule."[78] In fashioning a regime that prohibits the disclosure of "personal information" unless the press can establish its justification, *FIPPA* has it the wrong way around.

b) Delay in accessing Adjudicative Records

[65] Counsel for the Toronto Star submits that newsgathering inherently requires timeliness. Any newspaper reader would find it difficult to refute this observation. In fact, it takes only the most cursory understanding of the media to comprehend the adage that "old news is no news".[79] Since time is of the essence to effective journalism, the publication of "stale news…cannot rank in importance with the dissemination of contemporary material."[80]

[66] The Alberta Court of Appeal has observed that it is only "contemporaneous access" to relevant materials that "allows the media to fulfill their legitimate role as the eyes and ears of the public".[81] Generally speaking, it is essential in a system that protects free expression and the

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[74] *Toronto Star Newspapers Ltd. v Ontario*, [2005] 2 SCR 188, paras 1-3.
[75] *Ibid*., para 8.
[76] *Nova Scotia (Workers' Compensation Board) v Martin, supra*, paras 29-31.
[77] *R v Laba*, [1994] 3 SCR 965, para 24; *R v Keegstra*, [1990] 3 SCR 697.
[78] *Attorney General of Nova Scotia v MacIntyre*, [1982] 1 SCR 175, 185.
[79] Herman Wasserman, "Reflecting on Journalism Research: A quarter century of *Ecquid Novi*" (2004), 25(1) South African Journal for Journalism Research 179, 199.
[80] *Loutchansky v Times Newspapers Ltd*. [2002] 2 WLR 640, para 74 (CA).
[81] *R v White*, 2005 ABCA 435, para 6.

press that "the media…should not have their right to report on proceedings…delayed for any greater period of time than a court believes is absolutely necessary".[82] Just as justice delayed can be justice denied,[83] so reportage delayed can be reportage denied.

[67] The evidence adduced by the Toronto Star demonstrates varying amounts of delay in responding to requests for documents. As detailed earlier in these reasons, those tribunals who utilize the *FIPPA* process take from 10 days to 8 months and beyond to provide a requester with a final decision. The most typical time frame for the requests contained in the present evidentiary record are somewhere in the 30 to 45-day range. This is roughly in keeping with what one might expect from a review of the legislation itself, which allows for 30 days (with possible extensions) for a first decision by an institution head, with more time needed for an appeal to the IPC.

[68] Counsel for the Attorney General submits that there is no evidence that any of the delays (or redactions) actually impeded the writing of any stories or reporting on any of the cases mentioned in the record. However, it is the Toronto Star's evidence that for many of these incidents the newsworthiness of the reporter's story has faded by the time the documentary production was made by the given tribunal. In the more frequently litigated area of libel law, it is notoriously difficult to prove a negative such as libel chill or the number of articles *not* written,[84] and it stands to reason that the same applies with respect to delay. It may be difficult to calculate how many article ideas faded away as the days and weeks passed and the writer waited for a decision on whether an Adjudicative Record would be forthcoming.

[69] As Doherty JA has elsewhere put it, "The values promoted by s. 2(b) [of the *Charter*] are not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose."[85] It must be the rare story that is still timely months after the event. Canadian readers, like Canadian voters, expect that "the most accurate and timely polls [and news reports] will be available."[86] Thus, even if a reporter were "ultimately successful in his challenge…the full exercise of his rights would have been compromised by the delay in publication while the challenge was being made."[87]

[70] As with the presumption of non-disclosure in s. 21(1), the delay occasioned by *FIPPA* procedures may or may not be justifiable – "[a]n unreasonable delay denies justice,"[88] but not all delay is unreasonable. That said, it certainly burdens freedom of the press and amounts in the first instance to an infringement on the s. 2(b) *Charter* right of free expression.

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[82] *R v Kossyrine & Vorobiov*, 2011 ONSC 6081, para 5.

[83] *R v Jordan*, [2016] 1 SCR 631, para 19; but see Payam Akhavan, "Justice delayed is better than justice denied", *The Globe and Mail*, March 30, 2016, online: <www.theglobeandmail.com/opinion/ karadzic-verdict-justice-delayed-better-than-justice-denied/article29425024/>.

[84] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, para 203.

[85] *R v Domm* (1996), 31 O.R. (3d) 540, para 40 (Ont CA).

[86] *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, para 114.

[87] *Ibid*.

[88] *R v Jordan*, *supra*, para 19.

V. Reasonable limits on openness and expression

[71] When it comes to fundamental *Charter* guarantees such as the openness principle, freedom of the press, and freedom of expression, "any encroachment upon the guarantees demand[s] justification by the state on a stringent basis."[89] Having found that *FIPPA* violates s. 2(b) of the *Charte*r in two respects – substantively by imposing a reverse onus on a request for Adjudicative Records, and procedurally by occasioning delay in accessing Adjudicative Records – it is necessary to turn to s. 1 of the *Charter*. It is here that the analysis of *Charter* rights takes on "a more contextual approach and indicate[s] the harms that might be caused to other rights and interests".[90] These include, most notably, the privacy rights of litigants and the administration of justice in administrative tribunals.

[72] In considering whether *FIPPA*'s limits on freedom of expression are reasonable and justifiable in a free and democratic society, the analysis follows the *Oakes* test.[91] It will therefore consider whether the legislative objective is pressing and substantial, whether the means chosen by the legislature is rationally connected to the objective, whether the legislation minimally impairs the right of free expression, and whether it is proportional considering the deleterious and salutary effects on the right.

a) Pressing and substantial objective

[73] Counsel for the Toronto Star submits that the Attorney General has difficulty in articulating any objective for *FIPPA*, let alone a pressing and substantial one. To put it another way, the Toronto Star contends that if there is an identifiable objective to this legislation it is an illegitimate one in that it aims at overriding the openness principle. That is, it is specifically designed to place obstacles in the way of disclosing Adjudicative Records.

[74] In response, counsel for the Attorney General stresses the *FIPPA* objectives as they apply to administrative tribunals: "to provide a right of access to information while at the same time protecting the privacy of individuals." It is the Attorney General's position that the objective of providing individuals a measure of control over information that is personal to them is itself pressing and substantial. To put it another way, "the ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy."[92]

[75] Courts in other contexts have indicated that contemporary legislation and other state action often exhibits multiple objectives. These objectives, in turn, often take the form of a

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[89] Lorraine E. Weinrib, "Canada's Charter of Rights: Paradigm Lost?", (2002) 6 Review of Constitutional Studies 119, 151.
[90] Kent Roach and David Schneiderman, "Freedom of Expression in Canada", (2013) 61 SCLR (2d) 429, 485.
[91] *R v Oakes*, [1986] 1 SCR 103.
[92] *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers*, [2013] 3 SCR 733, paras 19.

policy balance between the particular *Charter* rights of the individual and the rights and interests of others with whom the individual may interact.

[76] As an example, counsel for Justice for Children and Youth makes the forceful point that criminal justice legislation aimed at young persons has long reflected multiple objectives: ensuring privacy and other accommodation measures for youths while fostering fair sentencing and other criminal process measures for the community at large. As a further example, in the context of s. 2(b) of the *Charter*, a demonstration in a public park may be curtailed with the objective of preserving some use of the public resource for other residents;[93] likewise, hate speech may attract criminal sanctions with the objective of preventing distress to other individuals and discord in society.[94] All of these combine a rights-oriented objective with a community-oriented objective.

[77] This thinking has been applied by the Supreme Court of Canada to *FIPPA* itself. In *CLA*, the Court identified the dual objectives of *FIPPA* by identifying its purpose and effect: "Both openness and confidentiality are protected by Ontario's freedom of information legislation".[95] The Williams Commission Report, on which *FIPPA* was originally based, endorsed the application of a freedom of information regime, with its built-in balance of the openness principle with privacy concerns, to administrative tribunals, with specific reference to the latitude to be given each tribunal to fashion its own access policy.[96]

[78] I have little hesitation in concluding that the multiple objectives of *FIPPA* are of sufficient importance, even considering that the law has the effect of infringing s. 2(b) of the *Charter*. The effort to prevent harm to some people is a pressing and substantial objective for a law that otherwise limits freedom of expression.[97]

b) Rational connection

[79] Neither the Toronto Star nor the Attorney General make much of an argument with respect to the question of whether means chosen by the legislature – the application of *FIPPA* to adjudicative tribunals – is rationally connected to its objectives. Counsel for the Toronto Star is somewhat dismissive of this question, given that he has concluded that there is no valid objective to the legislation. He tacitly concedes that there might be a rational connection between the means and the objective, but since the objective is seen to contradict authoritative case law identifying the openness principle as a constitutional imperative he contends that the rational connection question is of no import.

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[93] *Batty v City of Toronto*, 2011 ONSC 6862, para 95.
[94] *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467, paras 73-74.
[95] *CLA*, *supra*, para 2.
[96] Commission on Freedom of Information and Individual Privacy, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (Toronto: Ministry of Government Services, 1980, vol 2, 195.
[97] *R v Keegstra*, [1990] 3 SCR 697, 746-47.

[80] Counsel for the Attorney General gives the question equally short shrift. He maintains that the inclusion of adjudicative tribunals in the *FIPPA* regime is rationally connected to the purpose of balancing a right of access against a concern for privacy. Since the Attorney General has submitted that this balancing is itself a pressing and substantial objective, he submits that all that needs to be demonstrated at this stage is that that objective is logically furthered by the legislation.

[81] I tend to agree with counsel for the Attorney General on this point. Since I have found there to be a valid objective to *FIPPA*, the only question for the next stage of the *Oakes* test is to ask a question not of policy but of logic. As it was put originally in *Oakes*: is there a "rational connection between the fact proved and the ultimate fact presumed"?[98] The question here manifests as an inquiry into whether one can logically perceive a connection between the inclusion of adjudicative tribunals in the Schedule to *FIPPA* and the balancing that the statute aims to engage. The question virtually answers itself; the rational connection test is met.

c) Minimal impairment

[82] Counsel for the Attorney General observes that the minimal impairment requirement is the heart of a s. 1 analysis; it is here that challenged legislation most often rises and falls. The test is a rather stringent one in the sense that the legislative measure that has already been determined to impair *Charter* rights must now be seen to impair them minimally. When it comes to legislative measures with multiple, competing objectives that are balanced against each other, the minimal impairment test becomes a difficult one to meet. "A particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal."[99]

[83] As discussed earlier, the problem with *FIPPA* is twofold: it substantively infringes s. 2(b) by presuming non-disclosure of a broadly defined version of "personal information, and it procedurally infringes s. 2(b) by causing delay in accessing those Adjudicative Records that it does allow to be disclosed. Given the goal of balancing openness and access with privacy protection, the minimal impairment question must be asked in respect of both forms of rights violation. Does the reverse onus on producing personal information minimally impair the right, and do the timelines and wait periods built into the statute's access to information process minimally impair the right?

i) Is there minimal impairment in substance?

[84] Counsel for the Toronto Star submits that, "The exemptions in *FIPPA* and the broad definition of 'personal information' are often used to resist, and even prevent, disclosure of Tribunal Adjudicative Records." While this description may be accurate, it suggests that there is something improper about the way in which heads of institutions or the IPC are applying *FIPPA*.

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[98] *R v Oakes*, *supra*, para 51.
[99] *Canada (Attorney General) v JTI-Macdonald Corp*., [2007] 2 SCR 610, para 43.

That, however, is not the case. The officials tasked with applying *FIPPA* are, on my reading of the statute, genuinely applying its terms as enacted. If there is a problem with the way records are disclosed by institutions to which *FIPPA* applies, the problem is with the statutory terms themselves and not with anyone's manipulation of them.

[85] By way of illustration, in 2005 the IPC had to consider a double request to the predecessor to the LTB for a schedule of "Cases in a Hearing Block". One of the pair of requests sought a pre-hearing schedule of upcoming cases, while the other sought a post-hearing list of cases that had been considered. For the pre-hearing schedule, the IPC cited privacy grounds in authorizing production of a list of cases with all identifying features – names, addresses, and unit numbers – redacted. This, of course, made the disclosure meaningless in terms of knowing the actual hearings on the upcoming schedule, although the IPC indicated that the identifying information would be available at the hearings themselves since they were required under s. 9(1) of the *SPPA* to be open to the public.[100]

[86] The IPC then turned its attention to the request for post-hearing information, and again declined to make meaningful production of the tribunal's records. In a key passage of its ruling, the IPC found there to be no distinction between pre-hearing and post-hearing records, despite the fact that the post-hearing records had already been made public during the course of the hearing itself:

> The appellant also argues that the record is not personal information because it is 'public information'. The fact that information may be contained in a document that is or was available to the public does not mean that it is not personal information. Rather, the issue of public availability arises in the analysis of whether any personal information the record may contain is exempt under section 21(1) of [*FIPPA*]…[101]

[87] In other words, while the exemption for personal information was indeed invoked as a basis on which to refuse production of Adjudicative Records, the basis for the refusal was the operation of the statute itself. The presumption of non-disclosure, and the reverse onus on the requester to show that the request falls within an exception to the s. 21(1) personal information exemption, is a feature of *FIPPA* that must be confronted directly.

[88] In other, non-*FIPPA*-related contexts, the grounds for issuing a publication ban – i.e. for overriding the open court principle on a case by case basis – are contained in what has become known as the *Dagenais/Mentuck* test.[102] As the Supreme Court has explained, the openness principle is contained within s. 2(b) of the *Charter*, and so can only be limited in accordance with s. 1 of the *Charter*. Any test that seeks to limit a constitutionally entrenched principle must,

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[100] Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2265, Appeal PA-030192-1 (April 28, 2004).
[101] Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2418, Appeal PA-040326-1 (September 27, 2005) 4.
[102] *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835; *R v Mentuck*, [2001] 3 SCR 442.

therefore, incorporate the essential elements of the reasonable limits analysis within it.[103] The *Dagenais/Mentuck* test does this in a way that "mirror[s] the minimal impairment and proportionality steps in the s. 1 analysis set out in *R. v. Oakes*".[104] Under *Dagenais/Mentuck*, a publication ban may be issued if the following conditions are met:

> a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[105]

[89] As the test states, the reasons for overriding the openness principle must pose a serious risk, and not just an inconvenience to the parties or the adjudicative body. That said, although the *Dagenais/Mentuck* analysis has been characterized as a "stringent test", it has also been observed that it should not be "applied mechanistically".[106] As it applies to judicial proceedings, the test has been "tailored…to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans."[107] Thus, the names of police informants can be expunged from public accessibility,[108] and information contained in search warrants and other investigative instruments can be withheld from publication,[109] but only where the specific circumstances show that "the public interest in effective law enforcement and privacy" outweighs the principle of "accountability and the transparency of the legal system".[110]

[90] What is clear from the case law is that it is the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this balance. This, then, impacts directly on the onus of proof. In order for an adjudicative system to comply with s. 2(b) of the *Charter*, "The burden of displacing the general rule of openness lies on the party making the application."[111] As other courts across the country have stated, publicity is the order of things and "any exceptions" – including those specifically provided

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[103] *R v Mentuck, supra*, para 27.
[104] *Named Person v Vancouver Sun*, *supra*, para 34.
[105] *Ibid.*, para 32.
[106] *Toronto Star Newspapers Ltd. v Ontario*, *supra*, paras 17, 31.
[107] *Ibid*., para 31.
[108] *Ibid*.
[109] *R v Leipert*, [1997] 1 SCR 281.
[110] *R v Eurocopter Canada Ltd*. (2003), 67 OR (3d) 763, para 44.
[111] *Canadian Broadcasting Corp. v New Brunswick*, *supra*, para 71.

by statute – "must be substantiated on a case by case basis."[112] This onus is necessary "in light of the…*Charter* principles which inform the [*Dagenais/Mentuck*] test".[113]

[91] I acknowledge, as any court must, that the openness principle and the analysis that accompanies a request to override it, must "tak[e] into account the particular characteristics and circumstances of the…proceedings."[114] The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals.

[92] A decision about a revealing a police informant's identity in a record supporting a search warrant will obviously entail very different considerations than a decision about revealing a tenant's identity in a record filed in evidence in LTB hearing. The decision-maker contemplating a limitation on the openness principle must take the differing contexts and the statutory objectives of the particular administrative body into account.[115] The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no 'one size fits all' application of the openness principle.

[93] Varied though the contexts and considerations may be, however, the decision must always be a constitutionally justifiable one. That is, it "must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban…; is authorized by statute…; or under [civil] rules of court, for example, a confidentiality order".[116] This *Charter* requirement applies equally to "statutory tribunals exercising judicial or quasi-judicial functions involving adversarial type processes",[117] since "it is a basic principle that proceedings of…[such] administrative tribunals should be open to the public, with the ability to be...reported on".[118] It is therefore applicable to each of the adjudicative tribunals at issue in this Application.

[94] An across-the-board presumption such as that embodied in s. 21 of *FIPPA*, in which privacy and non-disclosure rather than openness and disclosure is the presumptive rule, cannot qualify as a minimum impairment of s. 2(b) of the *Charter*. The open court principle is the fundamental one and the personal information and privacy concerns are secondary to it.[119] That principle directs administrative tribunals to protect confidentiality only where a party seeking it establishes that it is necessary to protect important interests.[120] Although the decision-maker may

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[112] *R v Vandevelde* (1994), 89 CCC (3d) 161, 171 (Sask CA), citing *R v Lefebvre* (1984), 17 CCC (3d) 277, 282-83 (Que CA). See also *R v Brint* (1979), 45 CCC (2d) 560 (Alta CA); *R v Quesnel* (1979), 51 CCC (2d) 270 (Ont CA).
[113] *R v Eurocopter Canada Ltd*., [2001] OJ No 1591, para 35 (SCJ).
[114] *Toronto Star Newspapers Ltd. v Ontario*, *supra*, para 17.
[115] *Doré v Barreau du Québec*, [2012] 1 SCR 395, paras 55-56.
[116] *Re Vancouver Sun*, [2004] 2 SCR 332, para 31.
[117] *Southam Inc. v Minister of Employment and Immigration*, *supra*, para 9.
[118] *Law Society v Xynnis*, *supra*, para 10.
[119] *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522, para 56.
[120] *Hunte v Ontario (Superintendent of Financial Services)*, 2013 ONFST 3, para 19.

be exercising a statutory discretion taking into account the context on a case by case basis, the onus must remain on the party seeking to keep the information from the public rather than the other way around.

ii) Is there minimal impairment in procedure?

[95] As discussed earlier, the delay and bureaucracy inherent in the *FIPPA* regime also burdens the exercise of s. 2(b) *Charter* rights. As noted, freedom of the press is only operational when the press has timely enough access to information to publish to an audience. Untimely disclosure that loses the audience is akin to no disclosure at all.

[96] The question of whether *FIPPA* minimally impairs the right in this respect is a more difficult one. The Toronto Star contends that the statutory notice and other time periods, and the arrangement in which it is administrative personnel and the IPC rather than tribunal members make the disclosure decisions, violate the right to openness in an unjustifiable way. Counsel for the Toronto Star submits that the tribunals themselves can and often do make disclosure decisions, and that this alternative is a more workable and minimally impairing one than the decision-making regime established by *FIPPA*.

[97] The Attorney General, on the other hand, views *FIPPA* as establishing a system that allows administrative tribunals to achieve the appropriate balance between openness and privacy in a manner that fully takes into account each tribunal's mandate and function. Counsel for the Attorney General indicates that administrative tribunals work differently from courts and operate in diverse socio-economic contexts – specifically, they are less formal in their procedures, often collect large amounts of personal material from litigants in the pre-hearing stage of proceedings, tend to be sparsely staffed and under-resourced, and frequently deal with unrepresented and highly vulnerable litigants. It is the Attorney General's submission that *FIPPA*'s delegation of disclosure decisions to the head of each institution and to the IPC allows this reality to be taken into account.

[98] Moreover, counsel for the Attorney General argues that the result of the Toronto Star's proposal of unregulated access to tribunal records (except directly by each adjudicator) would result in an unwieldly burden on adjudicators. Since the Toronto Star's position closely analogizes adjudicative tribunals to courts, adjudicators in the tribunal system would have to add each disclosure application to their case load. *FIPPA*'s delegation of the task to institution heads and the IPC effectively relieves this pressure. It is the Attorney General's view that *FIPPA*'s structure is workable and sound, and that it establishes a decision-making expertise that deserves deference as a result of the accumulated knowledge about the privacy considerations at stake and the logistical support it provides to administrative tribunals.

[99] In terms of the expertise of the institution heads and, in particular, the IPC, it is fair to say that the jury is still out. Reading IPC decisions makes one keenly aware that *FIPPA* does not mandate the IPC to take s. 2(b) of the *Charter* into account in making disclosure decisions. Thus,

one finds decisions made in review of the HRTO that opine: "While the Tribunal makes the argument that there is a compelling public interest in disclosure of the records, it goes on to recognize that this office has not accepted the 'open court principle' as a basis for overriding the exemption in section 21".[121] Similarly, IPC decisions in review of LTB rulings on disclosure tend to circle back onto the statutory requirements rather than to weigh them against a principle of openness:

> Although the appellant's analogy between open court processes and the transparent conduct of hearings by tribunals covered by the *SPPA* has some merit, they are not identical. For example, section 65(4) of the Act excludes documents prepared and filed for the purposes of proceedings before the Courts from coverage under Ontario's freedom of Information regime; while administrative tribunals, including the Tribunal, are subject to the Act and bound by its access and privacy requirements. Accordingly, while the Tribunal's hearings and procedures must comply with the *SPPA*, decisions regarding disclosure of personal information contained in records outside of the actual hearings process must be determined in accordance with the requirements of the Act.[122]

[100] I do agree, of course, that institution heads and the IPC have developed a sensitivity to the privacy concerns of litigants before adjudicative tribunals. They have certainly been adept at applying the existing statutory presumption against disclosure of any personal information to the end of protecting their privacy. Indeed, I would say that they have been fully committed to *FIPPA*'s policy of ensuring total privacy, holding back not only pleadings and evidentiary documents from public access, but even schedules of cases making those tribunals inscrutable by the press.

[101] It remains to be seen how this will be tempered once institution heads and the IPC turn their minds more fully to the paramount consideration of openness that the *Charter* requires. The legislature has delegated the decision-making task to them, but their decisions now must start taking the applicable *Charte*r principles into account. "Deference as respect" may be a formula embraced by the courts,[123] but this posture must not be driven by ideology.[124] Properly understood, the point is to pay "respectful attention to the reasons offered or which could be offered in support of a decision."[125] Thus, it is equally accurate to say that, "Deference is earned; it is not a birthright."[126]

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[121] Order PO-2923, *supra*, 10.
[122] Order PO-2265, *supra.*
[123] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para 65, *Dunsmuir*, *supra*, para 48.
[124] See Mark S. Hurwitz, "Ideology and Deference in U.S. Courts of Appeals Decision Making on Administrative Law", Buffalo Legal Studies Research Paper Series, Paper No. 2006-003 (University at Buffalo Law School, 2005).
[125] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in: M. Taggart, ed., *The Province of Administrative Law* (London: Hart Publishing,1997), 286.
[126] *Kadia v Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007).

[102] With all of that, I am mindful of the submission made at the hearing of this Application by counsel for the Ontario Judicial Council. That institution is, of course, well versed in both the open court principle and the privacy interests that can be vested in sensitive adjudicative tribunal proceedings. Counsel admonished the court to be cognizant of the complex task of fashioning a disclosure system for a very diverse body of administrative institutions. Some of these institutions have full-time members that sit in formal hearings dealing with substantial commercial matters (e.g. OSC, FST, OMLC, OMB), others sit in more informal proceedings dealing with highly sensitive matters going to personal autonomy of the participating individuals (e.g. HRTO, CICB, OCPC), while still others hold hearings on social justice and welfare issues for unrepresented and often unsophisticated litigants (e.g. LTB, WSIAT).

[103] In view of this complex and diverse picture, counsel for the Ontario Judicial Council warned me to pay heed to "the law of unintended consequences". That, I must say, is sage advice. Under the circumstances, the Toronto Star's proposal – that the court strike down *FIPPA* insofar as it pertains to Adjudicative Records held by the listed quasi-judicial tribunals and replace it with direct access to the tribunals themselves – might minimally impair the right of openness enshrined in s. 2(b) of the *Charter*. But I do not know how much collateral damage will be done to the tribunal system in the process. An under-resourced tribunal staffed with part-time adjudicators and little in the way of administrative assistance may find itself overwhelmed in a suddenly *FIPPA*-free procedural environment.

[104] Moreover, there is a sense that the Toronto Star is perhaps frustrated by having to deal with a cumbersome, bureaucratic system which can sometimes seem neither user-friendly nor prone to make document requests easy. I sympathize with the desire of journalists and others who make *FIPPA* applications on a regular basis to cut through the 'red tape', as it were. But bureaucracy in and of itself is not a *Charter* violation. It's just annoying. Legal commentators in the United States have pointed out that, "We have to accept that there's a difference between laws that embody bad policy and laws that a state legislature lacks the power to enact. A law can be bad…without being unconstitutional."[127] That message is an apt one under Canada's constitutional system as well.

[105] In any case, the various timelines built into the *FIPPA* system appear designed to make the system operate fairly. One cannot act judicially in making an access determination without giving notice to affected parties and providing some amount of time for a response. The specific notice and other time periods provided for in *FIPPA* may or may not be ideal, but there is little evidence that the problems are with *FIPPA*'s terms on their face. Where the evidence in the record shows that there have been inordinate delays, the source of the problems may lie more with the particular administrators or decision makers who extend the *FIPPA* timelines than with the statutory system itself. Once the reverse onus on personal information is removed, those human delay factors will hopefully be reduced.

[127] Paul Reidinger, "Will Roe v. Wade be overruled?", ABA Journal (July 1, 1998) 7.

[106] The *Charter* requires public access to Adjudicative Records, which may be tempered on a case-by-case basis by other considerations – integrity of the administration of justice, safety and security of informants and other third parties, privacy for complainants and other litigants, etc. For an unconstitutional law, "the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*…. Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts".[128]

[107] To the extent that an applicant for Adjudicative Records has its rights undermined by an institution head or the IPC excessively extending the *FIPPA* timelines, the appropriate course of action is not to declare the statute (or any of its provisions) of no force and effect under s. 52(1). Rather, the Superior Court retains jurisdiction to fashion an "appropriate and just" remedy for the aggrieved rights holder under s. 24(1) of the *Charter*,[129] or to impose an administrative law remedy.

[108] All of this is to say that much as *FIPPA*'s various notice periods, times for submissions, and potential extensions of those times burden the exercise of s. 2(b) rights when it comes to access to Adjudicative Records, on a systemic basis the impairment is minimal. While there may be individual cases of unjustifiable delay and impairment of rights which could lead to an individual remedy, those cases are left for another day.

d) Proportionality

[109] The final step in the *Oakes* analysis is to determine whether there is proportionality between the deleterious and the salutary effects of *FIPPA*'s infringing measures.

[110] The deleterious effects of the presumption against disclosure in s. 21(1) and related provisions of *FIPPA* are real and substantial. As counsel for the Toronto Star points out, emphasizing privacy over openness not only has a negative impact on the press but also affects other stakeholders. Regulators have no way of identifying chronic offenders, reference checks on tenants and others who come before the various tribunals are impossible to carry out. Problematic landlords, police, and other actors, including repeat human rights offenders, vexatious litigants, and the like cannot be discovered by members of the public who have to engage with them. The public cannot know about upcoming hearings for a number of the tribunals, and the media are unable to engage public debate about cases which they do not know are forthcoming and so do not attend or cover.

[111] In the seminal press freedom case under the *Charter*, Wilson J. noted that, "We cannot ignore the fact that for every litigant concerned about the adverse impact of publicity upon his or her image in the community, there may be another equally concerned about public vindication

[128] *R v Ferguson*, [2008] 1 SCR 96, paras 59-60.
[129] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3, para 51.

and community support."[130] As indicated, 8 of the tribunals in issue by-pass the *FIPPA* process altogether, and make their documents presumptively available to the public. Other tribunals invoke *FIPPA* and make documents presumptively unavailable even in the face of parties who may not object to publication.

[112] Counsel for the Attorney General identifies a number of salutary effects of the reverse onus on disclosing personal information. These include the strong protection of privacy, the support for informality and efficiency by dispensing with the need for lawyers, and the encouragement of use of the administrative tribunal system by vulnerable individuals. While one can certainly appreciate the pragmatic advantages of the system as identified by the Attorney General, these must be seen as outweighed by a process that embodies substantial rather than minimal impairment.

[113] This is especially the case given that speech rights can be characterized as non-instrumental. McLachlin J. (as she then was) has made this point in reviewing the philosophical underpinnings of s. 2(b) of the *Charter*, to the effect that "freedom of expression may be viewed as more than a means to other ends. Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve."[131] Where the *Charter* right "respect[s] each and every person as an end," it cannot be contested or measured by a law that "merely manipulate[es] them, or some of them, as means".[132] If there is no sociological goal or end to weigh against the salutary features of the impugned legislation, the contest between the deleterious effects and those salutary benefits is really no contest at all.

[114] Moreover, there is no real evidence to support the Attorney General's most strenuous point – that tenants, human rights plaintiffs, complainants against medical professionals, etc. will likely cease using the relevant tribunals if their identities are exposed to the public. While there is affidavit evidence demonstrating that tribunal litigants are concerned about protecting their privacy, there is little to establish that a change in the s. 21(1) presumption against disclosure would have a chilling effect on tribunal applications.

[115] As already indicated, in matters touching on free expression chilling effects are notoriously difficult to prove. Even taking this difficulty into account, however, it is not possible for me to conclude that the statute's infringement of the openness principle is somehow more than counterbalanced by its potential, if speculative support for access to justice. On the record before me, the salutary effects of the presumption of non-disclosure of personal information in s. 21 of *FIPPA* do not outweigh the deleterious effects of that measure on the *Charter* right to openness.

[116] As for *FIPPA*'s procedural limitations on s. 2(b), I have already found that the notice requirements, timelines, and designation of institution heads and the IPC as decision-makers

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[130] *R v Edmonton Journal*, *supra*, para 23.
[131] *R v Keegstra*, [1990] 3 SCR 697, 802.
[132] Ernest J. Weinrib, "Public Law and Private Right" (2011), 61 UTLJ 191, 196.

minimally impair the right. While these procedural factors may be subject to extension and abuse in individual cases, they are in their own terms justifiable as minimal intrusions on the openness principle.

[117] Professor Hogg states in his textbook, and the Supreme Court has confirmed, that this effectively renders the proportionality analysis redundant.[133] That is not to deny the overall importance of proportionality, which embodies an analytic approach that has made Canadian law "a global constitutional reference point."[134] But as a general matter, proportionality determines the conditions which make a limitation on a constitutional right justified and therefore permissible.[135] A minimal impairment of a *Charter* right is already proportionate to that right and is justifiable on those terms.

VI. Standing and factual basis for the Application

[118] As a final matter (or, perhaps, as a preliminary, threshold matter), counsel for the Attorney General submits that the Toronto Star has no standing to bring this Application and that, in any case, the Application should have proceeded by way of judicial review of an IPC decision. Both of these arguments mischaracterize the proceeding; they treat it as a challenge to a particular administrative decision rather than a challenge to a statutory regime authorizing all document access decisions in respect of 14 named tribunals. In my view, this approach has no merit.

[119] As it turns out, this Application was really a challenge to the constitutionality of certain provisions of *FIPPA*. It was not a challenge to the constitutionality of any particular decision or set of decisions by administrative decision makers implementing *FIPPA*. Accordingly, no Applicant would be in a better position than the Toronto Star – a newspaper with vast and ongoing experience in making access to information applications – to bring the challenge. "[I]t would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."[136]

[120] Under current standing rules, the Toronto Star has public interest standing to bring this constitutional Application. In considering this question, "the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a

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[133] Alberta *v* Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567, para 75, citing Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, s. 38.12.

[134] Peter Oliver, Patrick Macklem, Natalie Des Rosiers, "Introduction", in *The Oxford Handbook of the Canadian Constitution*, P. Oliver, P. Macklem, N. Des Rosiers (Oxford U. Press, 2017) 5.

[135] Aharon Barak, *Proportionality, Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 3.

[136] *Thorson v Attorney General of Canada*, [1975] 1 SCR 138, 145.

reasonable and effective way to bring the issue before the courts."[137] The Toronto Star easily passes all three steps in the analysis. It raises serious *Charter* issues, it has a real stake in that it is a constant user of the *FIPPA* process for the tribunals in issue and, for that matter, any number of other tribunals across Ontario. The present Application is a convenient way to bring issues before the court that pertain to multiple administrative tribunals all authorized by the same piece of legislation.

[121] The Attorney General takes the position that the challenge to the 14 tribunals should be treated like 14 distinct applications, and the Toronto Star must prove that it has standing to challenge each one. Thus, counsel for the Attorney General argues that the case against several of the tribunals be dismissed, since there is no evidence in the record that a Toronto Star reporter submitted a request to them under *FIPPA*. Counsel for the Toronto Star responds with the observation that requiring 14 different applications, with 14 records of evidence, would be "wasteful, unnecessary, and unproductive and not in the interests of justice to these litigants or the public."[138] It is hard to disagree with that common-sense proposition.

[122] Furthermore, the Toronto Star is a representative applicant for the entire public – it is the public's right of access to Adjudicative Records that is in issue. In addition, the 14 named tribunals are, in effect, representatives for a large number of tribunals listed in the Schedule to *FIPPA* that act judicially. Whether at this moment the Toronto Star is seeking documents from the HRTO, the OLRB, the FST, or the HPARB (the last two of which the Attorney General argues should not be here due to a paucity of evidence) is immaterial. *FIPPA* applies to many tribunals that act judicially, and they all will be impacted by the present ruling with respect to the s. 21(1) reverse onus on personal information.

[123] By way of brief illustration of the type of standing that the Toronto Star enjoys, a doctor and his patient challenged the prohibition in Quebec's *Health Insurance Act* and *Hospital Insurance Act* on doctors billing their patients for private services. The Supreme Court of Canada described the standing of the two of them to bring the constitutional challenge, as follows:

> The validity of the prohibition is contested by the appellants, George Zeliotis and Jacques Chaoulli. Over the years, Mr. Zeliotis has experienced a number of health problems and has used medical services that were available in the public system, including heart surgery and a number of operations on his hip… Mr. Chaoulli is a physician who has tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a licence to operate an independent private hospital. Mr. Zeliotis and Mr. Chaoulli joined forces to apply to the court by way of motion for a declaration that s. 15 *HEIA* and s. 11 *HOIA* are unconstitutional and invalid.[139]

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[137] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, para 37.
[138] *Hanif v Ontario College of Pharmacists*, 2014 ONSC 2598, para 30.
[139] *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, para 5.

[124] Neither the doctor nor the patient had a current request for private service pending, although both had a history of making such requests. Likewise, the remedy sought by them did not pertain just to them; it pertained to all doctors and all patients seeking payment for private medical services. The Toronto Star and the 14 named tribunals are in parallel positions. The newspaper has a history of doing what it seeks to do with a number of the listed tribunals, and in any case the tribunals are representatives of all of the other similarly situated tribunals. Additionally, the Toronto Star itself is a representative applicant in the sense that its remedy will be every other similarly situated party's remedy.

[125] The Toronto Star may not, right at this moment, have a direct personal interest in obtaining specific Adjudicative Records from all 14 of the tribunals listed in its Application (or, for that matter, from all 185 administrative agencies listed in the Schedule to *FIPPA*). But as a major news outlet, it is certainly not a "mere busybody" that needs to be screened out for the sake of judicial efficiency.[140] It has standing to bring this Application.

[126] Along similar lines, counsel for the Attorney General also contends that the present constitutional challenge should have proceeded as a judicial review application. He submits that in failing to do so, the Toronto Star seeks to bypass the IPC. It is the Attorney General's submission that proceeding in this way violates the rule that parties must exhaust all administrative remedies before moving for a remedy in court.[141] Counsel argues that "only when the administrative process [i.e. the IPC appeal process] is finished or where the administrative process affords no effective remedy can they proceed to court."[142]

[127] There is, in fact, no administrative process that is relevant here. The Toronto Star commenced its Application in the way that it did because its challenge goes well beyond any one request for documents. Moreover, no administrative remedy could be forthcoming in this type of constitutional challenge. The Toronto Star seeks to invoke under s. 52(1) of the *Constitution Act, 1982* to strike down *FIPPA* as the enabling legislation under which the institutional heads and the IPC operate. Administrative decision makers generally have power to apply the *Charter* and to implement *Charter* remedies under s. 24(1), depending upon whether they are expressly or impliedly authorized to do so by their governing legislation.[143] But striking down their own enabling statute, or part thereof, is another matter.

[128] There is no reason for the Toronto Star to have proceeded by way of judicial review. That would have been appropriate had the Toronto Star wished to challenge a decision with respect to any one tribunal's Adjudicative Records. A Superior Court application like the present one is the appropriate way to bring a challenge to the provisions of *FIPPA* itself.

VII. Remedy

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[140] *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, para 36.
[141] *CB Powell Ltd v Canada (Canada Border Services)*, 2010 FCA 61, para 30.
[142] *Ibid*., para 31.
[143] *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5, 14-15.

[129] *FIPPA* infringes s. 2(b) of the *Charter* in two respects: a) substantively in terms of s. 21 and related sections that contain the presumption of non-disclosure for producing Adjudicative Records containing "personal information" as defined in s. 2(1); and b) procedurally in terms of the notice provisions, timelines, and authorization for institution heads and the IPC to make decisions about access to Adjudicative Records. The Attorney General bears the onus under s. 1 of the *Charter* to justify these infringements.[144] It has met this onus with respect to the procedural infringements, but has failed to meet the onus of justification with respect to the substantive breach.

[130] As the Supreme Court has long pointed out, the key to a *Charter* remedy is for the court to address the constitutional violation but to "refrain from intruding into the legislative sphere beyond what is necessary".[145] Given my finding that the presumption of non-disclosure, or reverse onus in s. 21 of *FIPPA* is unconstitutional insofar as it applies to requests for production of Adjudicative Records, *FIPPA*'s application to such requests from adjudicative tribunals is rendered inoperative under s. 52(1) of the *Constitution Act, 1982*. This raises several follow-on questions, as set out by the Supreme Court:

> Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended?[146]

[131] As indicated, the extent of the inconsistency is limited within the overall scheme of *FIPPA*. The legislation, with its stringent protections of privacy built into s. 21 and other related sections, applies to government records of all sorts and to institutions that serve the public other than in an adjudicative function. This ruling does not apply to non-adjudicative institutions or to records held by adjudicative tribunals that are not within the definition of Adjudicative Records used throughout these reasons for judgment. The present ruling applies only to requests for Adjudicative Records from the 14 institutions named in this Application and, by extension, any other analogous institution listed in the Schedule to *FIPPA* that operates in an adjudicative capacity and that holds Adjudicative Records.

[132] Since 8 of the listed tribunals apparently answer requests for Adjudicative Records directly and do not require requesters to engage the *FIPPA* process, little or no change is needed for them. Each must examine its procedures to ensure that the presumption of openness and disclosure required by s. 2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records, but nothing about their procedures is otherwise impugned by this ruling. Other tribunals may follow this model and by-pass the *FIPPA* process altogether by

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[144] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, para 69.
[145] *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 104.
[146] *Schachter v Canada (Employment and Immigration Commission)*, [1992] 2 SCR 679, 717.

dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires.

[133] Counsel for the Toronto Star has argued throughout that the *Dagenais/Mentuck* test is the appropriate one for any tribunal to apply when a request for Adjudicative Records is submitted to it. Counsel for the Attorney General has responded throughout that *Dagenais/Mentuck* is too high a test and that while it is appropriate for court records it does not take the varying contexts of administrative tribunals sufficiently into account. The case law demonstrates, however, that there is not just one level of analysis applied under that test, and that *Dagenais/Mentuck* is indeed flexible enough to be adapted by the various adjudicative tribunals to their own particular contexts and needs. In the *Mentuck* case itself, Iacobucci J. acknowledged this flexibility. He specifically admonished that in applying the test "the purposes and effects invoked by the parties must be taken into account in a case-specific manner", and went on to comment that, "This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case."[147]

[134] As an example, the Manitoba Court of Appeal has held that the *Dagenais/Mentuck* test is flexible enough to protect certain Adjudicative Records in a coroner's inquest whose confidentiality was made necessary due to the child protection imperatives of the inquest.[148] The test likewise does not require production of Adjudicative Records submitted at any stage of a proceeding that fall under a category of privilege,[149] and can be applied in modification to "ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information" that may impact on further proceedings.[150] These concerns to protect the vulnerable, conserve scarce resources, make efficient and timely decisions, enforce privilege, and ensure the fairness of all adjudicative hearings, are all relevant to adjudicative tribunals. Each can adapt the *Dagenais/Mentuck* test to its own particular needs in respect of these concerns.

[135] For those tribunals that adhere to the *FIPPA* regime, the ruling here leaves intact the procedural system established under that legislation. That is, the decision-making authority of the institution heads and, on appeal, the IPC, is not rendered inoperative. Likewise, the various notice provisions and timelines contained in the legislation are upheld, provided they are not unduly extended for any given decision (which, as indicated earlier, would have to be challenged on a case by case basis). Once the legislature has the opportunity to re-work *FIPPA*'s substantive grounds for making disclosure decisions so that there is a presumption of openness rather than a presumption of confidentiality, the *FIPPA* procedures can be utilized.

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[147] *R v Mentuck*, *supra*, para 37.
[148] *Canadian Broadcasting Corporation v Manitoba (Attorney General)* (2008), 228 Man R (2d) 312, para 30 (Man CA).
[149] *Named Person v Vancouver Sun*, *supra*, para 36.
[150] *Toronto Star Newspapers Ltd. v Canada*, [2010] 1 SCR 721, para 60.

[136] I would emphasize here what must be obvious to anyone perusing *FIPPA*: the statute is not a paragon of clarity. I say this not to disparage the drafters, but to point out that it contains numerous interrelated provisions scattered across its several parts, and that the privacy concerns that touch on the production of Adjudicative Records are not conveniently gathered in one provision. They can be found up front in the definition section, in Part II dealing with access to information applications, exemptions from access, and exceptions to the exemptions, and in Part III dealing with the protection of individual privacy. Reversing the s. 21(1) onus with respect to the disclosure of personal information in Adjudicative Records may require some revisiting of large portions of the entire statute.

[137] Again as a brief example, s. 21(1) contains the basic reverse onus that exempts personal information from the information that an institution head is authorized to disclose. It is followed by a list of specific exceptions to the general exemption in s. 21(1)(a) to (f), which is in turn followed by a list of "criteria re invasion of privacy" in s. 21(2)(a) to (i), which is in turn followed by a list of specific instances in s. 21(3)(a) to (h) where disclosure of personal information is "presumed to constitute an unjustifiable invasion of privacy". Some of these would doubtless survive a s. 2(b) *Charter* analysis and others would not. Thus, the concern for protecting the very vulnerable and for ensuring less formal and more efficient hearing processes where health matters – and especially mental health matters – are at stake would arguably justify the non-publication rule contained in s. 21(3)(a) (information that "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation"); similarly, the concern to safeguard pre-hearing investigative procedures would likely justify the non-publication rule contained in s. 21(3)(b) (information that "was compiled and is identifiable as part of an investigation into a possible violation of law").

[138] Other factors listed in s. 21(3) – including the presumption against disclosing anything containing education and employment history (s. 21(3)(d)), personal finances (s. 21(3)(f)), personal recommendations and evaluations (s. 21(3)(g)), etc. – appear more geared toward saving a person from embarrassment than furthering the objectives of the particular legal process. These would not survive a *Charter* analysis.[151] It is up to the legislature to re-work any statutory prohibitions on publication in a way that complies with the Supreme Court's analysis of the criteria for statutory publication bans. This will likely have to be done in a way which allows for tribunal-specific determinations of how the openness principle is balanced against privacy concerns. After all, "[t]he analysis under s. 1 of the *Charter*…can only be accomplished by canvassing the nature of the social problem which [a given measure] addresses."[152] In the Supreme Court's words, "Context is the key to understanding the scope and impact of a limit on a *Charter* right.[153]

[139] For those adjudicative tribunals that rely on the *FIPPA* process to determine access to Adjudicative Records, the need to revamp a relatively complex piece of legislation in order to

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[151] *MEH v Williams*, 2012 ONCA 35, para 28.
[152] *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877, para 87.
[153] *Toronto Star Newspapers Ltd. v Canada*, *supra*, para 3.

make it *Charter* compliant presents practical difficulties. In effect, it leaves a procedural system intact but with a substantive void to be filled in on the fly by institution heads and the IPC. Requests for Adjudicative Records can continue to be dealt with procedurally in the way they have been until now, except that each institution head in the first instance, and the IPC on appeal, must make their decisions by applying the *Dagenais/Mentuck* test in whatever modification the particular tribunal in the particular context of a given request requires.

[140] The concern is that this may put a difficult burden on decision-makers to adapt overnight to a new task without substantive statutory guidance. As has been described in other legislative contexts, "moving abruptly from a situation where [the disclosure process] is regulated to a situation where it is entirely unregulated would be a matter of great concern".[154] The courts should be reluctant to place administrative decision-makers in that situation.

[141] This case therefore calls for some time period in which the invalidity of *FIPPA*'s application to Adjudicative Records is suspended. During oral submissions, counsel for the Attorney General suggested one year. That seems to me to be an appropriate length of time for the relevant portions of *FIPPA* to be re-worked should the legislature choose to do so. Alternatively, it will provide time for institution heads and the IPC to establish a principled, tribunal-specific and context-specific basis for adapting and implementing the *Dagenais/Mentuck* test in response to requests under *FIPPA* for access to Adjudicative Records.

VIII. Disposition

[142] There shall be a declaration that the application of ss. 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of "personal information" to Adjudicative Records held by the institutions named in the Notice of Application infringes s. 2(b) of the *Charter* and is not justified under s. 1. It is therefore of no force or effect.

[143] The declaration of invalidity of this aspect of *FIPPA* is suspended for 12 months from the date of this judgment.

Morgan J.

Released: April 27, 2018

[154] *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, para 167.

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Toronto Star Newspapers Ltd.

Applicant

– and –

Attorney General of Ontario

Respondent

– and –

ARCH Disability Law Centre, HIV & AIDS Legal Clinic Ontario, Income Security Advocacy Centre, Laborers' International Union of North America, LIUNA Local 183, Information and Privacy Commissioner of Ontario, Canadian Journalists for Free Expression, Ontario Judicial Counsel, and Justice for Children and Youth

Intervenors

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: April 27, 2018