

# FOIP FOLIO

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February 2004

## Privacy Impact Assessment (PIA)

Our office has developed a self-test instrument that would be suitable for departments, boards, agencies, local governments, schools, universities or health trustees to use to improve privacy compliance. This consists of:

- (1) Introductory document;
- (2) Short Form questionnaire with 113 questions; and
- (3) Long Form which includes annotations and explanations.



Don't let the length of these things intimidate you. A number of the questions may not apply to your particular application. The longer you work with the PIA the easier it gets! Also, if you use the PIA when designing a new program, you will greatly reduce the risk that at some future time our office finds that your organization is offside the FOIP or HIPA privacy requirements.

These documents borrow from similar instruments that have been developed by the Ombudsman in Manitoba and the Information and Privacy Commissioner in Alberta. Although our office has no responsibility for the private sector *Personal Information Protection and Electronic Documents Act* (PIPEDA), Saskatchewan businesses may find the PIA helpful in achieving compliance with that federal law.

At this stage we are gathering feedback from major users of the FOIP and HIPA. The plan is to post the full, revised PIA package on our website, [www.oipc.sk.ca](http://www.oipc.sk.ca), before the end of March.

## Vehicle Ownership Information – Who can get it and why

Since the Alberta government has decided it will no longer make motor vehicle registration information routinely available to parking lot operators, there have been plenty of questions about the practice in Saskatchewan. Such disclosure is routine here.

The answer can be found in two Court of Queen's Bench decisions (*General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* [1993] S.J. No. 206, and *City Collection Co. v. Saskatchewan Government Insurance* [1993] S.J. No. 535). In these two cases the Court determined that the information in question (names and addresses of registered owners of vehicles) had been provided routinely to parking lot operators and commercial lenders by SGI prior to proclamation of the FOIP Act.

## Vehicle Ownership Information – Who can get it and why (continued)

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Section 4 of the FOIP Act provides that:

- (a) the Act complements and does not replace existing procedures for access to government information or records.
- (b) the Act does not in any way limit access to the type of government information or records that is normally available to the public.

In the result, parking lot operators are entitled to access the registration information from SGI and, unless the law is changed, can continue to do so without the consent of the individuals involved. Best to not forget your loonies at home!

### **Why does an Applicant want access and does it matter?**

The FOIP Act, LA FOIP Act and HIPA create a right to access information. Our office takes the position, consistent with the practice in other Canadian jurisdictions, that you are not therefore entitled to require an applicant to explain why certain records/information are sought. We have recently dealt with several cases where health trustees have refused to provide patients with access to their own information unless the applicant provides a reason for the access request. This is inappropriate and should not occur. Our view is that this applies to both requests for personal information and to requests for general information.

Although the applicant does not need to give a reason for seeking a record, this does not prevent a FOIP or HIPA Coordinator from inviting the applicant to share their reason for the purpose of ensuring that the public body knows exactly what records would be responsive to the request and to minimize cost to the applicant.

### **Does PIPEDA apply to Health Regions, Universities, Municipalities . . . ?**

Clearly, local authorities are subject to the *Local Authority Freedom of Information and Protection of Privacy Act*. Part IV of LA FOIP sets out a complete code for the collection, use, disclosure, access and correction of personal information in the custody or control of those local authorities. Unlike PIPEDA, Part IV is not consent driven and a local authority can use and disclose personal information for 22 different reasons without consent.

The OIPC has discovered that many local authorities mistakenly believe that anything they do of a “commercial” character will also be subject to PIPEDA. For example, if a Regional Health Authority operates a cafeteria or a university operates a bookstore or a municipality rents out ice to an old-timer hockey league, what privacy law will apply?

## **Does PIPEDA apply to Health Regions, \_\_\_\_\_ Universities, Municipalities . . .? (continued)**

We know for sure that Part IV of the LA FOIP Act will apply. Even though the above examples are commercial activities, early indications from the federal Privacy Commissioner's office are that the office will likely take the position that the provincial legislation governs and refer the complainant to our office. The key is that, even though these activities may be of a commercial nature, they are related to the core purpose of the local authority. Section 13(2) of PIPEDA provides that the federal Commissioner is not required to prepare a report if satisfied that the complaint could more appropriately be dealt with under provincial legislation. We therefore encourage local authorities to concentrate on meeting the requirements of Part IV of the FOIP Act.

### **Saskatchewan Crown Corporations and PIPEDA**

What about Crown Corporations that are clearly carrying on commercial activities such as SaskTel or SGI? PIPEDA does not apply to the provincial government or its agents. The FOIP Regulation lists 76 Crown, agencies and boards that are considered "*government institutions*". It appears that these 76 bodies are agents of the provincial Crown and consequently are outside of PIPEDA's scope. So, even though many Saskatchewan Crown Corporations are engaged in commercial activities, they should focus on compliance with Part IV of the FOIP Act.

### **Keep it simple**

We recognize that all provincial government departments are currently undertaking privacy training. Those departments are reminded that 20 years of privacy law experience in Canada has underscored the importance of keeping the compliance rules as clear, unambiguous and simple as possible. Employees most likely to encounter privacy and confidentiality issues are junior employees working as receptionists and intake officers who have a lot of direct client contact and others who primarily deal with client/patient information such as file clerks and records personnel. The value of training staff to become comfortable with FOIP sections 24 (definition of personal information), section 26 (collection), section 28(use) and section 29 (disclosure) is that the "grey" or ambiguous areas will be minimized. Uncertainty tends to impede effective service delivery. Case studies are an excellent way to make your privacy training sessions relevant and accessible for your staff. The interaction that comes from case study discussion also is more likely to engage your audience.

## Health Research

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Recent Canadian news reports have focused on a practice of research companies that access patient databases in physicians' offices. These stories allege that some physicians have permitted research companies access to their patient files and data. The purpose is ostensibly to identify potential trial subjects for clinical trials. The audits are typically done for doctors who are pressed for time and seek help reviewing their charts to find patients eligible for participation in a research study. If this were to happen in Saskatchewan it would likely be a *disclosure* to a non-trustee under HIPA. If there is no express consent from the patient, our office would likely require that all of the section 29(2) requirements are met.

## PIPEDA and Health Information

Industry Canada has produced a Second and Third Series of Questions and Answers for the health sector. These are available at [www.e-com.ic.gc.ca](http://www.e-com.ic.gc.ca). Since there has been no decision yet on whether the *Health Information Protection Act* will be deemed "substantially similar" to PIPEDA, the Saskatchewan health sector should monitor developments with PIPEDA. If HIPA is declared substantially similar then the health sector need only comply with HIPA. If it is found not to be substantially similar then both HIPA and PIPEDA will apply to health information in the province. This would be awkward since PIPEDA is consent driven and HIPA minimizes the consent requirement.

Our advice is that trustees should, in the meantime, ensure their staff are trained to HIPA standards. The Industry Canada material refers to a "*circle of care*". This is described as "*the individuals and activities related to the care and treatment of a patient. Thus, it covers the health care providers who deliver care and services for the primary therapeutic benefit of the patient and it covers related activities such as laboratory work and professional or case consultation with other health care providers.*" You will likely also have heard Saskatchewan Health officials refer to a "circle of care". This phrase does not appear in HIPA but, as we understand it, anticipates a *trustee* with a legitimate "need-to-know" in whatever particular context applies. We don't yet know if the circle of care referred to in the Industry Canada material is identical to that envisaged by Saskatchewan Health, but obviously there are similarities.

What we do know is that if PIPEDA applies, it will require a valid consent from patients who have been informed of their privacy rights and who are provided with an opportunity to know what personal information is being collected, for what purpose, how it will be used, disclosed and protected.

## Ontario Commissioner issues summons

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In February 2004 the Ontario Commissioner's office issued its first summons under the 16 year old *Freedom of Information and Protection of Privacy Act*. This was in respect of a 20 second gap in the sound track of a surveillance tape. This related to a September 1995 incident at Ipperwash Provincial Park when native protester Dudley George was shot and killed. A similar power exists in our Saskatchewan legislation but has never been used by the OIPC.

### Police and FOIP

Did you know that Saskatchewan municipal police forces are not subject to the LA FOIP Act? In most other provinces police are subject to FOIP laws. In fact, in a number of provinces police services receive more access requests than many other public bodies. The RCMP, when they provide municipal policing services, are subject to the federal *Access to Information Act* and the federal *Privacy Act*.

A British Columbia Legislative Committee reviewing the FOIP Act recently heard a submission from the B.C. Association of Municipal Chiefs of Police that police records should be exempt from disclosure during the stage where an investigation is active and ongoing. The Commissioner in that province disagrees and urged the Committee to reject the Chiefs' submission.

### U.S. Airline Screening criticized

This month, the U.S. General Accounting Office criticized the controversial airline passenger-screening program developed by the Department of Homeland Security. The Department was faulted for inadequate safeguards to protect against identity theft and abuse of privacy of airline travellers.

### Privacy need not be a roadblock

Sometimes privacy is viewed as an impediment to creative health care solutions. A Calgary innovation indicates otherwise. The Calgary Foothills Hospital has found a way to allow appropriate sharing of patient information as part of an aboriginal health program. A First Nations elder provides support and information to aboriginal patients and facilitates smudging and pipe ceremonies as well as traditional healing practices. The program is run by Eileen McRae, the aboriginal health representative and a licensed practical nurse at the hospital.

## Ontario Crowns back under FOIP

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The Ontario government recently announced that Hydro One and Ontario Power Generation are back under the scope of the *Freedom of Information and Protection of Privacy Act*. This follows the revelation that \$5.6 million in untendered contracts had been given to individuals alleged to have been government insiders. Premier McGuinty asserted that this is a major step toward ensuring transparency in the granting of contracts to private consultants. The Harris government had acted in 1999 to exempt these bodies from FOIP.

## Recommendations to strengthen B.C. FOIP Act

Hansard is now available to review proceedings of the British Columbia Special Committee to Review the Freedom of Information and Protection of Privacy Act on February 9, 2004. This was the presentation from the B.C. Information and Privacy Commissioner on changes required to make the access/privacy legislation more useful to the citizens of that province. The proceedings are available at <http://www.leg.bc.ca/cmt/37thparl/session-4/foi/hansard/140209p.htm>. The last two Saskatchewan Information and Privacy Commissioners have urged the Saskatchewan government to undertake a similar public review of the FOIP and LA FOIP Acts in this province.

## Future Events

**March 25 & 26** -- NETLAW offered by the Canadian Institute in Toronto.  
[https://nt5.magma.ca/canadianinstitute/ci/order/order\\_page.cfm?ID=2508](https://nt5.magma.ca/canadianinstitute/ci/order/order_page.cfm?ID=2508)

**April 1, 2004** -- Workplace Privacy Conference 2004 (Vancouver).  
<http://www.lancasterhouse.com/conferences/Vancouver/hr04v/wp04v/wp04v.asp>

**April 28 & 29** -- ARMA Saskatchewan Chapter. For further information, contact Jodie Woykin; Ph: (306) 751-1332 (Regina) or e-mail: [jwoykin@sgi.sk.ca](mailto:jwoykin@sgi.sk.ca)

**May 8** -- Ehealth 2004: offered by CIHI and COACH in Victoria, B.C.  
<http://www.e-healthconference.com>

**May 17 & 18** -- *Privacy Compliance in Healthcare* hosted by Insight in Toronto  
[http://www.insightinfo.com/conferences/brochures/brochure.cfm?product\\_code=HCC04661](http://www.insightinfo.com/conferences/brochures/brochure.cfm?product_code=HCC04661)

**June 9 to 11** -- University of Alberta Access and Privacy Conference  
<http://www.govsource.net/programs/iapp/conference/main.ncl>

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