



FOIP FOLIO

October 2007

'ADVICE' EXEMPTION REVISITED IN REPORT LA-2007-001

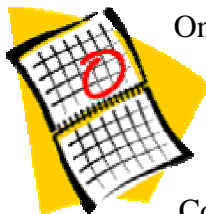


If you have been relying on the decision of Geatros J. in *Weidlich v. Saskatchewan Power Corporation* when you consider and apply the exemption in section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) or section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP), we strongly encourage you to read our latest Report LA-2007-001 (University of Saskatchewan). This Report dealt with the decision of the University to refuse access to the letters of resignation from 3 outgoing members of the University of Saskatchewan's Bio-medical Research Ethics Board. The Information and Privacy Commissioner discussed the scope of this exemption in both LA FOIP and FOIP and concluded that, to successfully invoke this exemption, the public body must show that the information relates to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. The exemption also applies when the information in question permits the drawing of accurate inferences as to the nature of the actual proposals, recommendations, analyses or policy options. The Commissioner determined that section 16(1)(a) of LA FOIP and section 17(1)(a) of FOIP do not apply to all kinds of "information or intelligence".

This Report also considers what is and is not personal information in an employment context. It signals that letters of resignation containing employment history, including the reasons for resigning, should be treated as the personal information of the authors and would therefore normally be exempt from release to an applicant other than the data subject.

LA-2007-001 can be accessed at the OIPC website, www.oipc.sk.ca under the *Reports* tab.

ELIZABETH DENHAM IN SASKATCHEWAN NOVEMBER 13 & 14



On Tuesday, November 13, 2007 **Elizabeth Denham** (Liz) will be speaking to the luncheon meeting of the Privacy and Access Law Section South of the Canadian Bar Association in Regina. On Wednesday, Liz will be presenting to the North Section in Saskatoon. Liz has been seconded from the Alberta Information and Privacy Commissioner Office to the federal Privacy Commissioner Office. In Ottawa, her title is Director of Research, Analysis and Stakeholder Relations. Few experts in Canada have the depth and breadth of experience dealing with access and privacy in both public and private sectors that Liz brings to her current position. She has

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ELIZABETH DENHAM IN SASKATCHEWAN NOVEMBER 13 & 14 (CONT'D)

a Master's Degree in Archival Studies. She has held the positions of Archivist for the City of Calgary, Privacy Officer/FOIP Coordinator for the Calgary Regional Health Authority, principal of Denham & Associates (consultants), and Director, Private Sector in the Alberta OIPC. Liz's topic will be *Privacy in the Private Sector - What's Working and What's Not*. There will be useful information provided for anyone involved in privacy in either public or private sectors. To register for this event in either city, call 244-3898 in Saskatoon or 1-800-424-8288 in other parts of Saskatchewan.

PORTFOLIO OFFICER WANTED



Our office is holding an open competition for a vacant Portfolio Officer position.

The Portfolio Officer position reports to the Director of Compliance and is responsible for the examination and resolution of diverse access to information and privacy issues arising from *The Freedom of Information and Protection of Privacy Act* (FOIP), *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and *The Health Information Protection Act* (HIPA). As a Portfolio Officer you will: monitor compliance with the Acts; mediate between individuals and public sector organizations and health trustees on access and disclosure issues; and generally uphold the access and privacy rights of Saskatchewan residents. You will also promote public awareness through accessible education programs.

Please visit our website at www.oipc.sk.ca for a copy of the employment ad and the Position Summary/Responsibilities. You can also view the ad on the Public Service Commission's website at the Career Centre (<http://www.careers.gov.sk.ca>). The closing date for the competition is November 2, 2007.

'DISCLOSURE OF PERSONAL INFORMATION WITHOUT CONSENT' LAW WAS STRUCK DOWN BY ONTARIO COURT

A recent Ontario Superior Court of Justice decision may have implications for legislation and legislative initiatives in our province. The decision is *Cheskes v. Ontario (Attorney General)*, 2007 CanLII38387 (ON S.C.), September 19, 2007.



Belobaba, J. was considering amendments to Ontario's *Vital Statistics Act* in regard to adoption records and access to those records. Key to the decision was a determination that a fundamental right to privacy guaranteed by the Charter (section 7) had been infringed and that the legislation could not be sustained after a section 1 analysis.

'DISCLOSURE OF PERSONAL INFORMATION WITHOUT CONSENT' LAW WAS STRUCK DOWN BY ONTARIO COURT (CONT'D)

Relying on *R. v. O'Connor*, the Justice declared that the disclosure of birth and adoption records under the new amendments “constitutes an invasion of the dignity and self-worth of each of the individual applicants, and their right to privacy as an essential aspect of their right to liberty in a free and democratic society has been violated.” Consequently, the applicants’ right to liberty in a free and democratic society had been violated.

In his judgment, Belobaba J. stated that:

[87] *The case law is clear that the liberty interest protected by s. 7 of the Charter includes more than freedom from physical restraint. The liberty interest also protects the rights of citizens to make fundamental life choices without interference from the state. Or, to put it in the language used by the Supreme Court in Malmo-Levine, the right to liberty in s. 7 includes the “right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. The only caveat is that the decisions being made must be fundamentally or inherently personal such that, “by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”*

[90] *The Attorney-General submits that the ‘fundamentally personal decision’ line of cases does not apply because here the private information is under the control of a government ministry. Strictly speaking, the decision whether or not to release the identifying information is the government’s, not the applicants. I accept this distinction but I am more persuaded by the following two points – the first point was made by a Supreme Court judge and the second by an expert on adoption. First, that all information about a person is in a fundamental way her own, for her to communicate or retain for herself as she sees fit, and second, that the facts surrounding an individual’s adoption belong to that person regardless of where and how that information is stored. Furthermore, to say that the information is in the “control” of a government ministry begs the very question that’s before me. The applicants argue that though the government possesses their identifying information and could physically transfer it to any party, s. 7 of the Charter protects their ability to choose where the government may make such a transfer. I can see no reason why the government’s collection of personal information permits it to intrude on fundamental personal choices that would otherwise fall within the ambit of the liberty interest.*

The judge determined that the following qualifies as a principle of fundamental justice under section 7:

Where an individual has a reasonable expectation of privacy in personal and confidential information, that information may not be disclosed to third parties without his or her consent. (107)

'DISCLOSURE OF PERSONAL INFORMATION WITHOUT CONSENT' LAW WAS STRUCK DOWN BY ONTARIO COURT (CONT'D)

Interestingly, the judge also determined that this was not a case where the court had to balance competing Charter-protected rights because the right to access confidential information as claimed by searching adoptees and birth parents is not a Charter-protected right. [119]

In its section 1 analysis, the judge concluded that the government's rationale involved a pressing and substantial objective and also that there was a rational connection with the impugned provisions and the legislative objectives. The legislation failed however the third element, minimal impairment.

The Ontario government had asserted that the adoption disclosure provisions in the new law are "*carefully tailored*" and do not unreasonably overshoot their purposes. The judge found otherwise. In fact, the judge stated that "[c]ontrary to the submission of the Attorney General, the disclosure provisions in the new law have not been '*carefully tailored*'. The applicants' rights under s. 7 have been completely eradicated."

INTERNATIONAL DATA PROTECTION AND PRIVACY COMMISSIONERS CONFERENCE



Data and Privacy Commissioners plus hundreds of privacy officers, academics, commentators, journalists, lawyers and consultants from all parts of the world met in Montreal in late September for their 29th conference, *Privacy Horizons: Terra Incognita*. In plenary, workshop, and breakout sessions, privacy experts addressed transborder data flows, ubiquitous computing, youth privacy, and challenges posed by new technologies. There was a heavy emphasis on practical tools and resources to address the challenges to privacy in 2007. A wealth of discussion papers and materials were developed for this event. Most of these are available at the website, www.privacyconference2007.gc.ca.

20 QUESTIONS BUSINESSES SHOULD ASK ABOUT PRIVACY



The Canadian Institute of Chartered Accountants has produced a useful tool for Saskatchewan businesses – *20 Questions Businesses Should Ask About Privacy*. 20 Questions includes questions and commentary on:

- understanding your business privacy risk;
- implementing a privacy compliance program;
- managing privacy risk; and
- security and safeguarding of personal information

This document can be downloaded free of charge from www.cica.ca/privacy.

REFLECTIONS ON RIGHT TO KNOW WEEK 2007

The week of October 1-5, 2007 saw a number of activities designed to promote awareness of the importance of the public's right to know about decisions made by Saskatchewan government institutions and local authorities. This included the official proclamations of Right to Know week by the Saskatchewan Government and the cities of Regina and Saskatoon.



The Saskatchewan Health Quality Council (HQC) was presented with the *Chief Justice E.M. Culliton 'Right to Know' Award* in recognition of excellent work done by the HQC in promoting transparency, active release and routine disclosure of public information. The award was accepted by **Shari Furness** on behalf of the HQC. The award was presented by **Murray Sawatzky**, Vice-President, Canadian Bar Association (Saskatchewan). Our thanks to **Kenneth Hodges, Q.C.** for sharing comments about the late E.M. Culliton and his legacy to the people of Saskatchewan. Particulars of the basis for the award

to HQC are available on the news release accessible at www.oipc.sk.ca under the *What's New* tab.

A Saskatoon Grade XII student, **Dylan Hardy**, received a \$300 scholarship for his essay on *Why Access to Information is Important in a Modern Democracy*.

John Reid, former Information Commissioner of Canada, delivered a keynote address on the *Increasing Importance of Access to Information* in Regina at the Saskatchewan Institute of Public Policy (SIPP) on Tuesday, October 2, 2007 and in Saskatoon at the University of Saskatchewan Faculty Club on Wednesday, October 3, 2007. The final event was a presentation by **David Fewer**, Staff Counsel for the Canadian Internet Policy and Public Interest Clinic on Thursday, October 4, 2007. Mr. Fewer's presentation at SIPP was entitled, *Privacy and the Right to Know: Rights, Complications and Limitations*.

The Regina Public Library followed the Right to Know theme by offering, during that week, the following movies: *Bowling for Columbine*, *Manufacturing Dissent*, *The Lives of Others*, and *Deliver Us From Evil*.

Thanks to our sponsors and supporters: Saskatchewan Law Foundation, Canadian Bar Association, McKercher McKercher Whitmore LLP, Saskatchewan Institute of Public Policy, Saskatoon Star-Phoenix, Regina Leader-Post, Regina Public Library, City of Regina, McPherson Leslie Tyerman LLP and Office of Saskatchewan Information and Privacy Commissioner. Members of the RTK Steering Committee were **Mark Anderson** (Chair), **Andrea Geisbauer**, **Jeff Barber**, **Neil Robertson**, **Mickey Woodard**, **Kara Philip**, **Sandra Barreth** and **Gary Dickson**.

REVISED REGULATIONS FOR FOIP AND LA FOIP



In the Saskatchewan Gazette, Volume 103, you will find revisions to a number of regulations including the FOIP Regulations and the LA FOIP Regulations. Most of the changes to the FOIP Regulations reflect the changes of names of public bodies, e.g. *Department of Environment and Resource Management* has been replaced by *Department of Environment*. Some changes substitute reference to new laws for old laws, e.g. *The Coroners Act, 1999* replaces *The Coroners Act*. There are also changes to the list of government institutions in Part 1 of the Appendix, e.g. *Office of Residential Tenancies* replaces *Office of the Rentalsman*.

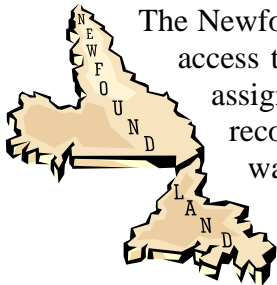
The LA FOIP Regulations have been revised in significant ways. In the list of local authorities in Part II of the Appendix, the reference to “*persons who operate hospitals, nursing homes or other institutions approved pursuant to subsection 3(1) of The Hospital Standards Act*” has been deleted and replaced by “*health care organizations as defined in The Regional Health Services Act*”. The *Saskatchewan Cancer Agency* replaces references to the *Saskatchewan Cancer Foundation*. As well, the Request for Review form has been slightly changed. The revised Request for Review form is available on our website, www.oipc.sk.ca under the tab *Forms*.

BROWN BAG WORKSHOPS



Our ‘brown bag’ luncheon series will begin again in the new year. For those of you not familiar with this initiative, these short workshops provide an opportunity for FOIP and HIPA Coordinators to hear from our office on a specific access and privacy topic, and to engage in discussions on timely issues of interest. The sessions are held from 12:10 to 12:50 p.m. at our office at 503-1801 Hamilton Street, Regina. Hand-outs you can take back to your office and share with colleagues are given out at each session. In order to plan our upcoming workshops, we are asking for your ideas of topics you would like to see addressed. To make a suggestion, please call Kara Philip at 787-8350 or 1-877-748-2298.

PERSONAL INFORMATION OR WORK PRODUCT



The Newfoundland and Labrador IPC has issued Report 2007-013 dealing with access to university records relating to the course preferences and teaching assignments of faculty at Memorial University. The Commissioner recommended the release of course preferences after finding that this was personal views or opinions of faculty members but given in the course of performing services for the University. This decision is available at www.oipc.gov.nl.ca.



WHAT ARE CANADIANS THINKING ABOUT PRIVACY?

The Office of the Privacy Commissioner of Canada has just released an opinion survey on attitudes towards privacy. The survey done in March 2007 is available at the website, www.privcom.gc.ca. Some key findings from that survey include:

- 7 in 10 Canadians feel they have less protection of their personal information than they did 10 years ago.
- 60% of respondents continue to agree that health information is one of the most important types of personal information that needs protection through privacy laws.
- 4 in 5 place great importance on having strong privacy laws. Despite this, more than half report they are not aware of any privacy laws currently in place.

FUTURE EVENTS

October 25-26, 2007 – *The Revealed 'I', A Conference on Privacy and Identity* – Ottawa, Ontario (visit www.idtrail.org/content/section/11/95/ for details)

November 13, 2007 – CBA Privacy and Access Law South: *Privacy in the Private Sector - What's Working and What's Not* - Speaker: Elizabeth Denham, Director of Research, Analysis and Stakeholder Relations, Office of the Privacy Commissioner of Canada - Hotel Saskatchewan, Regina (visit www.cba.org/saskatchewan/events/section.aspx for details)

November 14, 2007 – CBA Privacy and Access Law North: *Privacy in the Private Sector - What's Working and What's Not* - Speaker: Elizabeth Denham, Director of Research, Analysis and Stakeholder Relations, Office of the Privacy Commissioner of Canada – Saskatoon Club, Saskatoon (visit www.cba.org/saskatchewan/events/section.aspx for details)

December 3, 2007 – *Electronic Health Information and Privacy Conference* – Ottawa, Ontario (visit www.ehip.ca for details)

TO CONTACT US:

Office of the Saskatchewan Information and Privacy Commissioner
503 - 1801 Hamilton Street
Regina, Saskatchewan, S4P 4B4
Telephone: (306) 787-8350 / Toll Free: 1-877-748-2298
Fax: (306) 798-1603
E-mail: webmaster@oipc.sk.ca
Website: www.oipc.sk.ca

If you wish to subscribe to the Saskatchewan FOIP FOLIO, please send your e-mail address to webmaster@oipc.sk.ca

