

Broader Public Sector Accountability Act, 2010 - Implications for Ontario Hospital Foundations

Healthcare Philanthropy: Check up 2011
May 31, 2011

Laura E. West
416-865-5463
lwest@fasken.com



Overview of Presentation

- The *Broader Public Sector Accountability Act, 2010* S.O.2010 C.25 (the “BPSAA”)
 - Background
 - Overview
 - Implications for Ontario Hospital Foundations



Background

- Bill 122, "An Act to increase the financial accountability of organizations in the broader public sector" was introduced on October 20, 2010
- Introduced partly in response to concerns raised in the Ontario Auditor General's report, *Consultant Use in Selected Health Organizations*, but the scope of the BPSAA is broader
- Establishes new rules and higher accountability standards for hospitals, LHINs, and broader public sector organizations
- Bill 122, which enacts the BPSAA, received Royal Assent on December 8, 2010

3

Background

- Important for hospital foundations to be aware of new requirements imposed on hospitals by the BPSAA
- The BPSAA may not be directly applicable to hospital foundations but will have implications for hospital foundations due to their close relationships with hospitals
- Important for hospital foundations to be aware of scope of BPSAA to assess whether hospital foundations could potentially fall within the class of organizations subject to certain provisions of the BPSAA, its regulations and authorized directives

4

Background

- Relatively short but dense and complicated legislation
- Different effective dates for certain sections of the BPSAA
- Different organizations subject to different sections of the BPSAA
- Will likely be augmented by regulations (none currently in force) and cabinet management directives (two issued subsequent to the BPSAA being enacted)

5

Background

- The BPSAA introduces provisions related to:
 - Lobbying - certain organizations are prohibited from engaging lobbyists who are paid with public funds
 - Accountability and Public Reporting – certain organizations are required to publicly report on their use of consultants and provide public reports of their expenses
 - Expenses and Procurement Standards - the Management Board of Cabinet may issue directives and guidelines concerning allowable expenses and procurement practices on the part of certain organizations
 - Compliance Requirements – certain organizations are required to report on their compliance with provisions of the BPSAA
 - Extension of FIPPA – the *Freedom of Information and Protection of Privacy Act* is amended to apply to hospitals

6

Background

- Different dates upon which different sections of the BPSAA come into force:
 - Sections 1 to 4, 17 to 23 and 25 to 27 (General provisions, Lobbying rules, Enforcement, etc.) came into force January 1, 2011
 - Sections 5 to 16 (Accountability and Public Reporting, Expense, Procurement and Compliance rules) came into force April 1, 2011
 - Sections 24 and 28 (amending FIPPA to include hospitals) will come into force January 1, 2012

7

Background

- The BPSAA applies generally to an extended class of public service organizations but different sections applicable to different types of organizations
- Classification of organizations and the definitions of such classes of organization are key to interpreting the BPSAA

8

Background

- For the purposes of the BPSAA the term “broader public sector organization” means:
 - a designated broader public sector organization; and
 - a publicly funded organization.

9

Background

- “designated broader public sector organization” means
 - hospitals, school boards, universities and other post-secondary institutions, children’s aid societies, community care access corporations;
 - every corporation controlled by one or more designated broader public sector organizations that exists solely or primarily for the purpose of purchasing goods or services for the designated broader public sector organization or organizations;
 - every publicly funded organization that received public funds of 10 million dollars or more in the previous fiscal year of the Government of Ontario; and
 - every organization that is prescribed by regulation as falling within this definition

10

Background

- For the purposes of the BPSAA, “hospital” means:
 - a public hospital;
 - a private hospital that received public funds in the previous fiscal year of the Government of Ontario; and
 - the University of Ottawa Heart Institute.

11

Background

- “public funds” means the public money of the province of Ontario that is provided by the Government of Ontario or an agency of the Government of Ontario, directly to any authority, board, commission, committee, corporation, council, foundation or organization through a grant or transfer payment or other funding arrangement.....but public funds does not include:
 - money that is paid for the provision of goods or services to the Government of Ontario or an agency of the Government of Ontario,
 - money that is paid by the Government of Ontario or an agency of the Government of Ontario under a fee for service arrangement, or
 - money that is provided by the Government of Ontario or an agency of the Government of Ontario, by way of a loan or loan guarantee;

12

Background

- “publicly funded organization” means every authority, board, commission, committee, corporation, council, foundation or organization that received public funds in the previous fiscal year of the Government of Ontario, but does not include,
 - the Office of the Lieutenant Governor;
 - the Office of the Assembly or the office of an officer of the Assembly;
 - a ministry of the Government of Ontario;
 - an agency of the Government of Ontario;
 - a municipality;
 - subject to the regulations, a local board as defined in section 1 of the *Municipal Act, 2001* and section 3 of the *City of Toronto Act, 2006*;
 - a board of health under the *Health Protection and Promotion Act*;
 - subject to the regulations, an organization that undertakes its activities for the purpose of profit to its shareholders;
 - a long-term care home; or
 - any organization excluded under the regulations.

13

Overview

- Lobbying
 - The BPSAA provides that designated broader public sector organizations cannot engage a lobbyist to provide lobbyist services where the compensation for the services is paid from public funds
 - Certain other organizations (i.e., Ontario government agencies, Hydro One and its subsidiaries, Ontario Power Generation Inc. and its subsidiaries, Ontario Power Authority, Independent Electricity System Operator and every organization set out in the regulations) cannot engage a lobbyist to provide lobbyist services where the compensation for the services is paid from public funds or from revenues generated by the organization

14

Overview

- Lobbying

- Organizations cannot provide public funds to another person or entity to allow that person or entity to engage a lobbyist to provide lobbyist services for the organization
- There is a specific exclusion for membership fees paid by the organization to be a member of an association that is established to represent the interests of a group or class of similar organizations
- Regulations may make additional organizations subject to these rules and/or exempt organizations from the prohibition on using public funds to engage lobbyists

15

Overview

- Accountability and Public Reporting

- The BPSAA provides that certain organizations – i.e., LHINs, hospitals and any other organizations prescribed by regulation - are required to prepare reports on the use of consultants
- For these purposes, “consultant” means a person or entity that under an agreement, other than an employment agreement, provides expert or strategic advice and related services for consideration and decision-making

16

Overview

- Accountability and Public Reporting
 - The Minister of Health and Long-Term Care may issue directives concerning:
 - the form, manner and timing of these consultant reports;
 - the information to be included in such reports; and
 - to whom the reports shall be submitted
 - LHINs, hospitals and other organizations prescribed by regulation must comply with such directives
 - Regulations may be passed to require designated broader public sector organizations to report on the use of consultants

17

Overview

- Accountability and Public Reporting
 - LHINs and hospitals are required to post on their public websites information about expense claims that is required to be posted under directives issued by the Minister of Health and Long-Term Care
 - Regulations may also be established to provide for public posting of expenses by broader public sector organizations (i.e., designated broader public sector organizations and publicly funded organizations)

18

Overview

- Accountability and Public Reporting
- Directives regarding expense claim reporting shall provide, among other things, for the:
 - designation of the individuals, including board members and senior managers, whose expense claim information must be posted;
 - information in expense claims that is required to be posted;
 - form and manner in which the information is to be posted,
 - timing and frequency of when expense claim information must be posted; and
 - duration of time for which expense claim information must be posted

19

Overview

- Expenses Standards
- The BPSAA provides that the Management Board of Cabinet may issue directives requiring designated broader public sector organizations to establish expense rules and may make guidelines with respect to allowable expenses for publicly funded organizations
- An expense will be considered an allowable expense and may be reimbursed by a designated broader public sector organization if the expense meets the requirements set out in the rules made under the directives

20

Overview

- Expenses Standards

- Directives may require, among other things, for designated broader public sector organizations to establish rules that:
 - impose restrictions on who may make expense claims, on the types of expenses or the amounts that may be claimed or the circumstances in which the expense claims may be made;
 - require specified information or documents to be supplied or kept in support of an expense claim;
 - require the establishment of procedural requirements for making expense claims; and
 - meet any standards set out in the directives.

21

Overview

- Expenses Standards

- The Management Board of Cabinet has issued a directive regarding Broader Public Sector Expenses effective April 1, 2011.
- It is available at:
- http://www.fin.gov.on.ca/en/bpssupplychain/documents/bps_expenses_directive.html
- It requires designated broader public sector organizations to establish expense rules where expenses are reimbursed from public funds and to post their expense rules on their websites.

22

Overview

- Expenses Standards

- The directive requires that the expense rules address:
 - an accountability framework
 - prohibition on reimbursement of meal and hospitality expenses for consultants and other contractors
 - rules specific to serving alcohol
 - rules for hospitality events
 - good record keeping practices
 - rules for individuals making claims (e.g. all appropriate approvals should be obtained before incurring the expense, original itemized receipts are required)
 - rules for individuals approving claims (e.g. cannot approve their own claims, provide approval only for expenses incurred in the performance of organization business)

23

Overview

- Procurement Standards

- The BPSAA provides that the Management Board of Cabinet may issue directives governing the procurement of goods and services by designated broader public sector organizations and that broader public sector organizations shall comply with such directives.
- The Management Board of Cabinet may also make guidelines with respect to the procurement of goods and services by publicly funded organizations.

24

Overview

- Procurement Standards

- The Management Board of Cabinet has issued a directive regarding the procurement of goods and services by designated broader public sector organizations which is:
 - effective April 1, 2011 for hospitals, school boards, colleges, universities, community care access corporations and children's aid societies; and
 - effective January 1, 2012 for publicly funded organizations that received public funds of 10 million dollars or more in the previous fiscal year of the Government of Ontario

25

Overview

- Procurement Standards

- The directive, which replaces the BPS Supply Chain Guideline issued by the Ministry of Finance in 2009, is available at:

http://www.fin.gov.on.ca/en/bpssupplychain/documents/bps_procurement_directive.html#11020

26

Overview

- Procurement Standards
- The stated purpose of the directive, which is quite extensive, is to:
 - ensure that publicly funded goods and services, including construction, consulting services, and information technology are acquired by broader public sector organizations through a process that is open, fair, and transparent;
 - outline responsibilities of broader public sector organizations throughout each stage of the procurement process; and
 - ensure that procurement processes are managed consistently throughout the broader public sector

27

Overview

- Compliance Obligations
- The BPSAA requires LHINs and hospitals to prepare attestations about compliance under the BPSAA
- Attestations are to be made by Chief Executive Officers, administrators or superintendants and approved by the board of the LHIN or hospital
- Regulations may be passed requiring broader public sector organizations (i.e., designated broader public sector organizations and publicly funded organizations) to file attestations about compliance with the requirements under the BPSAA.

28

Overview

- Compliance Obligations
- The attestations of LHINs and hospitals must be publicly posted on the websites of the LHINs and hospitals.
- They must attest to:
 - the completion and accuracy of reports required on the use of consultants;
 - compliance with the prohibition on engaging lobbyist services using public funds;
 - compliance with the expense claim directives issued by the Management Board of Cabinet; and
 - compliance with procurement directives issued by the Management Board of Cabinet

29

Overview

- Compliance Obligations
- The Minister of Health and Long-Term Care may issue directives respecting the attestations, including directives with respect to
 - the information that shall be included in the attestations and any other information in relation to the attestations;
 - to whom the attestations shall be submitted; and
 - the form, manner and timing of the attestations.
- LHINs and hospitals are required to comply with any directives so issued.

30

Overview

- Enforcement Provisions
- Requirements under the BPSAA are deemed to be part of service accountability agreements entered into by LHINs and hospitals and must be complied with as part of those agreements
- The BPSAA provides that the employment contract of every senior manager of a LHIN or hospital is deemed to contain terms which make the obligations of the hospital or LHIN under the BPSAA the obligations of the senior manager as well
- The boards of LHINs or hospitals may reduce the compensation of senior managers where the organization has failed to comply with its BPSAA obligations.

31

Overview

- Enforcement Provisions
- The BPSAA provides that the provisions of any contract that conflict with certain provisions of the BPSAA is invalid and thus unenforceable.
- The BPSAA restricts the ability of parties affected by its requirements to claim against the Crown or any organization subject to the BPSAA, for any damages, loss of revenues arising from the application of the BPSAA, its regulations and directives.
- The BPSAA provides that no judicial review may be sought of a directive issued under the procurement provisions or a procurement process undertaken under a directive.

32

Overview

Application of FIPPA to Hospitals

- The BPSSA amends the *Freedom of Information and Protection of Privacy Act* (FIPPA) to make hospitals subject to FIPPA
- FIPPA performs two main functions:
 - it establishes an access to information regime that permits persons to obtain any record or part of a record in the custody or control of certain institutions (including hospitals) subject to the exclusions, exemptions and request procedure set out in FIPPA; and
 - it protects personal information by regulating the collection, use, accuracy, disclosure, retention and destruction of personal information by institutions (including hospitals)

33

Overview

Application of FIPPA to Hospitals

- FIPPA will apply to hospitals as of January 1, 2012 but is retrospective to January 1, 2007
- As a result, records that came into a hospital's custody and/or control on or after January 1, 2007 will be subject to FIPPA.

34

Overview

Application of FIPPA to Hospitals

- The BPSAA's amendment to FIPPA does not change any of the rules that are applicable to personal health information and the *Personal Health Information Protection Act, 2004* will continue to apply to the collection, use and disclosure of personal health information by hospitals.
- The BPSAA provides for a corresponding amendment to the *Quality of Care Information Protection Act* to clarify that FIPPA will not apply to "quality of care information", as defined in that statute.

35

Overview

Application of FIPPA to Hospitals – Access

- Generally speaking, FIPPA imposes on hospitals a general obligation to disclose records (i.e., any type of recorded information, whether on paper, on film, on digital form or in some other format) in their custody or control

36

Overview

- Application of FIPPA to Hospitals – Access
- FIPPA will allow hospitals to deny access to a record or a part of a record that has been requested in specific circumstances:
 - if the requested record contains information that is “excluded” from FIPPA;
 - if the requested record contains information that is “exempt” from disclosure under FIPPA; or
 - if the request itself is “frivolous or vexatious”
- FIPPA generally requires institutions to sever exempt or excluded information in a record so as to allow the remaining information in the record to be disclosed

37

Overview

- Application of FIPPA to Hospitals – Access
- The amendments to FIPPA introduced by the BPSAA have some specific hospital related exclusions – i.e., these amendments provide that there are certain types of hospital records to which FIPPA will not apply
- These include:
 - ecclesiastical records of a church or religious organization that is affiliated with a hospital;
 - records relating to the operation of a hospital foundation;
 - records related to the personal practice of a health professional who practices within a hospital;
 - records relating to charitable donations made to a hospital
 - records relating to abortion services.

38

Overview

- Application of FIPPA to Hospitals - Access
- Operational changes will be necessary to ensure that hospitals comply with FIPPA access to information requests – including changes to existing processes, policies and procedures

39

Overview

- Application of FIPPA to Hospitals – Use and Disclosure
 - FIPPA imposes rules that govern the management by institutions of personal information to ensure that privacy is protected in the day-to-day operations of such institutions
 - “Personal information” is recorded information about an identifiable individual
 - The BPSAA makes specific hospital related amendments to FIPPA’s provisions regarding the use and disclosure of personal information
 - The BPSAA clarifies that a hospital may use personal information in its records for its own fundraising activities or those of an associated foundation if the use of the personal information is reasonably necessary for its fundraising activities

40

Overview

- Application of FIPPA to Hospitals – Use and Disclosure

- In order to use such information, the hospital must comply with certain rules, including:
 - to give notice to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be used for fundraising purposes;
 - to periodically and in the course of soliciting funds for fundraising, give notice to the individual to whom the personal information relates of his or her right to request that the information cease to be used for fundraising purposes;
 - to periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, publish a notice of the individual's right to request that the individual's personal information cease to be used for fundraising purposes; and
 - when requested to do so by an individual, cease to use the individual's personal information

41

Overview

- Application of FIPPA to Hospitals – Use and Disclosure

- A hospital may disclose personal information in its records, for the purpose of its own fundraising activities or the fundraising activities of an associated foundation, if:
 - the hospital and the person to whom the information is disclosed, have entered into a written agreement that satisfies certain requirements;
 - certain notice requirements are met; and
 - the personal information is reasonably necessary for the fundraising activities

42

Overview

- Application of FIPPA to Hospitals – Use and Disclosure
 - For a hospital to disclose personal information in its records, either for the purpose of its own fundraising activities or the fundraising activities of an associated foundation, the hospital shall ensure that,
 - notice is given to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be disclosed for fundraising purposes;
 - periodically and in the course of soliciting funds for fundraising, notice is given to the individual to whom the personal information relates of his or her right to request that the information cease to be disclosed for fundraising purposes; and
 - periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, notice is published in respect of the individual's right to request that the individual's personal information cease to be disclosed for fundraising purposes.

43

Overview

- Application of FIPPA to Hospitals – Use and Disclosure
 - An agreement between a hospital and another person for the disclosure of personal information in the hospital's records for fundraising activities, must;
 - require that the aforementioned notice requirements are met;
 - require that the personal information disclosed be disclosed to the individual to whom the information relates upon his or her request; and
 - require that the person to whom the information is disclosed shall cease to use the personal information of any individual who requests that the information not be used.

44

Implications for Ontario Hospital Foundations

- Ontario hospital foundations not directly subject to BPSAA unless they fall into the definition of “broader public sector organization”
- Ongoing review of this definition and applicability of the BPSAA to certain organizations (through future regulations or directives) therefore important
- The BPSAA also has implications for Ontario hospital foundations as a result of their close relationships to Ontario hospitals
- Important for Ontario hospital foundations to be aware of the changes to the operations of Ontario hospitals resulting from the provisions of the BPSAA and how these changes may affect Ontario hospital foundations and their fundraising activities

45

Implications for Ontario Hospital Foundations

- Greater public disclosure of hospital information and financial practices
 - Disclosure of use of consultants on hospital websites
 - Disclosure of expense rules on hospital websites
 - Disclosure of compliance with BPSAA on hospital websites
- Access to information requests under FIPPA

46

Implications for Ontario Hospital Foundations

- Greater public disclosure will impact the amount of information that potential donors have regarding the hospital
- Consider how this will impact fundraising initiatives and donor queries to the hospital foundation
- Hospital foundations and fundraising professionals will need to be informed as to the information provided to the public about the hospital to ensure that any queries and/or issues arising from such information can be addressed in the fundraising process

47

Implications for Ontario Hospital Foundations

- New policies and procedures required for Ontario hospitals
 - New lobbying, expense and procurement policies and procedures required by the BPSAA
- Review of policies and procedures of hospitals and associated foundations may be advisable to ensure that they are aligned and not confusing or contradictory – consideration should be given as to whether policies and procedures should be coordinated in light of new changes

48

Implications for Ontario Hospital Foundations

- Application of FIPPA to Hospitals
 - Hospital foundations are not subject to FIPPA and do not have to establish the same procedures and policies that hospitals will need in order to be in compliance with access requests
 - However, hospital foundation information that is shared with a hospital may become under the custody and control of the hospital
 - FIPPA exclusions for information pertaining to charitable donations made to hospitals and information pertaining to the operations of a hospital foundation

49

Implications for Ontario Hospital Foundations

- Application of FIPPA to Hospitals
 - Advisable for procedures to be put in place with respect to the sharing of hospital foundation information with hospitals in light of FIPPA
 - Foundations, along with hospitals, should be educated as to the implications of the FIPPA regime and public access requests
 - Advisable for foundations to be informed of the processes that hospitals intend to use in responding to access requests and the procedures to be put in place to address requests for information that is excluded from FIPPA (e.g., charitable donations and foundation operations)

50

Implications for Ontario Hospital Foundations

- Application of FIPPA to Hospitals
 - Advisable for procedures to be put in place with respect to the sharing of hospital information with hospital foundations in light of FIPPA
 - Ensure that use and disclosure of personal information for fundraising complies with requirements of FIPPA and that policies, agreements and procedures are put in place to ensure this result
 - Ensure that notification of use of personal information requirements and cessation of use of personal information requirements are complied with

51

DISCLAIMER

This handout is provided as an information service by Fasken Martineau DuMoulin LLP. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2011 Fasken Martineau DuMoulin LLP

52

Contact Information

Laura E. West
Fasken Martineau DuMoulin LLP
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6
(416) 865-5463
lwest@fasken.com

53



54