

FOIP FOLIO

December 2003

Best wishes of the season from our office! We hope that you and your family enjoy your holiday. We hope that you return to work well-rested. We anticipate that 2004 will be an eventful and busy calendar year for everyone in the access/privacy community.



HEALTH INFORMATION PROTECTION ACT

It is clear that the federal government will not amend the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) to exempt health information prior to January 1, 2004 as some have anticipated. We do not yet know whether HIPA will be deemed ‘substantially similar’ under section 26(2)(b) of PIPEDA. Until that question is resolved, we will proceed on the basis that HIPA will apply to private sector trustees as well as public sector trustees and that PIPEDA may apply to private sector trustees. It is anticipated that it will be at least another three or four months before we know whether or not PIPEDA has been displaced by HIPA.

Congratulations are due those trustees that are working hard and creatively to implement HIPA. The Commissioner has met with those responsible for HIPA implementation in the Prince Albert Parkland, Saskatoon Regional and Regina Qu’Appelle Health Regions as well as health researchers, the College of Physicians and Surgeons and the Saskatchewan Medical Association. He has found an impressive amount of work already done and much more planned in coming months. This includes the creation of teams to oversee implementation in their respective regions, cataloguing of existing information practices and identification of changes necessary to achieve compliance with HIPA.

Compliance work is more difficult in the absence of regulations. The slow pace of regulation development should not however be an excuse for trustee inactivity. Experience with privacy legislation in the health field in other jurisdictions suggests that four particular areas will pose most of the challenges and difficulties for trustees. These areas are:

- (1) security;
- (2) individual access to personal health information;
- (3) disclosure outside of the ‘circle of care’;
- (4) consent i.e. when it is required, what it consists of, how it is recorded, etc.

All trustees should be actively developing procedures in each of those areas.

Is there a *HIPA* grace period and if so, what exactly does that mean?

Our office has encountered considerable confusion around the question of some kind of a grace period. Some trustees are apparently under the impression that no enforcement proceedings under HIPA will be undertaken for some indefinite period.

Three points should be made with respect to this question:

- a) Saskatchewan Health is charged with administration and implementation of HIPA but does not provide oversight. Oversight is provided by our office and by the courts. The role of the courts is actually very limited. Although HIPA does define certain offences and a range of penalties upon conviction, the experience in other jurisdictions is that these would rarely be invoked. Since the *Manitoba Personal Health Information Act* came into force in 1997 there has been only one charge initiated. That charge resulted in an absolute discharge granted by the Provincial Court in that province. Since the *Health Information Act* came into force in Alberta on April 25, 2001 there have been no charges and no prosecutions initiated. In any event, consent of the Saskatchewan Crown is required before any charges can proceed. Saskatchewan Health has indicated that no prosecutions would be “recommended to proceed” provided trustees are acting in good faith and are working towards full compliance. Government reserves the right to prosecute if a “more serious and deliberate violation” occurs.
- b) In Manitoba and Alberta there has however been considerable activity by the oversight agencies (the Information and Privacy Commissioner in Alberta and the Ombudsman in Manitoba). This activity includes the processing of complaints by individuals who believe the legislation has been breached, own-motion investigations and the review and approval of privacy impact assessments. The minute that HIPA was proclaimed, the citizens of the province acquired certain rights and remedies. Those rights and remedies cannot be suspended or forestalled by any trustee. If someone in this province requests that the Commissioner review a decision of a trustee, the Commissioner is bound to do so in accordance with HIPA.
- c) In investigating complaints or undertaking reviews our office will be mindful of the amount of work that needs to be done by trustees to achieve full compliance. We also recognize the difficulty of no regulations. What will be required is:
 - the designation of someone in your organization with responsibility for HIPA compliance;
 - development of a compliance plan;
 - initiation of work to achieve compliance.

In addition, we encourage you to focus on the four problem areas described on page one.



Schools and Local Authority

Freedom of Information and Protection of Privacy Act

One of the promising Saskatchewan developments in education is the ‘schoolPLUS’ shared services model. SchoolPLUS entails collaboration among schools, health authorities, police and other service providers. The LA FOIP Act does not expressly recognize shared services among different kinds of care providers and requires special attention as to how to comply with the legislation without losing the advantages that accrue. To complicate matters, some of the partners may be subject to *The Health Information Protection Act*, others subject to the FOIP Act or LA FOIP Act and others subject to PIPEDA.

A similar challenge was addressed earlier this year by Alberta’s Information and Privacy Commissioner. This case involved a child who was admitted to hospital for treatment related to a suicide attempt. A health worker (subject to that province’s health information law) completed a suicide risk assessment. Some of that information was later disclosed to a liaison worker at the child’s school. The school collected that information and entered it into the school’s computer system, the Student Information Record System (SIRS). Consent to disclose was not obtained nor was it sought from the child’s parents. A complaint was made to the Office of the Information and Privacy Commissioner (“OIPC”) that this sensitive personal information was not adequately protected. The OIPC found that there was authority for the disclosure of this health information to the school. The school however was not prepared to provide the kind of continuing treatment and care required to meet the stated purpose of the disclosure. The OIPC found that a disclosure for purposes of providing continuing treatment and care presumes that the recipient understands and is able to carry out the intended purpose. The OIPC also found that the collection of the information by the school was appropriate and authorized by the Alberta FOIP Act. The OIPC found that the school had not taken reasonable security arrangements to protect this sensitive personal information. The school was ordered to develop policies and procedures to remedy this deficiency and to submit a Privacy Impact Assessment to the Commissioner within a fixed time period. The Alberta decision is available at www.oipc.ab.ca under 2003 Investigation Reports.

What would happen in Saskatchewan? Our office has not yet dealt with such a fact situation. There are legislative provisions that would come into play in such a case. HIPA has a provision for disclosure without consent. Section 27(2) deems consent to disclosure for “*the purpose of arranging, assessing the need for, providing, continuing, or supporting the provision of, a service requested or required by the subject individual.*”

As for the authority of the school division to collect such information, there is provision in *The Education Act* whereby a board of education may enter into arrangements with agencies and individuals in the community that provide specialized services related to the health and welfare of students. [Section 192]



Schools and Local Authority

Freedom of Information and Protection of Privacy Act (continued)

There is no explicit requirement in the LA FOIP Act that requires a school to take reasonable steps to protect the confidentiality of personal information. Nonetheless, if a student's personal information should be acquired by someone who does not have a legitimate need to know for purposes unrelated to the original purpose or a related purpose, that would likely be a violation of the LA FOIP Act. In other words, there are good reasons to ensure that reasonable steps are taken by the school authority to safeguard such personal information and to guard against unintended disclosure.

PIPEDA

January 1, 2004 *The Personal Information Protection and Electronic Documents Act* will apply to the collection, use and disclosure of personal information as part of commercial activities.

Public sector FOIP Coordinators and their experience with FOIP or LA FOIP should be a useful resource for private sector organizations wrestling with privacy rules for the first time. Our office encourages private sector organizations to locate and chat with an experienced FOIP Coordinator. It would be foolish for private sector organizations not to mine useful information from our decade of experience with the FOIP Act and LA FOIP Act. You may even get a free coffee and enjoy a keen audience for a recounting of your experiences and 'war stories' with FOIP.

The interesting world of private sector privacy is about to become a whole lot more interesting soon. The Quebec government has initiated a process to have the Quebec Court of Appeal consider whether there is constitutional authority for the privacy provisions in PIPEDA. At issue is whether the federal government has the right to determine that a provincial law is or is not adequate in terms of privacy protection. This has important implications for Saskatchewan's *Health Information Protection Act*.

There are some new resources available to organizations attempting to comply with PIPEDA. These include:

For small business, <http://privacyforbusiness.ic.gc.ca>

For the health sector, <http://strategis.ic.gc.ca/privacy/health>

For all organizations, http://privcom.gc.ca/information/guide_e.asp



Contracting Out

Last summer our office considered the contracting out of data processing functions in the aftermath of the ISM hard drive theft and related privacy issues. We determined that a best practice would be for Saskatchewan institutions to adopt the *Guidelines for Data Services Contracts* developed by the Information and Privacy Commissioner Office for British Columbia. Features of the Guidelines include:

- The contract must incorporate the Act's definition of "personal information"
- The contract must state that the public body is only transferring physical custody of personal information and control of that information. Authority over the information remains with the public body
- The contractor must comply with use and disclosure rules and follow appropriate security measures
- The contractor must appoint a knowledgeable senior person to ensure privacy compliance
- The contract should stipulate whether services can be subcontracted and under what conditions

The British Columbia document can be accessed as OIPC Guideline 01-02 at www.oipc.bc.ca. A model contract can be accessed at http://www.msar.gov.bc.ca/foi_pop/Privacy/Tools/PIPA_Tool_9.pdf

OIPC Website

Our domain name has now been registered as www.oipc.sk.ca. Thanks to the Commissioners in Alberta and British Columbia for their assistance in registering a name similar to theirs. Thanks also to the Information Technology crew at the Legislative Assembly office for their diligence in this process. We are now developing content and expect that this should be available before the middle of January.

As part of developing our 'brand identity', we need your help in coming up with a logo we can use on our website, our printed materials and letterhead. Any and all suggestions gratefully accepted. The creator of the accepted logo will receive fame (or at least special mention in the FOIP FOLIO) and our everlasting gratitude.

Our plan is to post summaries of our reports and recommendations after completing a review under the legislation. Our intention is to publish the identity of the government institution, the local authority and the health information trustee as the case may be. This is consistent with the practice in British Columbia, Ontario and Alberta and a number of other jurisdictions. We will not normally publish the identity of individuals on our website.



Future Events

January 29, 2004 -- READY OR NOT...Privacy Legislation Compliance in Saskatchewan. (Regina). Hosted by Saskatchewan Institute of Public Policy. 1:15 p.m. -- 4:30 p.m. Gallery Building, College Avenue Campus, University of Regina. To register call Karen at (306) 585-5869 or email her at sipp@uregina.ca.

February 6, 2004 -- Canadian Bar Association Mid-Winter Meeting (Regina) includes a full day program on privacy compliance, for information contact (306) 244-3898

February 26, 2004 -- Workplace Privacy Conference 2004 (Toronto), for information visit: <http://www.lancasterhouse.com/conference/Toronto/hr04t/wp04t/wp04t.a>

April 1, 2004 -- Workplace Privacy Conference 2004 (Vancouver), for information visit: <http://www.lancasterhouse.com/conference/Vancouver/hr04v/wp04v/wpo>

May 8, 2004 -- e-Health 2004: Challenges Today for Success Tomorrow (Victoria), Hosted by CIHI (Canadian Institute for Health Information) and COACH (Canada's Health Informatics Association). For information visit <http://www.e-healthconference.com/>.

June 10 & 11, 2004 -- Access and Privacy Conference, (Edmonton) Hosted by University of Alberta, Government Studies. Speakers include the new federal Privacy Commissioner and a number of provincial/territorial Commissioners. For information visit <http://www.govsource.net/programs/iapp/conference>

Our office is including information on relevant events for your convenience and interest but disclaims responsibility for the content of such conferences.
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Can We Help?

If you have comments or suggestions for us, please send us a note to the attention of Pam Scott, Office Manager, Office of the Saskatchewan Information and Privacy Commissioner at (306) 787-8350 / e-mail: pscott@oipc.sk.ca. To receive future issues please provide your e-mail address.

To Contact Us

Saskatchewan Information and Privacy Commissioner
#100, 1230 Blackfoot Drive
Regina, Saskatchewan S4S 7G4

Phone: (306) 787-8350
Fax: (306) 798-1603

