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New health privacy *Act* takes effect Nov. 1

The *Personal Health Information Protection Act*, 2004 (*PHIPA*) – a new provincial law governing the collection, use and disclosure of personal health information – comes into effect within days.

Commissioner Ann Cavoukian and Health Minister George Smitherman with several of the IPC's new publications on *PHIPA*.

The new privacy law, the first in Ontario in nearly 14 years, takes effect Nov. 1. It is designed to provide a set of comprehensive and consistent rules for the health care sector to ensure that personal health information is kept confidential and secure.

"This will help protect the most sensitive of all personal information," said Information and Privacy Commissioner Ann Cavoukian, who stressed how pleased she was "that the new government has moved forward so quickly with this much-needed legislation. This is something my office has been advocating for, and working towards, virtually since the office opened in 1987."

PHIPA will apply to all individuals and organizations involved in the delivery of health care services. There are also restrictions on the use or disclosure of personal health information given to outside agencies, such as insurance companies or employers, by a health information custodian.

Under the new legislation, health information custodians will be required to implement information practices that are *PHIPA* compliant. For example, custodians must take reasonable steps to safeguard and protect personal health information and ensure that medical records are retained, stored, transferred and disposed of in a safe and secure manner.

PHIPA sets out a formal procedure for individuals seeking access to their personal information – and for requesting correction of that information. And health information custodians will now be required to notify an individual if his or her personal

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Recent IPC Publications

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

Promoting Transparency through the Electronic Dissemination of Information. This IPC paper, which was a chapter in *E-Government Reconsidered*, a book published by the Saskatchewan Institute of Public Policy, emphasizes that the "e-information" component of e-government must receive more attention as a precondition for effective e-governance. April 2004.

Incorporating Privacy into Marketing and Customer Relationship Management. This is a joint report by the Office of the Information and Privacy Commissioner/Ontario and the Canadian Marketing Association. May 2004

Cross-National Study of Canadian and U.S. Corporate Privacy Practices. This joint study, by the IPC and the Arizona-based Ponemon Institute, benchmarks the corporate privacy practices of Canadian and U.S. companies. May 2004.

Guidelines for Using RFID Tags in Ontario Public Libraries. These guidelines (covering Radio Frequency Identification) are intended to assist vendors and library staff. June 2004.

Privacy and Access: A Blueprint for Change. The Commissioner's 2003 annual report. June 2004.

Frequently Asked Questions: Personal Health Information Protection Act. August 2004.

A Guide to the Personal Health Information Protection Act. This is a tool to help health information custodians understand their rights and obligations under this new privacy legislation. September 2004.

The Personal Health Information Protection Act and Your Privacy. This brochure introducers the new *Act* and answers some pertinent questions in plain language. October 2004.

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

Upcoming Presentations

In October, Commissioner Ann Cavoukian was making a presentation, *Biometrics and the Privacy Paradox*, at the *Promise and Perils of the Technological Age* conference at De Paul University in Chicago.

November 2. Commissioner Cavoukian is making a presentation, *Go Beyond Compliance to Competitive Advantage: Make Privacy Pay Off*, at the Independent Financial Brokers Toronto Fall Summit 2004, at the Toronto Congress Centre.

November 4. Commissioner Cavoukian is delivering a presentation, *Building in Privacy from the Bottom Up: How to Preserve Privacy in a Security-Centric World*, at the Privacy, Policy, Law and Technology conference at Carnegie Mellon University in Pittsburgh, PA.

November 8. Ken Anderson, Assistant Commissioner (Privacy), is addressing the faculty of the Department of Information Studies at the University of Toronto, on the *Personal Health Information Protection Act*.

November 10. Commissioner Cavoukian is speaking at the Corporate State conference at the Sutton Place Hotel in Toronto.

Nov. 18. Assistant Commissioner Anderson is the featured speaker at the RFID Canada 2004 Conference at the International Centre in Toronto.

December 7. Tom Mitchinson, Assistant Commissioner (Access), is chairing a panel discussion on open meetings laws at the annual conference of the Council on Governmental Ethics Laws (COGEL) in San Francisco.

Summaries

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

Order MO-1823
Appeal MA-030059-1
Township of Huron-Kinloss

The Township of Huron-Kinloss (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records supporting the decision by the township's chief building official to grant a building permit for a new 3,000-head hog barn on a local farm. The requested records included the application for a building permit, construction drawings, the nutrient management plan and the environmental assessment required by the township's bylaws.

In 2001, the township had issued a previous building permit to the same applicants for the construction of two barns to house a total of 4,000 hogs. Local opposition to the project resulted in litigation and a court decision quashing the building permit [*Welwood v. Huron-Kinloss (Township) Chief Building Official*, [2002] O.J. No. 1131 (S.C.J.)]. The new permit, which was the subject of the request, was granted after the court decision. The appellant is a ratepayer group involved in opposing the first permit.

Although the adjudicator found that the records qualified for exemption under section 7(1) as advice or recommendations to government, she applied the "public interest override" at section 16 of the *Act* to order disclosure. To override an exemption, section 16 requires a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.

The adjudicator noted that the subject of the records had and continues to rouse strong interest and attention in the community as the subject of public debate, litigation and judicial scrutiny, and that the court had recognized that there was an ongoing balancing of interests between residents and agribusinesses that would extend beyond the conclusion of that litigation. Given these circumstances, the adjudicator found that there was a compelling interest in having the information in the records made available for public scrutiny.

The adjudicator also found that as the second building permit application followed on the heels of a court determination that inquired into the approval process for a very similar application by the same proponent and found the process wanting, she was satisfied that the compelling public interest clearly outweighed the purpose of section 7(1).

The adjudicator did not find that the section 10, third party information exemption, applied to protect private interests from public scrutiny. However, she commented that even if that exemption were to apply, the compelling public interest would clearly outweigh the purpose of that exemption, given that the proposed development engaged more than just the private interests of the affected parties but extended to the "broader community" and required the balancing of legitimate competing interests.

Order: PO-2312
Appeals: PA-030365-1 and PA-030407-1
Ministry of Community Safety and Correctional Services

The Ministry of Community Safety and Correctional Services (the ministry) received three similar requests under the *Freedom of Information and Protection of Privacy Act (the Act)* from the same requester for information contained in the Sex Offender Registry. The ministry responded that *Christopher's Law (Sex Offender Registry), 2000* has the effect of excluding the requested information from the scope of the *Act*.

Specifically, the issue was whether section 67(1) of the *Act*, in combination with sections 10 and/or 13(1) of *Christopher's Law*, excludes the information from the access provisions of the *Act*. Section 67(1) states that the *Act* prevails over confidentiality provisions in other statutes unless section 67(2), or the other statute, specifically provides otherwise. Section 67(2) does not mention *Christopher's Law*.

The adjudicator examined whether section 13(1) of *Christopher's Law* qualifies as a

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Mediation Success Stories

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

A second look at records leads to access

The Ministry of Children and Youth Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an operational report on a youth facility operated by the ministry. The report reviewed the current policies and procedures of the facility and contained a list of recommendations to improve the efficiency of day-to-day operations, including staffing suggestions.

The ministry denied access to the entire report, saying that it may interfere with a law enforcement matter in accordance with section 14(1). The ministry also claimed that a part of the report qualified as the employment and educational history of the individuals who created the report in accordance with section 21(3)(d) of the *Act*. The requester appealed the denial of access.

In discussions with the mediator, the appellant explained that he was not aware of the ongoing law enforcement matter and that he was not seeking access to any reports concerning law enforcement issues. The appellant indicated that his request for access to the operational report stemmed from his interest in policies and procedures relating to labour relations issues. In addition, the appellant clarified that he was not interested in obtaining access to information about employment or educational history of the authors of the report.

The mediator discussed the records with the ministry and noted that although the report mentioned the ongoing police matter, it did not provide any details of the police investigation. The ministry contacted the police service that was conducting the investigation and the police service confirmed that in fact, the report was not being used as part of its ongoing investigation and that it had no objection to releasing the report.

As a result, the ministry reviewed its decision on access and agreed to disclose the report with the exception of the part containing the education and employment background of the authors. The appellant was satisfied with the outcome and the appeal was resolved.

Compromise results in resolution of fee appeal

The Regional Municipality of York (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the sampling and analysis of well water in three named communities within the region. The time period covered by the request was from 1990 to 2000.

In response, the region issued a fee estimate totalling $580. The estimate consisted of search time of 16 hours at $30 an hour; preparation time of three hours at $30 an hour and the photocopying of 50 pages at 20 cents a page. The region requested a written acceptance of the fee and a deposit equalling 50 per cent of the total.

The requester asked the region to waive the fees based on his view that disclosure of the records would benefit public health and safety. The region declined to waive the fees.

The requester (now the appellant) appealed the region's fee estimate and its decision not to waive the fees.

During the course of mediation, after the mediator clarified the elements of the request with the appellant, the region provided the appellant with three options, offering variations in the processing of his request with corresponding fees for each option. The appellant was not satisfied and wished to pursue the appeal.

In an effort to resolve this appeal, the region subsequently offered a fourth option in which all information for the three communities mentioned in the request would be identified, no preparation charges would apply and the region would not charge for photocopying over 700 pages of records. The fee would total $250.

The appellant was pleased with the region's open approach and reasonable offer. He accepted the fourth option and the appeal was resolved.

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It's been a year to remember for IPC's senior health privacy specialist

It has been one of the most eventful years in Debra Grant's professional life.

Senior health privacy specialist with the Information and Privacy Commissioner/Ontario (IPC), Grant was the lead researcher as the IPC prepared its submission re Ontario's proposed personal health privacy legislation. A wide array of IPC recommendations were incorporated into the final version of the *Personal Health Information Protection Act (PHIPA)*, which comes into force Nov. 1.

Debra Grant (right) with Commissioner Ann Cavoukian and Assistant Commissioner Ken Anderson.

At the same time, Grant was serving on the special privacy advisory committee created by the Canadian Institutes of Health Research (CIHR) to advise on the development of *Guidelines for Protecting Privacy and Confidentiality in the Design, Conduct and Evaluation of Health Research*. A draft version of the *Guidelines* was released earlier this year by the CIHR for public comment.

Grant, who joined the IPC in 1991 as a research officer shortly before completing a Ph.D. in social psychology at York University, has conducted research and helped develop policies on a wide range of access and privacy issues. She also provides detailed statistical analysis for the IPC's annual report.

"Her work has been invaluable to the IPC," says Commissioner Ann Cavoukian.

For the past decade, Grant has focused increasingly on personal health information privacy.

"These are very challenging times for everyone who specializes in health privacy issues – with reform in the delivery of primary care, the implementation of electronic health records, and the pressure on the government to make more effective use of personal health information for planning and managing our publicly funded health care system," said Grant. "The privacy issues that must be addressed are both complex and numerous."

But she welcomes the challenge. "I honestly enjoy dealing with these issues – they are real issues, things that can make a difference in people's lives."

Ontario's new health privacy legislation may appear to be extremely complicated, she said, "but this is understandable if you consider the complexity of the issues that the legislation must address." She believes *PHIPA* sets a new standard for privacy in the health sector that will not only have a long-term impact on how personal health information is collected, used and disclosed in Ontario, but elsewhere as well.

The CIHR *Guidelines* are also a major step forward, said Grant. "They will become the standard that anyone doing research using health information will follow."

A significant amount of health research is based at universities, while research into areas with commercial potential, such as the development of new drugs and medical devices, is also conducted by private companies. And, government and affiliated research or statistical agencies conduct research on such subjects as emerging public health issues and the effectiveness of the health care system. The *Guidelines* cover these and other aspects of health research.

PHIPA covers many more elements of personal health information privacy than research, but there is a direct tie-in between *PHIPA* and the *Guidelines*, said Grant. "*PHIPA* and health privacy laws in several other provinces provide a framework in terms of legal requirements. When it comes to research, the *Guidelines* will provide more detailed guidance."

Anyone seeking more information about the draft *Guidelines* can visit: http://www.cihr-irsc.gc.ca/e/22085.html.

IPC'S complaint process under *PHIPA*

Once the *Personal Health Information Protection Act, 2004* (*PHIPA)* comes into effect Nov. 1, any person may complain to the Office of the Information and Privacy Commissioner/Ontario (IPC) if he or she has reasonable grounds to believe that another person or organization has contravened or is about to contravene *PHIPA* or its regulations.

Two types of complaints

There are two broad types of complaints under *PHIPA*. The first arises where a person has requested access to or correction of his or her personal health information, but has not received a satisfactory response. The second arises where a person believes some other aspect of *PHIPA* has been contravened, such as the provisions relating to collection, use or disclosure of personal health information.

Emphasis on informal resolution

Where possible, the IPC prefers to resolve complaints informally, through mediation or other means. If necessary, the IPC may use its broad order-making powers to resolve the issues. Mediation is always the IPC's preferred method of resolving complaints.

Access and correction complaints

In these cases, the IPC first determines whether the complaint will proceed through the formal process. For various reasons, a complaint may be dismissed at the outset, such as where it is made beyond the statutory time limit, or where the IPC believes the person complained against has already responded adequately to the complaint.

If the complaint proceeds, the IPC assigns the complaint to a mediator, who seeks to mediate a mutually agreeable settlement between the parties. If a settlement cannot be reached, the matter is sent to an adjudicator who conducts a review. During the review, the adjudicator seeks written representations from the parties and resolves the complaint by issuing a binding order. The order may require the health information custodian to disclose or correct the record, depending on the circumstances.

Depending on the nature of the issues in the complaint, the IPC may adopt a more straightforward process that could involve oral representations, such as where the sole issue is whether the health information custodian has conducted an adequate search for responsive records.

Collection, use, disclosure and other complaints

Again, the IPC first determines whether the complaint will proceed through the formal process. If so, the IPC gathers information about the circumstances of the complaint, and seeks to address any immediate concerns about possible further breaches of the statute.

The IPC then assigns the matter to a mediator who tries to effect a mutually agreeable settlement between the parties. If a settlement cannot be reached, the complaint is sent to an IPC investigator who conducts a review. During the review, the investigator seeks written representations from the parties and provides them with a draft order. The parties may then comment on the draft order and, after considering the views of the parties, the investigator resolves the complaint by issuing a final, binding order. The order may require a health care custodian to cease collecting, using or disclosing information, or to change its information practices as necessary to minimize the possibility of future contraventions of *PHIPA*.

In some cases, the Commissioner, rather than an outside party, may initiate the complaint. This may occur where, for example, the IPC learns of a possible contravention of *PHIPA* through media reports. In Commissioner-initiated complaints, the IPC conducts a review of the matter and seeks to resolve it informally. The matter may be resolved informally where, for example, the health information custodian has already taken steps to adequately address the IPC's concerns that gave rise to the complaint. If an informal resolution is not possible, the IPC will issue an order.

What is a health information custodian?

The *Personal Health Information Protection Act* applies to individuals and organizations defined as "health information custodians" involved in the delivery of health care services. Health information custodians include the following:

- health care practitioners (including doctors, nurses, audiologists and speech-language pathologists, chiropractors, chiropodists, dental professionals, dieticians, medical radiation technologists, medical laboratory technologists, massage therapists, midwives, optometrists, occupational therapists, opticians, pharmacists, physiotherapists, psychologists and respiratory therapists);
- service providers under the *Long Term Care Act;*
- community care access centres and homes for special care;
- hospitals;
- homes for the aged and nursing homes;
- pharmacies;
- medical laboratory or specimen collection centres;
- ambulance services;
- other community centres for health or mental care;
- professionals responsible for making assessments of an individual's mental capacity;
- medical officers for health and boards of health;
- the Ministry of Health and Long-Term Care;
- entities designated as a health information custodian under the regulations.

Summaries

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"confidentiality provision." In order to do so, the provision must restrict the disclosure of information. Section 13(1) does not do this. Rather, it authorizes the collection, retention, use and disclosure of information. Therefore, section 13(1) does not qualify as a "confidentiality provision," and section 67(1) of the *Act* cannot apply on the basis of section 13(1).

As regards section 10 of *Christopher's Law*, the adjudicator concluded that although it restricts access to certain information and therefore qualifies as a "confidentiality provision," it does not contain the degree of specificity necessary to bring the provision within the scope of section 67(1). The adjudicator also noted that when the *Act* came into force in 1988, confidentiality provisions in other statutes were deemed to prevail for a one-year period, after which the default position would shift and the *Act* would prevail, subject to specific exceptions. Since that time, the Legislature has taken care to ensure that whenever a provision is enacted that requires information to be kept confidential, despite a right of access to that information under the *Act*, it says so clearly, making specific reference to the *Act* or explicitly adding the provision to the section 67(2) list.

The adjudicator observed that the *Act* is not mentioned specifically in section 10, nor does it impose a specific duty in express or explicit language to refuse access to records requested by a member of the public. The adjudicator concluded that section 10 of *Christopher's Law*, when read in conjunction with section 67(1) of the *Act*, is not a confidentiality provision that "specifically provides" that it prevails over the *Act*, and therefore it does not.

The adjudicator ordered the ministry to make an access decision under the *Act*.

New health privacy *Act*

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information is lost, stolen, or accessed by an unauthorized individual or organization. As well, a contact person must be designated who is responsible for responding to access and correction requests, inquiries and complaints.

The office of the Information and Privacy Commissioner (IPC) is the independent oversight agency, charged with broad investigation, mediation and order-making powers. Complaints regarding privacy breaches by a health information custodian covered under *PHIPA* can be made to the IPC.

"Effective health information privacy legislation has to strike the right balance between allowing health care professionals to quickly pass on the information needed for patient care to another health professional, while restricting unauthorized disclosure," said Commissioner Cavoukian. "*PHIPA* does just that. While *PHIPA* builds in extensive privacy protection, it was designed not to interrupt the actual delivery of health care services."

The Commissioner stressed that one of the most important steps now is helping to ensure that all health care professionals are aware of the legislation and what is required. "I look forward to working with physicians and other health care professionals to ensure that the implementation of *PHIPA* complements the invaluable work that they perform on a daily basis. An example of the approach my office will be taking to the implementation of *PHIPA* can be summarized by the **three C's**: Consultation, Co-operation and Collaboration."

The IPC has developed extensive educational tools on *PHIPA*, including comprehensive *Frequently Asked Questions*, providing a general overview of the legislation. Other key publications include a *Guide to the Personal Health Information Protection Act*, primarily aimed at health care providers, and *The Personal Health Information Protection Act and Your Privacy*, a short brochure aimed at the general public. These can be accessed on the IPC's website, www.ipc.on.ca.

Mediation Success Stories

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Building trust goes a long way in mediation

The Quinte Conservation Authority (the authority) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all information relating to two named properties and a specified project. The requester's property was affected by flooding the previous fall.

The authority granted access to all responsive records. However, one of the documents listed in the index of records was not included in the records disclosed to the requester.

The requester (now the appellant) appealed the authority's decision, believing that additional responsive records, other than the identified missing document, existed. During the course of mediation, further searches were conducted and additional records were located and disclosed to the appellant. In addition, the authority explained that the missing document never actually existed, that the information had been provided verbally by telephone.

The appellant was satisfied with the explanation provided about the missing document, but maintained that site visit notes and measurements ought to exist. The mediator relayed as many details as possible to the authority, which was willing to conduct yet another search. The authority consistently provided regular updates to the mediator on the status of the search.

Once the appellant's concerns and questions were addressed, he recognized the authority's efforts and willingness to resolve his appeal and was satisfied with its resolution.

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