



FOI Tactics for Thriving

*In a World of Body-Worn Cameras,
Next-Gen 911 and Other Rapid Change*

Justin Petrillo
FOI Assist

About Me

- Founder and Principal of FOI Assist
 - FOI Assist Software (foiassistapp.ca)
 - Software to help provincial and municipal institutions in Ontario track and respond to Freedom of Information (FOI) requests
 - FOI Assist Knowledge Base (foiassist.ca)
 - How-to articles, news and resources, all free
- Lawyer and Software Developer
- Advised on FOI in private practice
- Managed FOI program at the Toronto 2015 Pan Am Games





The Challenge

Context: Aging FOI Legislation

ATIA, FIPPA and MFIPPA

- Canada was one of the first nations in the world to enact Freedom of Information (FOI) legislation
- The Federal *Access to Information Act* came into force in 1983
- Ontario's provincial and municipal Freedom of Information legislation arrived soon thereafter.

The screenshot shows the Ontario e-Laws website interface. At the top, there is a navigation bar with the Ontario logo, a search bar labeled "SEARCH LAWS", and a "SEARCH" button. To the right of the search bar are links for "contact us" and "français", and a "Topics +" menu. Below the navigation bar is a breadcrumb trail: "HOME PAGE / LAWS / MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT, R.S.O. 1990, C. M.56".

The main content area displays the title "Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56". Below the title are two tabs: "Versions" (selected) and "Regulations under this Act". Under the "Versions" tab, there is a list of versions with their effective dates:

- current** April 19, 2021 – (e-Laws currency date)
- March 17, 2021 – April 18, 2021
- May 29, 2019 – March 16, 2021
- 25 more

Below the version list are "Print" and "Download" buttons.

Below the main content area, there is a section for "Français" with the title "Municipal Freedom of Information and Protection of Privacy Act" and "R.S.O. 1990, CHAPTER M.56".

Below the French section, there is a "Consolidation Period" note: "From April 19, 2021 to the e-Laws currency date." and "Last amendment: 2021, c. 4, Sched. 11, s. 25." and a link for "Legislative History: [+]".

Below the consolidation period, there is a "CONTENTS [-]" section with a table of contents:

1.	Purposes
2.	Interpretation
3.	Designation of head
PART I FREEDOM OF INFORMATION Access to Records	
4.	Right of access

Context: Aging FOI Legislation

ATIA, FIPPA and MFIPPA

- FIPPA: January 1, 1988
- MFIPPA: January 1, 1991
- We can be proud that we were one of the first places in the world to enact Freedom of Information legislation
- But the result now is that our FOI legislation is some of the oldest in the world

Ontario SEARCH LAWS SEARCH contact us français Topics +

HOME PAGE / LAWS / MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT, R.S.O. 1990, C. M.56

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56

Versions Regulations under this Act

current April 19, 2021 – (e-Laws currency date)
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Print Download

Français

Municipal Freedom of Information and Protection of Privacy Act
R.S.O. 1990, CHAPTER M.56

Consolidation Period: From April 19, 2021 to the e-Laws currency date.

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Legislative History: [+]

CONTENTS [-]

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	PART I
	FREEDOM OF INFORMATION
	Access to Records
4.	Right of access

Context: Aging FOI Legislation

Back Then

- No email in government offices / police services
- Paper records were the norm
- Personal computers just being adopted ("dumb" terminals were more common)
- No smartphones (voice-only cell phones were a luxury)
- Voicemail was rare



Context: Aging FOI Legislation

Back Then

- Per FIPPA and MFIPPA: “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”
- This doesn't seem to anticipate FOI requests for hundreds of hours of video footage or thousands of electronic documents!



Challenges FOI Programs are Facing Now

1

**Video Footage
(BWC, Dashcam,
Security Camera
Footage)**

2

**New Systems
(Next-Gen 911,
ERMS)**

3


**Increasing
Complexity of
FOI Compliance**

4

**Growing
Awareness &
Increasing
Volumes of FOI
Requests**



Tactics for Thriving



Alternative Fee Systems

Alternative Fee Systems

You don't have to use FOI requests for everything

- FIPPA and MFIPPA allow you to set up your own alternative procedures (and fees!) for public records
- If you have a reasonable system set up for providing certain types of records to the public, you don't have to process FOI requests for those records anymore



Emer

Online Services ▾ Community Safety and Support

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As an institution under *MFIPPA*, requested footage will be analysed according to the legislation and access may be granted in full, partial or denied in its entirety. You will receive a written response explaining our decision and notification of a refund issued if you are denied access.

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[Make a body-worn camera footage request online](#)

Alternative Fee Systems

“Publicly Available Information” exemption

- FIPPA s.22 / MFIPPA s.15
- Also known as the “Information Soon to be Published” exemption
- Allows institutions to replace the standard FOI fee structure with a different fee structure better suited to a particular type of records
- Applies to public record requests (not personal information)

Information soon to be published

15 A head may refuse to disclose a record if,

- (a) the record or the information contained in the record has been published or is currently available to the public; or
- (b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it. R.S.O. 1990, c. M.56, s. 15.

Alternative Fee Systems

“Publicly Available Information” exemption

- Key part of the exemption is that an institution may refuse to disclose a record that is “currently available to the public”
- “Currently available to the public” does not have to mean “available for free” or “available online”

Information soon to be published

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Alternative Fee Systems

“Through a regularized system of access”

IPCO Order P-327 (July 14, 1992)

“In my view, in order for records to qualify [for the exemption], they must either be published or available to members of the public generally, **through a regularized system of access**, such as, for example, a public library or a government publications centre.”

Information soon to be published

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Alternative Fee Systems

“Through a regularized system of access”

- But what counts as a “regularized system of access” today?
- And what fees can be charged?
- A recent decision of the IPCO provides a lot of helpful guidance here: *Order MO-4384 (York Regional Police Services Board)* decided May 30, 2023

Information soon to be published

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Alternative Fee Systems

Order MO-4384

- York Regional Police Service (YRPS) received a request for access to crime scene photographs related to a specified incident.
- YRPS issued a decision denying access to the photographs under section MFIPPA s.15(a), which covers information that is published or is otherwise currently available to the public.



Alternative Fee Systems

Order MO-4384

- The requestor appealed.
- The relevant records were 32 crime scene photographs.
- Under a municipal by-law, the police were permitted to impose fees or charges for services.
- The by-law included a "Schedule A" which listed the applicable fee as \$51 for 10 photographs, resulting in a total fee of \$153 [sic] for all 32 photographs.



Alternative Fee Systems

Order MO-4384

- On the basis that the photographs in question were available to the public (albeit for a fee) the police refused to provide the photographs in response to the requestor's FOI request, citing s.15(a) of MFIPPA.
- The police instead referred the requestor to their existing process for obtaining such photographs.
- The applicant refused to pay fees for the photographs in question, and the matter proceeded to adjudication.



Alternative Fee Systems

Order MO-4384

Citing IPCO orders P-327, P-1387 and MO-1881, Adjudicator Anna Truong found:

[For section 15(a) of MFIPPA] to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.



Alternative Fee Systems

Order MO-4384

[13] To show that a “regularized system of access” exists, the institution must demonstrate that:

- ***a system exists***
- ***the record is available to everyone, and***
- ***there is a pricing structure that is applied to all who wish to obtain the information***



Alternative Fee Systems

Order MO-4384

- Adjudicator Truong determined that the YRPS's system for requesting crime scene photographs **met all the requirements**



Alternative Fee Systems

Order MO-4384

[29] In summary, as required by section 15 (a) of the Act, the police have demonstrated that a system exists, the photographs are available to everyone, and there is a pricing structure that is applied to all who wish to obtain them. Accordingly, I find that section 15(a) applies to the photographs at issue because the police have established that the photographs are currently available to the public through a regularized system of access.



Alternative Fee Systems

Order MO-4384

Adjudicator Truong also found:

- That the fee being charged for the photographs was “not so prohibitive that it would amount to an effective denial of access”
- That the police had properly exercised their discretion under 15(a) not to disclose the photographs in response to the FOI request when an alternative system existed for obtaining such records



Alternative Fee Systems

Order MO-4384:

Fee Analysis

- Let's consider the amount of the fee charged here:
 - \$51 for 10 photographs
 - Resulting in a total fee of \$153 for the 32 photographs requested
- What would the YRPS have charged under the standard MFIPPA fee structure?
- Assuming the search time is negligible, and no "preparation" time is involved, the usual fees for a request like this may well have been under \$20.



Alternative Fee Systems

Order MO-4384: Fee Analysis

- So, the fees charged under an alternative records disclosure system do not have to be closely comparable to what the institution would have collected processing the same request as a regular Freedom of Information request under FIPPA or MFIPPA.



Emer

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[Make a body-worn camera footage request online](#)

Alternative Fee Systems

So What Can You Charge?

- There's no specific guidance from IPCO regarding video footage, but it seems clear you can charge more than you would have charged for the equivalent FOI request
- This seems to offer institutions a lot of flexibility in situations where the standard FOI fee structure just doesn't make sense



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Alternative Fee Systems

Limitations: Personal Information

- An institution may not be able to rely on the Publicly Available Information exemption set out in MFIPPA s.15 and FIPPA s.22 when dealing with requests for personal information
- Specifically, when the version of the requested records disclosed to the public differs from the version that would be disclosed in response to an FOI request for personal information



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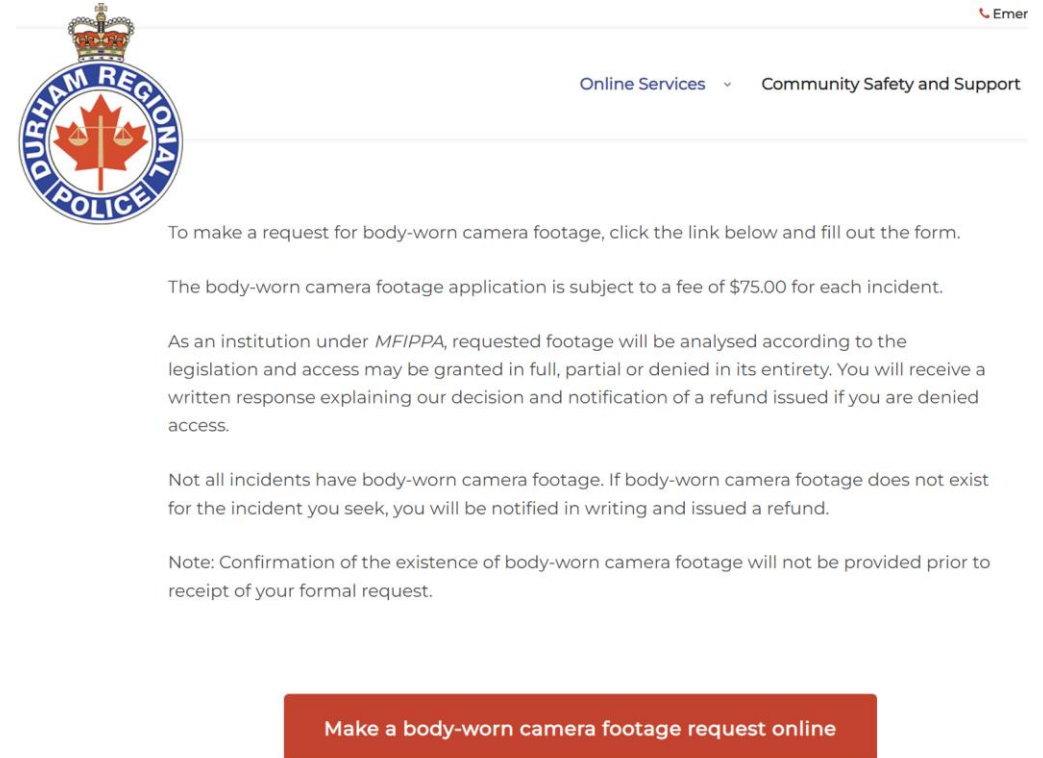
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Alternative Fee Systems

E.G., Meeting Minutes

- Consider the example of a municipality that posts minutes of its meetings to its website.
- Personal information contained in the minutes would have to be removed before the minutes could be published online.



The screenshot shows the Durham Regional Police website. On the left is the police crest. On the right, there are navigation links for "Online Services" and "Community Safety and Support". The main content area contains the following text:

To make a request for body-worn camera footage, click the link below and fill out the form.

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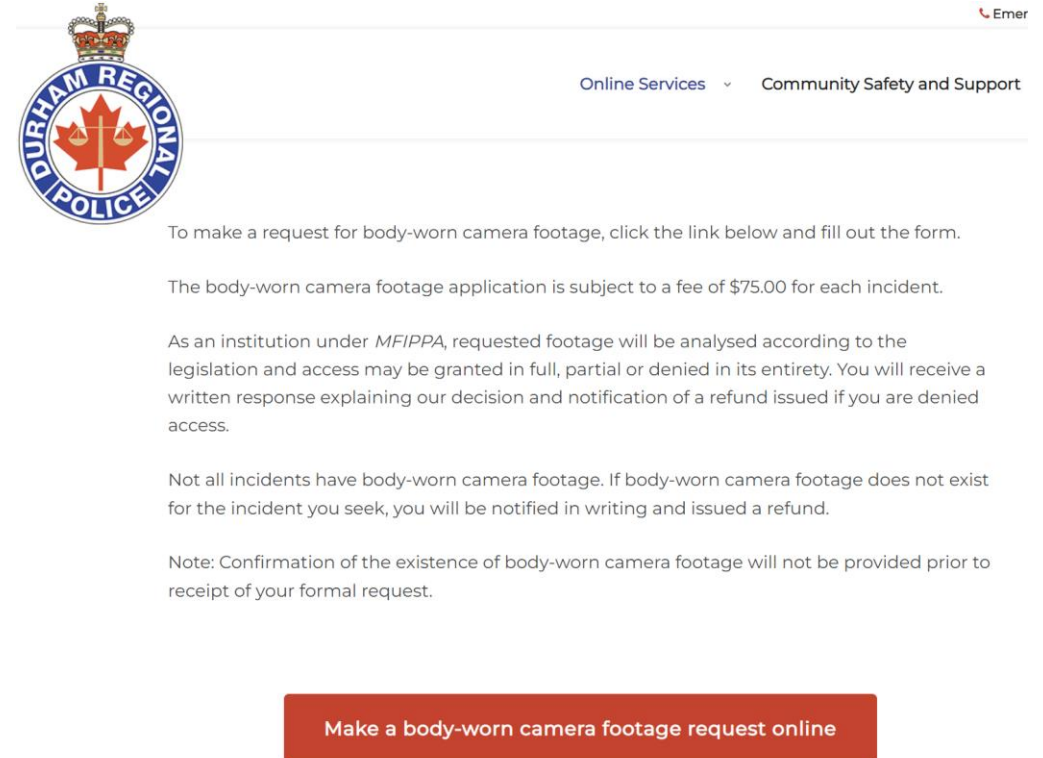
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At the bottom right, there is a red button with the text: [Make a body-worn camera footage request online](#)

Alternative Fee Systems

E.G., Meeting Minutes

- If a requestor asked for a copy of such minutes in an FOI request for general records, the municipality could refuse to provide them on the basis of MFIPPA s.15(a), and
 - Tell the requestor to go download the minutes from its website instead, or
 - Charge a flat fee to mail out a hard copy



The screenshot shows the Durham Regional Police website. The logo is on the left, and the navigation menu includes "Online Services" and "Community Safety and Support". The main content area contains the following text:

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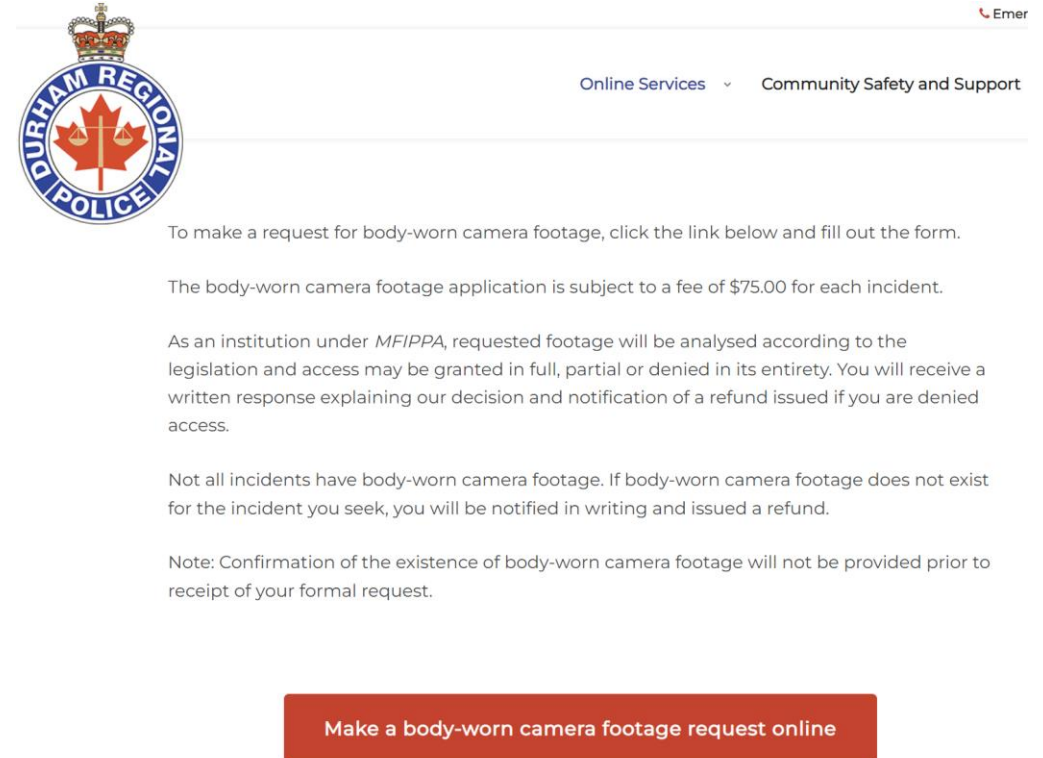
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[Make a body-worn camera footage request online](#)

Alternative Fee Systems

E.G., Meeting Minutes

- However, if an individual whose personal information was redacted from such minutes submitted an FOI request for the unredacted version, the municipality would not be able to rely on s.15(a) to refuse the request
- This is because the version of the minutes on the website would not be the same as what that the requestor would be entitled to receive via an FOI request.

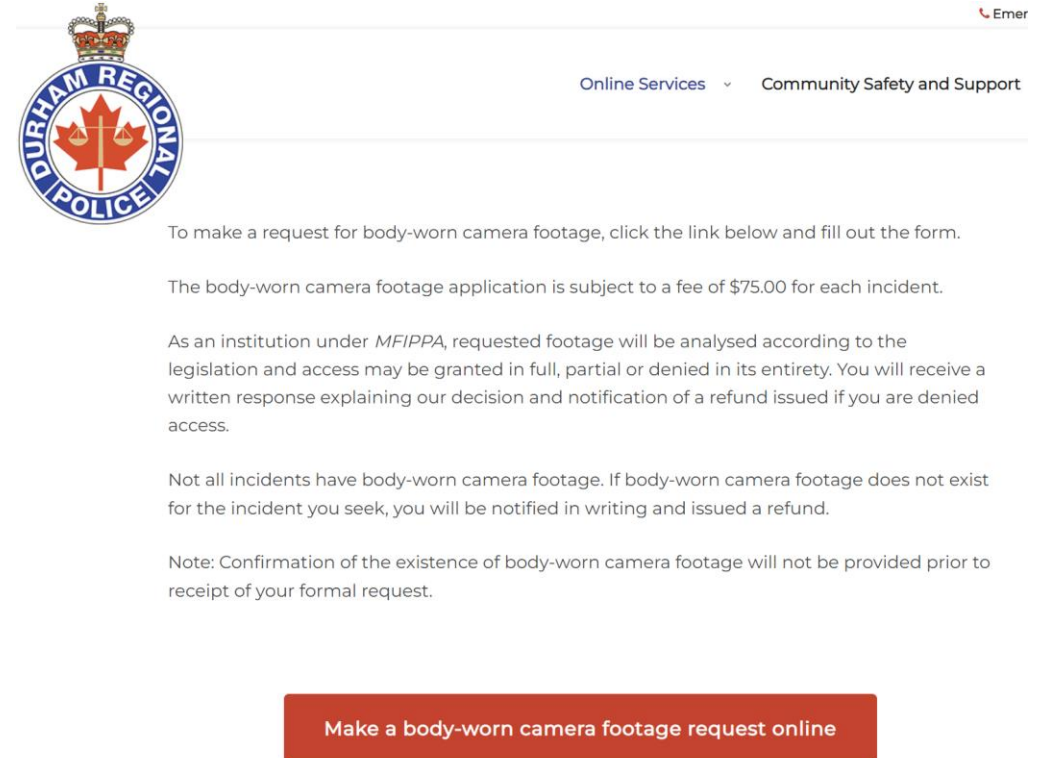


The screenshot shows the Durham Regional Police website. At the top left is the Durham Regional Police logo, which features a crown above a red maple leaf inside a blue circular border with the text "DURHAM REGIONAL POLICE". To the right of the logo, there are navigation links: "Online Services" and "Community Safety and Support". Below the navigation, there is a section titled "Make a body-worn camera footage request online". The text in this section reads: "To make a request for body-worn camera footage, click the link below and fill out the form. The body-worn camera footage application is subject to a fee of \$75.00 for each incident. As an institution under MFIPPA, requested footage will be analysed according to the legislation and access may be granted in full, partial or denied in its entirety. You will receive a written response explaining our decision and notification of a refund issued if you are denied access. Not all incidents have body-worn camera footage. If body-worn camera footage does not exist for the incident you seek, you will be notified in writing and issued a refund. Note: Confirmation of the existence of body-worn camera footage will not be provided prior to receipt of your formal request." At the bottom of the screenshot is a red button with the text "Make a body-worn camera footage request online".

Alternative Fee Systems

Video Footage, Next-Gen 911

- This may be an issue for security camera footage, bodycam, dashcam, and next-gen 911 information
- If the person making the request is actually present in the recording, they may not be satisfied with the “publicly available” version (e.g., with their face blurred out)

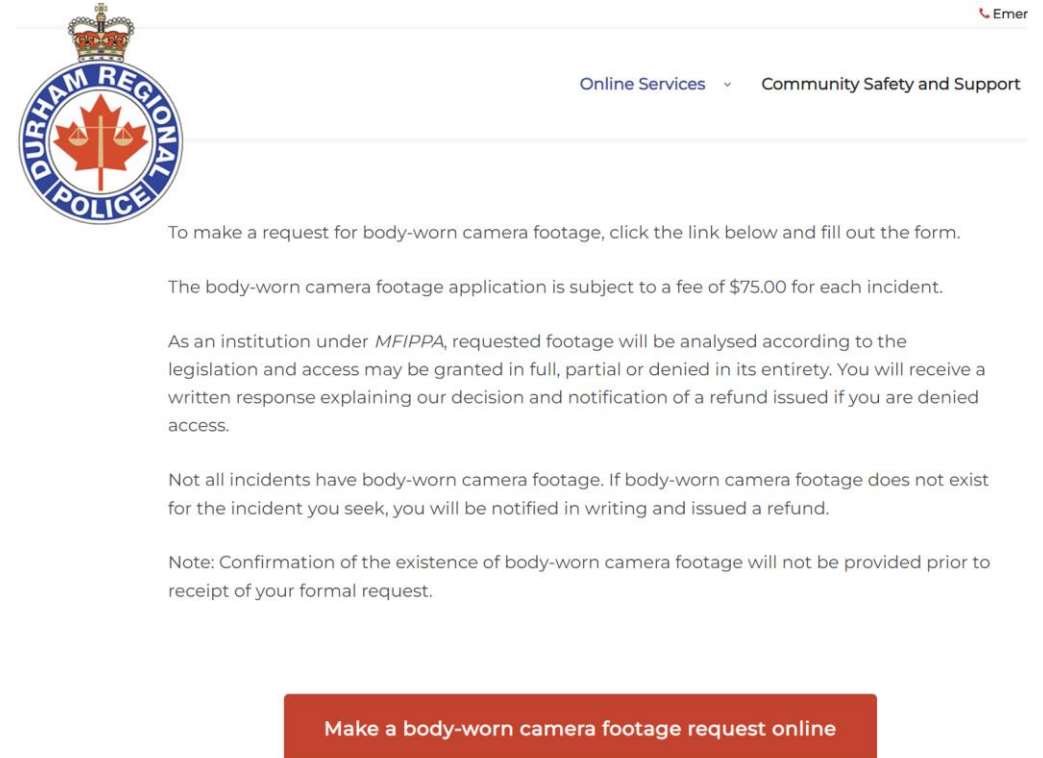


The screenshot shows the Durham Regional Police website. At the top left is the police crest with the text "DURHAM REGIONAL POLICE". To the right, there are navigation links: "Online Services" and "Community Safety and Support". Below the crest, the text reads: "To make a request for body-worn camera footage, click the link below and fill out the form." This is followed by: "The body-worn camera footage application is subject to a fee of \$75.00 for each incident." A paragraph explains that as an institution under MFIPPA, requested footage will be analysed according to the legislation and access may be granted in full, partial or denied in its entirety. It states that a written response explaining the decision and notification of a refund issued if denied access will be provided. Another paragraph notes that not all incidents have body-worn camera footage and that if it does not exist for the incident, the requester will be notified in writing and issued a refund. A final note states that confirmation of the existence of body-worn camera footage will not be provided prior to receipt of a formal request. At the bottom right, there is a red button with the text "Make a body-worn camera footage request online".

Alternative Fee Systems

Video Footage, Next-Gen 911

- In such a case, the requestor may have a “backup” right to put in a standard FOI request for their personal information and pay the fees set out under FIPPA/MFIPPA



The screenshot shows the Durham Regional Police website. At the top left is the Durham Regional Police logo, which features a crown above a red maple leaf inside a blue circle with the text "DURHAM REGIONAL POLICE". To the right of the logo, there are navigation links: "Online Services" and "Community Safety and Support". Below the navigation, there is a section titled "Make a body-worn camera footage request online". The text in this section reads: "To make a request for body-worn camera footage, click the link below and fill out the form. The body-worn camera footage application is subject to a fee of \$75.00 for each incident. As an institution under MFIPPA, requested footage will be analysed according to the legislation and access may be granted in full, partial or denied in its entirety. You will receive a written response explaining our decision and notification of a refund issued if you are denied access. Not all incidents have body-worn camera footage. If body-worn camera footage does not exist for the incident you seek, you will be notified in writing and issued a refund. Note: Confirmation of the existence of body-worn camera footage will not be provided prior to receipt of your formal request." At the bottom of the page, there is a red button with the text "Make a body-worn camera footage request online".

Alternative Fee Systems

Video Footage, Next-Gen 911

- But it still seems OK to have a standard process for requesting certain types of records (whether personal or not)
- Just keep in mind that requestors will always have a right to FOI their personal info if they don't like the alternative process you set up
- Can't rely on s.15 / s.22 to refuse a personal information request



Emer

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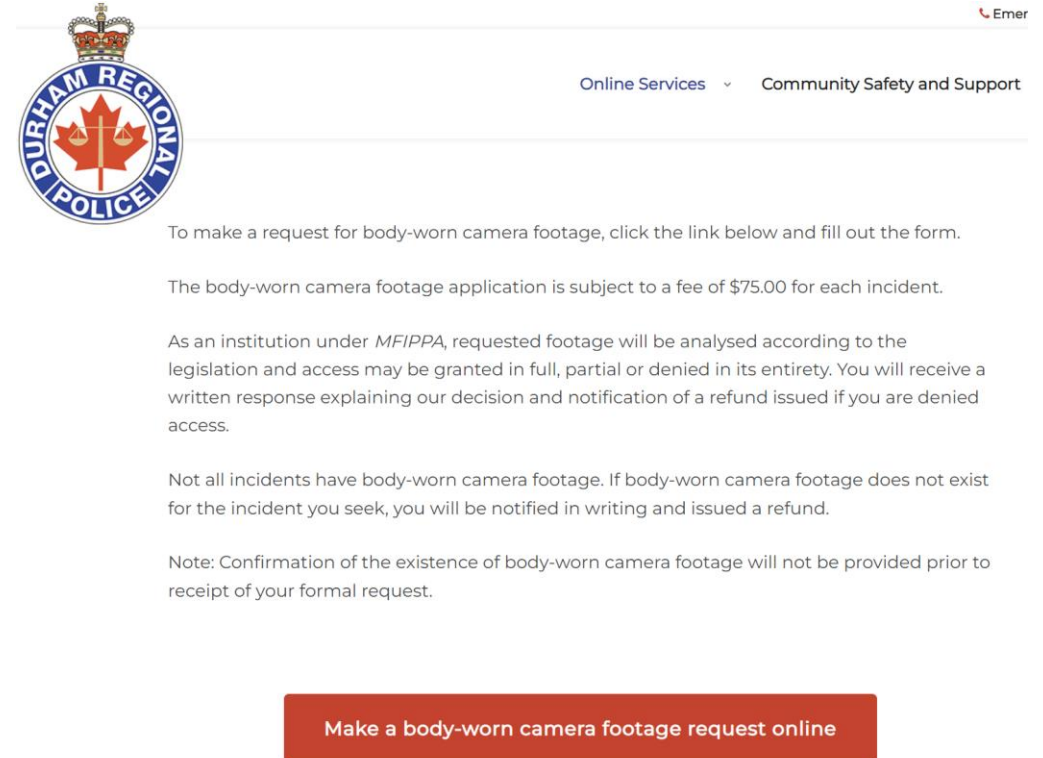
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Alternative Fee Systems

Take-aways

- IPCO will support such alternative fee structures so long as:
 - an alternative system exists,
 - the record is thereby available to everyone, and
 - the pricing structure is reasonable and is applied to all who wish to obtain the information.
- Police services should consider establishing new systems and fee structures to help them respond to public record requests of all kinds



The screenshot shows the Durham Regional Police website. On the left is the police crest. On the right, there are navigation links for "Online Services" and "Community Safety and Support". Below these, there is a section titled "Emer" with a red arrow pointing to a link that says "Make a body-worn camera footage request online".

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Applying FIPPA/MFIPPA to Video and Audio Recordings

Are Body-Worn Camera Recordings “Labour and Employment” Records?

Reported The Globe & Mail

The Request

- A Black University of Toronto student alleged that in August 2021, three officers mistook him for someone else, tackled him, put a knee on his neck and tasered him
- His lawyer submitted an FOI request for the officers’ body-worn camera footage of the incident



Are Body-Worn Camera Recordings “Labour and Employment” Records?

The Decision Letter

- Police responded with a decision letter stating that, per s. 52(3), MFIPPA does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to ... proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.



Are Body-Worn Camera Recordings “Labour and Employment” Records?

The Decision Letter

The decision letter continued:

- *it has been determined, upon further review of your request and the circumstances surrounding the incident involving your client, that the responsive records are currently related to a labour matter in which our institution has an interest. As such, disclosure of the responsive body worn camera audio/video record cannot be released at this time as the record currently falls outside the auspices of the Act.*



Are Body-Worn Camera Recordings “Labour and Employment” Records?

The Appeal

- The requestor’s lawyer appealed the decision
- We’re still awaiting the outcome
- This will be an important case to watch



Are Body-Worn Camera Recordings “Labour and Employment” Records?

The Analysis

- That said, I have doubts that IPCO will find body-worn camera footage is “prepared, maintained or used by or on behalf of an institution in relation to proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution” under MFIPPA 52(3)



Are Body-Worn Camera Recordings “Labour and Employment” Records?

The Analysis

- Body-worn camera footage seems very similar to officers’ notes, which describe events in a comparable manner and serve a similar purpose, including use in employment proceedings
- Yet IPCO takes the position that officer’s notes are subject to disclosure under FIPPA & MFIPPA



Are Body-Worn Camera Recordings “Labour and Employment” Records?

The Analysis

- Perhaps the argument is that only some BWC footage is excluded under 52(3)?
- Would this require police to pre-judge whether BWC footage might be used in an employment proceeding later?
- See further details in the May 2023 article on the **FOI Assist Knowledge Base** (foiassist.ca)



Are Body-Worn Camera Recordings “Labour and Employment” Records?

Take-aways

- If you are trying to apply the labour and employment exclusion to body-worn camera footage, expect an uphill battle
- Of course, other exemptions or exclusions may apply
- I am sympathetic: FIPPA/MFIPPA certainly did not contemplate anything like body-worn camera footage circa 1988/1991!



Absurd Result

Refresher

- IPCO takes the position that the application of FOI exemptions can lead to an “absurd result” in various situations, e.g.,
 - Requestor previously provided the record to the institution
 - Record is a transcript or recording of the requestor
 - Requestor has previously seen the record or is familiar with its contents
- And when exemption/exclusion language is applied too broadly?



Absurd Result

Refresher

- This is especially relevant to video and audio recordings of the requestor, so you have to know about it and keep it in mind
- Also applies to requests performed through an agent (e.g., the individual's lawyer or family member)



Absurd Result

Refresher

- If applying exemptions under FIPPA/MFIPPA would lead to an “absurd result”, then exemptions cannot be applied
- **This rule is not found anywhere in FIPPA/MFIPPA**
- You have to read IPCO decisions
- Or better yet, read my slides from last year’s FOIPN – I’m happy to send them to you, just ask!



Absurd Result: Update

ORDER PO-4428 (Aug. 18, 2023)

- Recent decision considering the absurd result principle
- Inmate died after an altercation with correctional officers at Central East Correctional Centre
- Father of deceased requested:
 - use of force occurrence reports
 - video of a segregation unit hallway taken on the day the inmate died



Absurd Result: Update

ORDER PO-4428

Adjudicator Colin Bhattacharjee found:

[T]he use of force occurrence reports and the surveillance videos that the ministry claims are excluded by section 65(6)1 are operational records that were first created by the ministry in connection with its core mandate. Copies were then “collected” by the ministry after they were created and, according to the ministry, were subsequently “used” by it in relation to anticipated proceedings before the GSB relating to the employment of a person.



Absurd Result: Update

ORDER PO-4428

[T]he original records, which were created in connection with the ministry's core mandate, are not excluded from the Act by section 65(6)1, because they were not collected, prepared, maintained or used by the ministry in relation to anticipated proceedings before the GSB relating to the employment of a person by the ministry. The fact that the ministry may have collected and used copies of some of these records in relation to anticipated proceedings before the GSB is not sufficient for the section 65(6)1 exclusion to apply to the original records.



Absurd Result: Update

ORDER PO-4428

Adjudicator Colin Bhattacharjee cited an earlier decision, Order M-927, with approval:

[I]t would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the Act because they happen to have been reviewed in connection with an investigation of an employee's conduct.



Absurd Result: Update

ORDER PO-4428

- ***"[I]t would be a manifestly absurd if ... records ... were removed from the scope of the Act because they happen to have been reviewed in connection with an investigation of an employee's conduct"***
- Seems applicable to the Toronto Police case we just discussed!
 - (Though perhaps BWC footage is more like an employment record?)



Absurd Result: Update

ORDER PO-4428

- Decision reads like a “belt-and-suspenders” approach to me:
 - “The records are not employment records”
 - BUT if they are, we’ll call that an “absurd result” anyway
 - Therefore, we will consider them covered by FIPPA/MFIPPA
- Really shows the power & scope of the Absurd Result principle!





Adopt New Systems with FOI in Mind

FOI By Design

Privacy by Design: All Grown Up

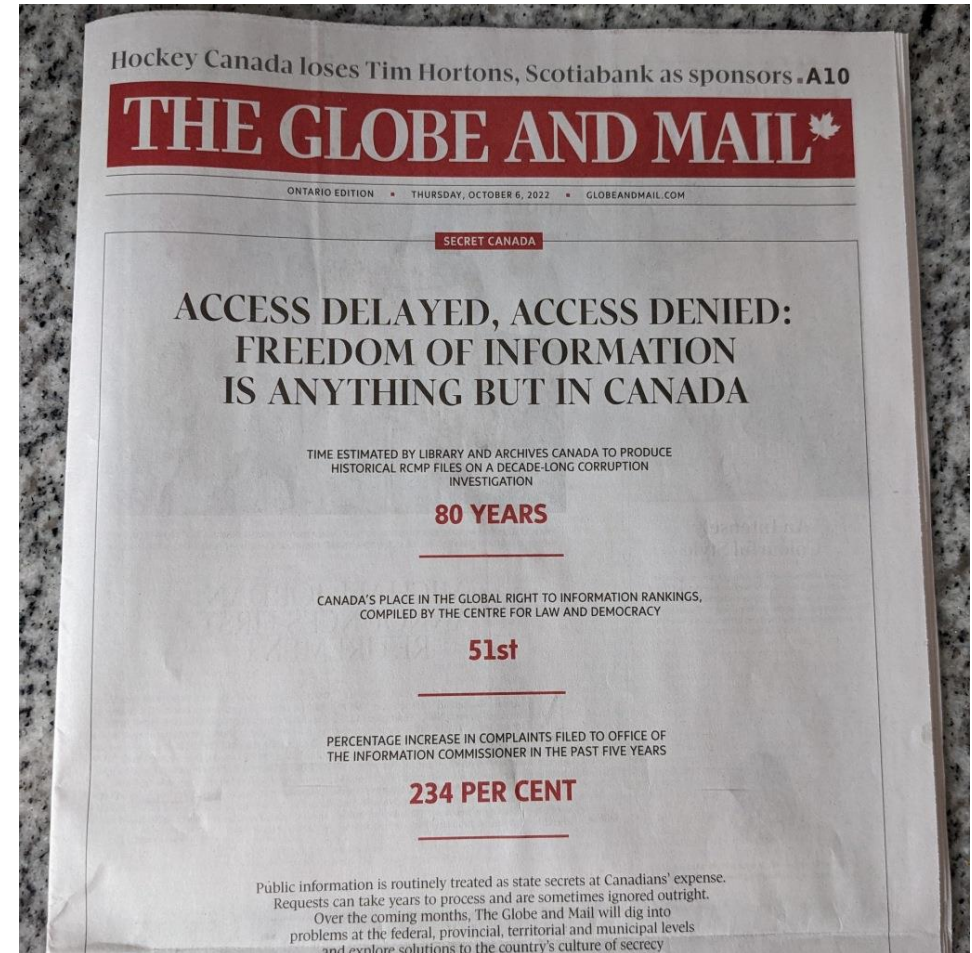
- Since the 1990's, we have been told to incorporate privacy considerations into the systems and technologies we adopt
- Institutions seem to have gotten the hang of this pretty well by now
- So today I'm here to tell you we need to focus on "FOI By Design"



FOI By Design

Higher Expectations

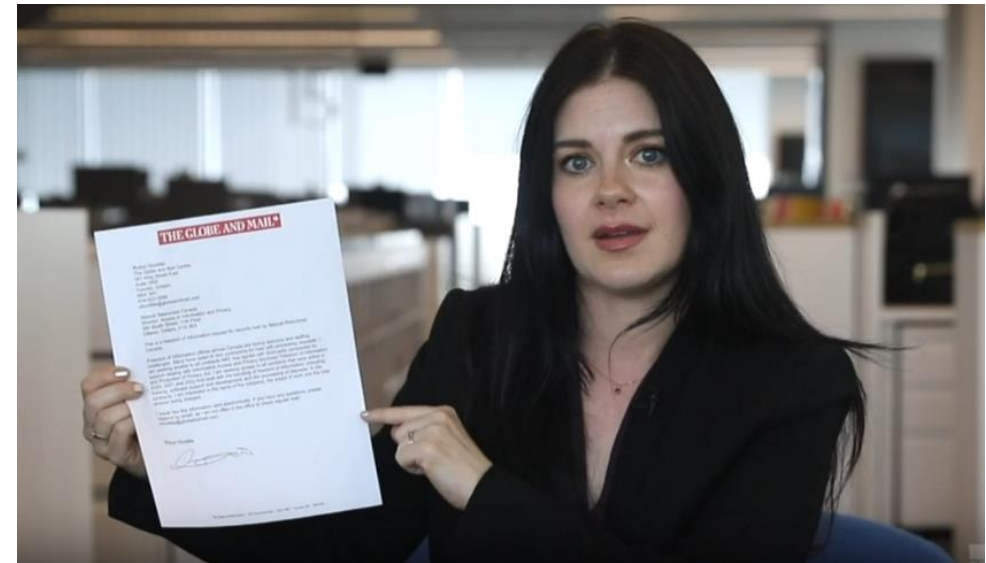
- Freedom of Information request volumes continue to increase
- The public is becoming more and more aware of their rights to information, and more sophisticated about the decisions institutions reach
- Expectations are increasing



FOI By Design

Higher Expectations

- Don't expect "our systems don't support that kind of search" to hold up in appeal (at least, not always)
- IPCO is sympathetic to requestors
- FOI has been around over 30 years
- Requestors should not be penalized for an institution's technological choices
 - (Maybe this was different when FOI was new!)



FOI By Design

ORDER PO-3537 (Oct 5, 2015)

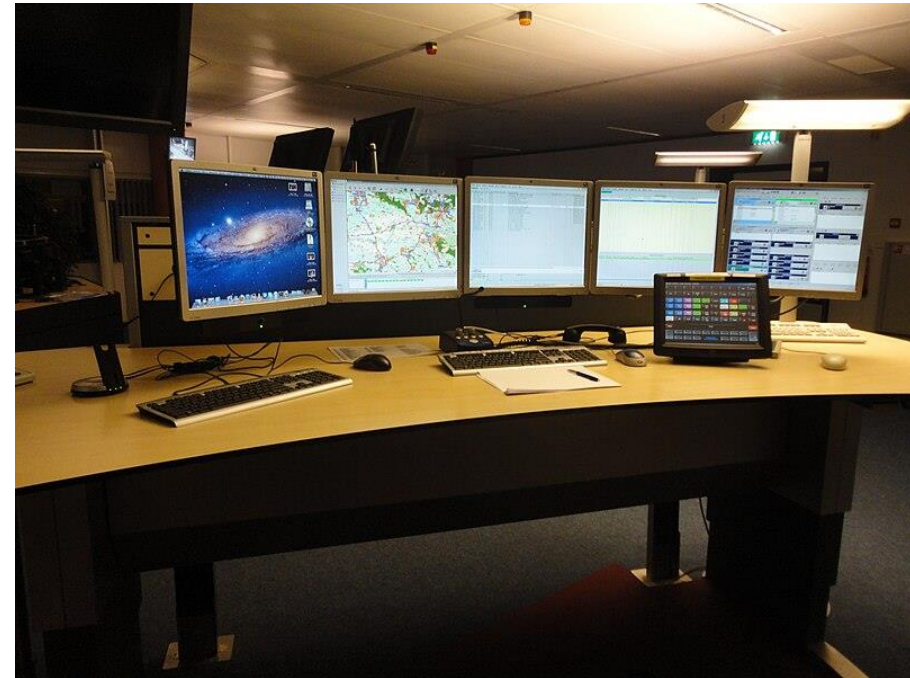
- Requestor submitted: "Given the fact that the records are of recent origin and that the search times are excessive, and since the evidence shows that there is a deficient records management system in place, I will not subsidize the development of a proper records management system at this institution."
- IPCO cited the above in the decision and reduced the fee estimate from \$14,724.50 to \$1,260.00



FOI By Design

Be proactive

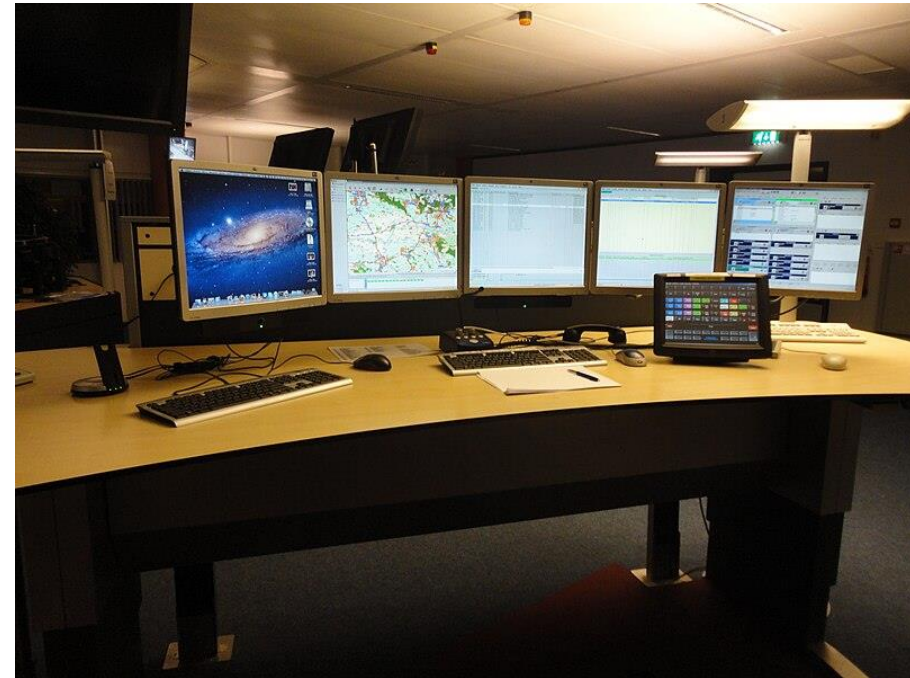
- The FOI function is an important client of any new information systems.
- So, make sure you have a seat at the table when new systems are being implemented.
 - Ask: "How will this support our obligation to respond to Freedom of Information requests"?
 - Provide requirements.
 - Don't just accept whatever comes!



FOI By Design

Be proactive

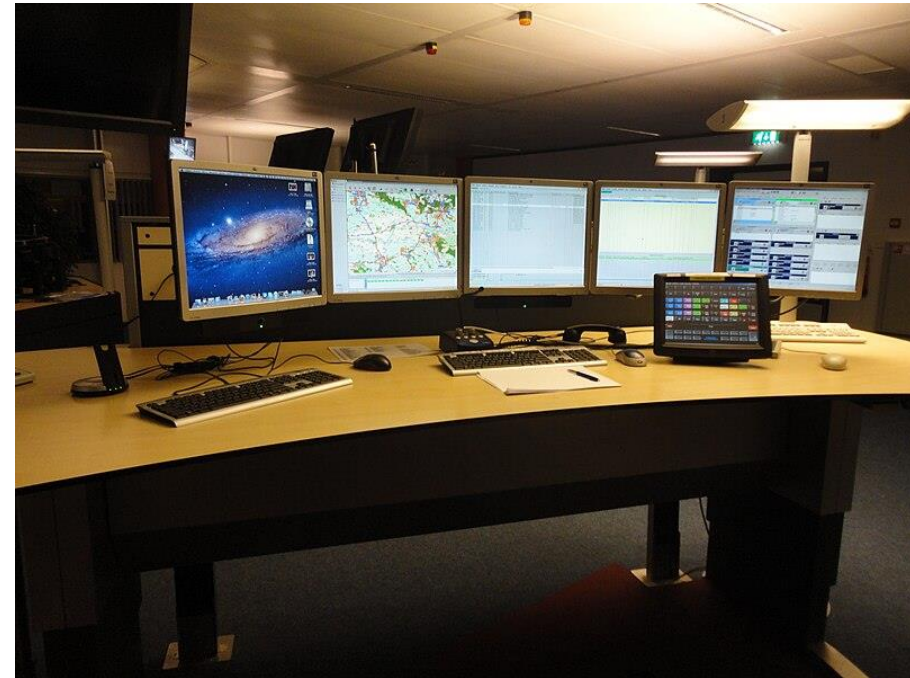
- Part of this is making sure incoming systems for handling BWC, Dashcams, Next-Gen 911, etc., serve your FOI process
- And that they enable you to deliver results that meet or exceed the expectations of the Privacy Commissioner and the public



FOI By Design

Be proactive

- The other part of the equation is to make sure you have a good system in place for processing FOI requests in general.
- E.G., currently, how are you:
 - Keeping up with the latest guidance and legislation?
 - Ensuring templates are up-to-date?
 - Tracking of deadlines and workflow?
 - Accepting FOI requests, payments and identification?
- Are you making efficient use of your time?



FOI By Design

There is a better solution out there!





Thank you!

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