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ANN CAVOUKIAN, Ph.D., COMMISSIONER

Make privacy a priority or face the consequences, warns Commissioner

Corporate directors who fail to address privacy as a major issue are failing to live up to their responsibilities to both customers and shareholders, says Ontario Information and Privacy Commissioner Ann Cavoukian.

The reputation that corporations quickly acquire for how they deal with their customers' personal information can either drive business – or drive it away, noted the Commissioner, who recently released a paper aimed directly at corporate directors.

"Personal information must be protected – and more companies are starting to realize it is in their own best interest to do so," said the Commissioner. She stressed that companies that succeed in carving out a reputation for protecting personal information can gain a significant advantage over others. "Research has shown that consumers are becoming increasingly concerned, better informed and more demanding with regard to the protection of their personal privacy."

Privacy and Boards of Directors: What You Don't Know ***Can*** *Hurt You* cites a number of recent privacy breaches where organizations failed to protect personal information. These included:

- a pharmaceutical company that inadvertently disclosed the e-mail addresses of 600 patients who took Prozac;
- a data management company that failed to protect a computer hard-drive that contained the personal information of thousands of Canadians;

Commissioner Ann Cavoukian.

- the misuse of personal health information as part of a promotional campaign for an anti-depressant.

These are just some of the incidents raising questions about the liability of directors in protecting the personal information collected, used and disclosed by their organizations, said the Commissioner.

A lack of attention to privacy, she said, can result in a number of adverse consequences. Among those she cites in the paper are:

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Let the public in: A case for greater openness and transparency

This article by Ann Cavoukian and Tom Mitchinson originally ran in the Toronto Star *on October 15, 2003.*

In light of recent abuses to good governance in both the corporate and public sectors, the issue of accountability has taken centre stage. The public's demand for greater accountability is getting stronger and "trust me" is just not good enough. It is not good enough for shareholders who demand accountability from their corporate directors, and it is not good enough for citizens who expect good governance at all levels of government.

For government, transparency is a key requirement to achieve accountability. Our freedom of information law is the vehicle for Ontarians to review what government officials are doing and how they are spending taxpayer dollars.

Commissioner Ann Cavoukian and Assistant Commissioner Tom Mitchinson.

Clearly, the Ontario public is demanding to know how local governments are spending money and how decisions are being made. Last year alone, freedom of information requests to municipalities jumped a full 25 per cent. Citizens now demand that public business be conducted in an open and transparent manner, not behind closed doors and not without prior notice and an opportunity to become involved before a decision is made.

Municipal governments take considerable pride in their open business style and – on one level – they deserve this reputation. However, public concerns are pushing things further, and transparency and accountability have become hot topics in this year's municipal election campaign. In Toronto, for example, at least three mayoralty candidates have complained that too many meetings take place in "backrooms" away from public scrutiny. Some call for tougher ethics rules, and others want to reduce opportunities for closed meetings.

Ontario needs a tough new municipal "Open Meetings" law to bring greater transparency and accountability. The *Municipal Act* does not go far enough here. It does require, with limited exceptions, that Councils conduct their business at open meetings where the public can attend and observe the debate. But accessible, transparent government goes far beyond opening the doors to a meeting.

The broader objective of transparency is to ensure that citizens understand how decisions are made and have an opportunity to participate in the decision-making process. To be truly effective, we need a new law that will encourage integrity in our municipal governments and help ensure that elected and appointed municipal officials operate in the public interest.

This legislation must:

- require municipalities to give the public adequate advance notice of each Council and committee meeting;
- prohibit Councils from considering business not included on a published notice;
- give the public a legal right to complain if it feels that open meeting rules have not been followed;
- establish an efficient and accessible oversight system, with a body responsible for investigating complaints and resolving disputes; and
- provide remedies and penalties if the law has been broken.

The issue of what constitutes a "meeting" has dogged municipalities for years. The courts have even had to step in on occasion to provide direction. The *Municipal Act* attempts to define various types of meetings, but we still read about situations where informal "meetings" take place, without proper notice or quorums, invariably accompanied by cynical allegations that elected officials are trying to avoid an open public process for dealing with controversial issues. Integrity will always be an issue unless we have rules for transparency that are clearly understood and consistently adhered to.

Some municipalities are very good about posting advance notices of meetings, with agenda items clearly described. Some are even tapping into the potential of the Internet as a vehicle to disseminate this information throughout the community. But what if a Council wants to amend an agenda? What if a topic is raised at a meeting that wasn't included in the posted notice? Do these actions erode citizens' democratic rights? These issues need to be more clearly addressed and understood.

The State of Hawaii's *Public Proceedings and Records Act* has grappled with this issue. It prohibits Council from meeting unless written public notice, including a detailed agenda, is provided at least six days prior. If not complied with, the meeting must be cancelled. The agenda of a properly constituted meeting also can't be amended unless the meeting is postponed in order to re-notify the public.

One of the most glaring deficiencies in Ontario's current municipal Open Meetings scheme is the lack of efficient and accessible oversight. What do citizens do if they learn that an issue of public importance was decided in a "backroom"? Who do they turn to when they learn of a meeting that was held without proper notice? A lengthy and costly court process is clearly not the answer. We must have a dispute-resolution process that is flexible and accessible to everyone.

And finally, any open meetings scheme must have teeth. If rules have been broken there has to be a remedy, or series of optional remedies, to address the problem.

With a municipal election campaign underway, we need to hear where candidates stand on a new "Open Meetings" regime. Many candidates, of all political stripes, appear to accept the need to improve integrity and transparency in public administration. Let them now take these worthy concepts and root them in a practical and concrete way. Let them join the voices calling on the province to enact a new and comprehensive "Open Meetings" law. If they're not prepared to do so, such talk may be little more than political rhetoric.

Make privacy a priority

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- violations of privacy laws;
- harm to customers whose personal information is used or disclosed inappropriately;
- damage to the organization's reputation and brand;
- financial losses associated with deterioration in the quality and integrity of personal information;
- financial losses due to a loss of business or the failure or delay in the implementation of a new product or service due to privacy concerns; and
- loss of market share or a drop in stock prices following negative publicity about a "privacy hit."

The paper explains what fair information practices are (internationally recognized privacy principles), outlines the business case for implementing sound privacy practices and suggests key steps that directors should take. The paper concludes with a series of questions that can be used to help determine if a company has fully addressed privacy compliance.

"I have found a surprising lack of awareness that the fiduciary duties of directors extend beyond governance and financial auditing issues to include privacy protection," adds the Commissioner. "This paper should serve as a good starting point for these organizations and individuals."

The paper is available on the IPC Web site at www.ipc.on.ca.

Summaries

"Summaries" is a regular column highlighting significant orders and privacy investigations.

Order MO-1684
Appeal MA-020208-2
City of Toronto

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information pertaining to the development of a property at the corner of Spadina Road and Thelma Avenue, owned by the Toronto Parking Authority (TPA), an agency of the City.

The City identified a large number of responsive records and notified several parties whose interests might be affected by the disclosure of the records. The City then granted access to some records and denied access to others based on a number of exemptions, including section 10, the third party commercial information exemption, and section 11, the exemption under which records can be withheld if disclosure might reasonably be expected to be injurious to the economic and other interests of an institution. The appellant appealed the decision.

One of the issues that the adjudicator addressed in this order was whether the content of a draft agreement can satisfy the definition of "supplied" as required by the test that must be met for the section 10 exemption to apply.

Previous orders have discussed whether the content of a draft agreement can be seen to have been "supplied" to the City by an affected party and have concluded, in general, that for such information to have been supplied to an institution, it must be clear that the information originated from the affected party. Since the information in an agreement is typically the product of a negotiation process between the institution and the affected party, that information will not qualify as originally having been "supplied" for the purposes of the third party commercial information exemption claim.

The adjudicator concluded that the drafts exchanged between the parties and the related correspondence did not satisfy the "supplied' component of the section 10(1) test. In the circumstances of this appeal, the adjudicator found that the records at issue reflected the considerable "give and take" of an ongoing process of negotiating the development agreements that took place over the course of a number of years and neither the original draft text nor the proposed changes could be attributed to either party with any certainty.

In this order, the adjudicator also addressed whether development proposals might properly be withheld under the section 11(d) exemption, applicable when the disclosure of the information could reasonably be expected to be injurious to the financial interests of an institution.

The City argued that in previous orders, conditional purchase and sale agreements for government property were found to fall under the section 11(d) exemption on the basis that if the deal fell through, by disclosing the conditional agreement the government entity would be prejudiced in negotiations with new purchasers.

The adjudicator distinguished the records and circumstances of this appeal from those previous orders and found that unlike the sale of specific property, development proposals are generally unique to the particular developer. In the adjudicator's view, the difference lies in the fact that if negotiations surrounding a conditional purchase and sale agreement fall through, the government entity may still attempt to sell the parcel of land on the same terms; on the other hand, following the failure of negotiations of a development proposal, any new development proposal could vary significantly from the particular development negotiated with the affected party. The adjudicator concluded that these circumstances

significantly reduced the likelihood of harm under section 11(d) as the disclosure of such records would have limited, if any, relevance to any subsequent negotiation process and ordered the records to be released to the appellant.

Order PO-2128
Appeal PA-020162-1
Management Board Secretariat

The Ministry of the Attorney General received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the legal costs incurred by both the Government of Ontario and by the government's insurer for the defence of government officials in the civil lawsuit brought by the family of the individual killed during the occupation at Ipperwash Provincial Park.

The Ministry advised the requester that Management Board Secretariat (MBS) had custody and control of the requested records and that the request had therefore been transferred to MBS. MBS identified one responsive record and denied access to it based on two exemptions.

One of the key issues the adjudicator addressed in this order was the argument made by MBS that the solicitor-client privilege exemption outlined in section 19 of the *Act* applied to the record because it contained information about legal accounts.

Previous orders involving legal accounts applied the Federal Court of Appeal reasoning in *Stevens* v. *Canada (Privy Council)*(1998), 161 D.L.R. (4th) 85 and found that unless an exception applies, lawyers' bills of account, in their entirety are subject to solicitor-client privilege at common law. One of the exceptions outlined by the Court in *Stevens* specifies that information which is not a communication but is a mere statement of fact is not privileged. Relying on that exception, some of those previous orders have found that privilege does not apply to total dollar amounts for legal costs.

However, a more recent decision involving the application of solicitor-client privilege to legal accounts, *R.* v. *Charron* (2001), 161 C.C.C. (3d) 64 (Que. C.A.), leave to appeal granted [2001] C.S.C.R. no.615 (S.C.C.), also known as *Maranda*, has emerged. In that decision, the Quebec Court of Appeal found that the fact of payment is not inherently a solicitor-client communication and that this "fact" does not, on its own, reveal confidential information arising from the solicitor-client relationship. In the Court's view, barring unusual circumstances, disclosing the amount paid to a lawyer would not undermine the purpose of solicitor-client communication privilege by creating a chilling effect on solicitor-client communications.

In reviewing the specifics of this case, the adjudicator found that the information contained in the record at issue in this appeal, an aggregate amount paid by an insurer for various legal services, more closely paralleled the information at issue in *Maranda* than that in *Stevens* and therefore chose to apply the reasoning set out by the Court in *Maranda*. The adjudicator concluded that in the circumstances of this appeal it is difficult, if not impossible, to infer from the figure itself, information about the "nature of the retainer" or other particulars of the relationship between the various government defendants and their counsel. Given that he was not persuaded that any meaningful information about the solicitor-client relationship could be inferred from the total cost figure, he found that it did not attract solicitor-client communication privilege and ordered MBS to disclose the total cost figure to the appellant.

Mediation success stories

"Mediation success stories" is a regular column highlighting several of the recent appeals that have been resolved through mediation.

Both parties committed to mediation

The Hamilton Entertainment and Convention Facilities Inc. (HECFI) received four access requests from a member of the media. The requests were for records relating to:

- HECFI's business with a number of named entities;
- the names of consultants, advisors and temporary personnel, along with their responsibilities, fees and purposes for which they were retained, and any reports they produced;
- expenses claimed by the Board of Directors Chairs and Vice Chairs for a specified time period; and
- expenses claimed by HECFI's Managing Director/CEO for a specified time period.

In response to all four requests, HECFI applied section 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act* to deny access to the records in their entirety.

During mediation, HECFI's Freedom of Information Co-ordinator (the Co-ordinator) worked closely with the mediator and the appellant to effect a mutually satisfactory resolution of the appeals:

- HECFI identified those named entities for which they had records and notified them of the request. The named entities consented to the disclosure of their records to the appellant.
- The appellant met with representatives of HECFI and narrowed the scope of the request to those consultants, advisors and temporary personnel that had submitted invoices amounting to $5,000 or more annually. HECFI provided the requester with a list reflecting the narrowed request.
- HECFI revised its decision and granted the appellant access to the expense claim records of the Chairs, Vice Chairs and Managing Director/CEO.

As a result, all four appeals were resolved during mediation. The positive approach to mediation exhibited by *both* the Co-ordinator and the appellant led to a resolution to the satisfaction of all concerned.

Mediation addresses appellant's real interest

After a child made an allegation to his teacher that one of his parent's had hit him, the school contacted the local Children's Aid Society (the CAS) and the local Police Service. Both agencies investigated the allegation by conducting interviews at the school and with both parents.

The other parent then made a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the local Police Service for a copy of the police investigation report. The Police granted partial access to the records, severing the name of the CAS worker. The parent appealed the Police's decision.

During the mediation process, it became apparent that the appellant knew the name of the CAS worker, in fact, had met with the worker, and therefore wasn't interested in pursuing access to the severances. The appellant's real concern was that, in the appellant's view, the police investigation report did not accurately reflect the appellant's and the family's interview.

Once the mediator determined the appellant's real interest, the Police's Freedom of Information and Protection of Privacy Co-ordinator agreed to provide the mediator with the name of a police official with whom the appellant could discuss the accuracy of the reports. Once the meeting was arranged, the appellant agreed that the appeal was resolved.

Building trust for ongoing relationship

A requester submitted four requests under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Transportation for access to records relating to the proposed construction of a highway extension in southwestern Ontario. The Ministry issued fee estimates, and upon receipt of 50% of the fee from the requester, granted access to the records.

The requester appealed the fee and also raised a number of issues relating to the records to which she had been granted access. Specifically: a number of records she received either were not responsive to the request or were records she had specifically excluded from the request; yet these non-responsive records had been included in the calculation of the photocopying fees; one disc provided by the Ministry could not be opened; and a promised disc had not been provided.

The Ministry took a comprehensive approach with a view to resolving all four appeals. Despite the fact that the Ministry's actual search time for the four appeals was greater than their estimate, they nonetheless wanted to address the appellant's various issues. They offered the appellant assistance in opening the disc and offered to reduce by 50% the outstanding balance on three appeals.

The appellant accepted the Ministry's offer and the four appeals were settled. Both parties agreed that the discussions and negotiations undertaken in the course of mediation had helped them build a relationship of trust which should serve them well in future dealings.

Third party appellant and requester participate in teleconference and resolve appeal

The Ministry of the Environment (the Ministry) received a three-part request under the *Freedom of Information and Protection of Privacy Act* for information relating to site assessments of a specified property. Parts one and three of the request were for certain Environmental Site Assessment reports and part two of the request was for the Preliminary Site Assessment report.

The Ministry granted access to one Environmental Site Assessment report but advised that it could not locate the other report. The Ministry also granted access to the Preliminary Site Assessment report (the preliminary report), despite objections by the affected party.

The affected party (now the appellant) appealed the Ministry's decision to grant access to the preliminary report, claiming section 17 (third party information).

During mediation, the Mediator contacted the appellant to discuss the application of section 17 to the record. The mediator referred the appellant to specific orders in which records similar to the record at issue in this appeal had been ordered disclosed in full.

The appellant believed that the circumstances in his case could be distinguished because of ongoing litigation. Further, he believed it would be "misleading" to disclose the preliminary report to the requester. However, upon understanding that the requester had already obtained access to the remediation records, the appellant agreed to discuss his objections directly with the requester.

The Mediator arranged a teleconference between the two parties and herself. During the teleconference the requester explained that she wanted access to the preliminary report to verify that all of the matters raised in the report had been addressed. The appellant gave his view that since the report was only a preliminary assessment it could not be used to verify that all contamination matters had been addressed. The requester indicated that she understood his view. The parties then had some discussion about their litigation.

In the end, because the requester already had the remediation records and, based on their discussions and understandings about the preliminary nature of the report, the appellant decided to consent to the disclosure of the preliminary report and the appeal was resolved.

Recent IPC publications

The IPC has issued (in order of publication) the following publications and submissions since the last edition of *IPC Perspectives*:

Business Improvement Project: How to Assist in Increasing Compliance with the **Freedom of Information and Protection of Privacy Act** is a joint project of the IPC and the Ministry of Health and Long-Term Care, Freedom of Information and Protection of Privacy Office. April 2003.

What to do if a privacy breach occurs: Guidelines for government organizations is aimed at government organizations but the guidelines can be used by all organizations. May 2003.

National Security in a Post-9/11 World: The Rise of Surveillance … the Demise of Privacy? provides an introduction to the main anti-terrorist initiatives to outline the factors governments should consider to ensure surveillance technologies and other national security systems are implemented in a manner that minimizes the impact on privacy. May 2003.

2002 Annual Report. June 2003.

The State of Privacy and Data Protection in Canada, the European Union, Japan and Australia outlines some of the global developments in the privacy arena. June 2003.

Inspection Reports and the **Municipal Freedom of Information and Protection of Privacy Act** is a joint project of the Town of Newmarket and the IPC. June 2003.

A Guide to Ontario Legislation Covering the Release of Students' Personal Information provides students, parents and school board staff with a basic understanding of how the *Municipal Freedom of Information and Protection of Privacy Act* interacts with the *Education Act* to protect privacy and provide access to the personal information of students. Revised July 2003.

Electronic Records and Document Management Systems: A New Tool for Enhancing the Public's Right to Access Government-Held Information? examines the role of electronic records and document management systems (ERDMSs) in enhancing the public's right to access information from government institutions. July 2003.

The Security-Privacy Paradox: Issues, Misconceptions, and Strategies is a joint paper with hands-on advice for developing strategies for information security and privacy protection. August 2003.

All of these publications and more are available on the IPC's Web site at www.ipc.on.ca.

Upcoming presentations

December 4. **Commissioner Ann Cavoukian** will be the keynote presenter at the International Association of Business Communicators' Privacy & Business Luncheon in Toronto.

February 11. **Commissioner Ann Cavoukian** will give a keynote address on biometrics at the government of B.C.'s annual Privacy & Security Conference in Victoria, B.C.

February 23. **Commissioner Ann Cavoukian** will speak on privacy matters to the University of Toronto's Centre for Innovation Law and Policy in Toronto.

April 28. **Commissioner Ann Cavoukian** will address the Canadian Automobile Association (manufactures and retailers) on privacy issues in Toronto.

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Communications Department
Information and Privacy Commissioner/Ontario
80 Bloor Street West, Suite 1700
Toronto, Ontario M5S 2V1
Telephone: 416-326-3333 • 1-800-387-0073
Facsimile: 416-325-9195
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