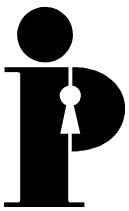
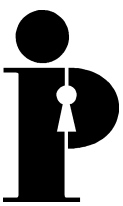
Information
and Privacy
Commissioner/
Ontario

Workplace Privacy:
The Need for a Safety-Net



Tom Wright
Commissioner
November 1993



Information and Privacy Commissioner/Ontario

2 Bloor Street East
Suite 1400
Toronto, Ontario
M4W 1A8

416-326-3333
1-800-387-0073
Fax: 416-325-9195
TTY (Teletypewriter): 416-325-7539
Website: www.ipc.on.ca

This publication is also available on the IPC website.
Cette publication est également disponible en français.

Foreword

In June 1992, the Office of the Information and Privacy Commissioner of Ontario (IPC) released *Workplace Privacy: A Consultation Paper*. The paper reviewed three workplace practices which have a profound impact on personal privacy. These three practices — electronic monitoring, employee testing, and the misuse of employment records, have dominated discussion about privacy issues within the workplace for some time; and this predominance is likely to continue.

The consultation paper was sent to a small sample of selected stakeholders over the summer of 1992. In turn, the sample of respondents provided thought-provoking comments. More details about what the respondents had to say on the issues of workplace privacy are provided in the section of this report entitled "Stakeholder Comments."

Some respondents highlighted an issue in the paper which requires clarification. They pointed out that the paper did not make clear enough to which workplaces the *Charter of Rights and Freedoms* (the *Charter*) applies. Section 32(1) of the *Charter* applies:

> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[1]

Therefore, in a strict sense the *Charter* applies only to workplaces where the employer can be said to be government; it does not apply to private sector employees. However, employees or employee representatives in the private sector often rely on the fundamental principles enshrined in the *Charter* in arguments before courts, labour tribunals and labour arbitrators.

Other respondents felt that the consultation paper did not provide sufficient discussion or reporting on the topic of HIV/AIDS in the workplace. The reason that HIV/AIDS was not extensively covered in the paper was due only to the fact that this issue was the subject of two previous reports produced by the IPC: *HIV/AIDS in the Workplace* (December 1989) and *HIV/AIDS: A Need for Privacy* (October 1990).

Overall, the purpose of producing the consultation paper was to identify the significant privacy issues facing employees and employers today. Positioning the issues under the banner of "workplace privacy" provided an opportunity to explore the issues collectively. Various options for addressing the issues identified were also included in the consultation paper in order to solicit from the stakeholders a sense of the future direction the IPC could take in advancing the workplace privacy agenda with the Government of Ontario.

This document is the next step forward. The IPC believes that issues of workplace privacy cannot be left unattended. There is a need for a privacy safety-net for all employees in Ontario. The existing regulatory framework in Ontario is fragile on several fronts. The *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* cover only provincial and municipal government organizations respectively. These Acts have limited application to workplace privacy issues except protection of personal information. The Ontario *Human Rights Code* does not explicitly address the issue of workplace testing; reference must be made to the Human Rights Commission's Policy on Employment-Related Medical Information, and its Policy Statement on Drugs and Alcohol Testing. Both of these policies restrict, but do not prohibit, workplace testing.

Existing provincial statutes such as the *Employment Standards Act*, the *Labour Relations Act*, the *Occupational Health and Safety Act*, the Ontario *Human Rights Code*, and the *Health Protection and Promotion Act* all provide some potential for appropriate amendments to cover workplace privacy issues. The challenge would be to ensure that any amendments tackle not only this generation of invasive employment practices, but the next generation as well.

This challenge, however daunting, must be met head-on. A goal of effective regulatory changes which are satisfactory for both employees and employers is essential and achievable. In support of advancing this goal, the IPC will remain a committed advocate for regulatory changes respecting workplace privacy issues.

Tom Wright
Commissioner

Table of Contents

Background

Workplace Privacy Issues

The issues, practices, and privacy concerns relating to electronic monitoring, employee testing, and the misuse of employee records were the subject of *Workplace Privacy: A Consultation Paper* (IPC, June 1992). The Executive Summary from that paper is reproduced in Appendix A of this report.

Electronic Monitoring

In *Workplace Privacy: A Consultation Paper*, the practices and techniques of electronic monitoring were generally identified to include the following:

> Visual surveillance devices, such as closed circuit television systems, are often considered the most commonly used in the workplace. Telephone surveillance, in the form of call management systems and service observation, is being used to monitor employee telephone activity and to collect performance data. Computer-based monitoring uses specifically designed software to collect performance data for employees working on computers from the time they log on, to the time they log off. Access control systems, such as cardkeys and keypads, are also used for surveillance purposes. Some access devices utilize biometric technology to verify an individual's identity. A final type of monitoring is electronic vehicle tracking which tracks vehicles by using a transmitter or transponder attached to the vehicle.

Since the release of *Workplace Privacy: A Consultation Paper*, examples of the use of video cameras are increasingly common. More and more people are becoming accustomed to the watchful eye of the camera in the bank, in the variety store, or in the department store. Employees, as well as members of the public, in these locations and in other types of workplaces, may be subject to covert or overt surveillance. In either case, the video camera and tape recording provide the observer with a complete visual account and memory of the subject and/or location under scrutiny. As a surveillance technique, the video camera offers the potential to be a formidable technology of control.

Central to the issues of workplace privacy for employees are feelings related to dignity, trust, respect, autonomy and individuality. When invasions of privacy occur, employees often feel that self-worth, morale and the overall quality of working life are eroded. The ensuing negative impact of invasions of privacy on work quality and productivity, is hidden human and real costs (e.g., absenteeism, and employees' compensation claims) not often calculated by employers. In the United States, Karen Nussbaum, Executive Director of the Cleveland-based 9 to 5 National Association of Working Women has captured the paradox of monitoring:

> Monitoring is one of a growing list of surveillance techniques used in the workplace. Like drug testing, background data checks, handwriting analysis and "integrity tests," it is seen by management as a means of ensuring employee honesty and productivity.
>
> The problem is, these techniques don't work. Drug tests have up to a 40% error rate. The Office of Technology Assessment found that there is no evidence that integrity tests predict behaviour on the job. And most studies show that computer monitoring — at least when employed in the usual fashion — is actually counterproductive. A study that was done last year at the University of Wisconsin, for example, reported that monitored telephone employees suffer significantly high rates of physical and psychological problems.[2]

With electronic monitoring, as many before have expounded, it is not the inherent evil of the technology, but the use made of it. The electronic monitoring of work rarely occurs in isolation from the monitoring of the worker; it is this aspect of monitoring which most employees find degrading.

Employee Testing

The second category of workplace privacy issues identified in *Workplace Privacy: A Consultation Paper* consisted of the testing practices used by employers to enhance their knowledge of their employees; in this category the IPC included drug, genetic, lie detector and psychological testing. The dominant privacy concerns about these practices are rooted in loss of personal autonomy, lack of consent, invasion of privacy of person, and invasion of informational privacy.[3]

Drug testing can detect the use of alcohol, prescription and over-the-counter drugs, as well as illicit drugs; testing may be mandatory or voluntary, random or universal. Many of those concerned with drug testing have pointed out that, for example:

> Random drug testing does not have the capacity to monitor the use of drugs or alcohol in the workplace, nor is it capable of indicating the effects of drug or alcohol use on a worker's performance. Rather, the testing can show only that drugs or alcohol had been consumed at some time in the period before the test was applied.[4]

As with drug testing, the term "genetic testing" refers generally to a number of techniques used to examine the genetic make-up of an individual and to determine the existence of inherited genetic traits or environmentally induced genetic changes. Generally, two types of tests could be used in the workplace: (1) genetic monitoring which focuses on environmental workplace hazards that may affect an employee's genetic material, and is undertaken periodically; and (2) genetic screening which involves examining the pre-existing genetic make-up of an individual to identify certain inherited traits or disorders. Unlike monitoring, which takes place over time, a single test is required for genetic screening.

The associated anguish in providing bodily fluid samples for any type of testing, especially where the results can be unreliable or indeed erroneous, further fuels employees' claims that this action is an unnecessary affront to human dignity.

In Ontario, the mandatory use of lie detector tests is prohibited under the *Employment Standards Act*. Unlike lie detector tests, the use of psychological tests is not prohibited and is becoming increasingly popular. These tests usually include a range of instruments: general intelligence tests, aptitude tests, performance tests, vocational interest tests, personality tests and honesty tests. The validity of these tests has been questioned due to possible built-in cultural and gender biases.

Employment Records

In Ontario, the freedom of information and protection of privacy legislation provides provincial and municipal employees with a right of access to and protection of their own personal information. Comparable legislation for employees in the private sector does not, however, exist.

Current Realities

The present economic climate provides an urgent context in which to further the debate on the issues of workplace privacy. With plant closures and lay-offs continuing in 1993, the quest for the competitive, productive, efficient and safe workplace is ongoing. For privacy advocates, the means of achieving such efficiency and productivity is pivotal to the debate on privacy and the workplace.

The invasion of an individual's privacy has a far-reaching impact on quality of work life and takes a toll, among others, in the form of stress. In fact, stress in the workplace is now being called a worldwide epidemic by the United Nation's International Labour Organization (ILO). In a report entitled *Job Stress: The 20th Century Disease*, the ILO "points to growing evidence of problems around the world, including developing countries, where … companies are doing little to help employees cope with the strain of modern industrialization."[5] The report also says that "[a]s the use of computers spreads throughout the world, workers in many countries are being subjected to new pressures, including electronic eavesdropping by superiors...."[6]

In a recent survey conducted for the Steelcase Worldwide Office Environment Index, 24 areas of workplace life were examined. The findings of the survey present a snapshot of the office workplace: among these findings, 29 per cent of those interviewed said that the quality of working life has worsened compared to 10 years ago; and that only 39 per cent of employees are satisfied with their jobs.[7] Given these findings, one could speculate that invasive workplace practices could be a contributing factor of deteriorating quality of working life.

Undoubtedly, the tension associated with the employers' use of privacy-invasive technologies and the impact on employees flourishes with each new application of an electronic surveillance device, or bio-technical marvel in testing, or new capacities to collect employee information.

The challenge for all concerned with workplace privacy is to use technology in ways which respect employees. On balance, employers also have an obligation to ensure a safe and healthy working environment that is within the context of a productive business. Moreover, employers seeking to achieve/maintain some level of either local or global competition have defended the use of some workplace technologies from several perspectives. In *Workplace Privacy: A Consultation Paper*, the IPC identified the employers' rationale in using these technologies to include not only increased efficiency and productivity, but also as a factor in the following components of workplace life: alcohol and drug abuse, employee theft, routine personnel matters, health costs, employer liability and generally, as an overall benefit to good employees who have nothing to hide.

In search of the practical next step, this paper provides further basis upon which to help shape future action to address existing and anticipated privacy issues in the workplace. The framework chosen is drawn primarily from the variables contained in recent developments on the privacy front and inspired by the comments received from the group of stakeholder respondents approached by the IPC in June 1992.

Recent Developments

Since the release of the consultation paper in June 1992, several significant reports have been produced, new telecommunications regulatory mechanisms have been introduced by the Government of Canada, new voluntary codes have emerged in the private sector, and articles on workplace privacy issues continue to proliferate:

- In the area of genetic testing, the Privacy Commissioner of Canada released *Genetic Testing and Privacy* in mid-1992. This report gives extensive attention to the broader implications of genetic testing in society, including, but not limited to employment situations. A passage from the introduction to this report states:

  > The *Privacy Act* is the focus of this report's efforts to prevent genetics from spawning another nightmare in our surveillance society. The Act, however, is simply not up to the job. It applies only to federal government institutions. Its provincial counterparts, where they exist, also apply only to government institutions under provincial jurisdiction.[8]

  Through the course of 22 recommendations, the Privacy Commissioner of Canada demonstrates that "more precise legal controls must be adopted. But law alone cannot ensure that genetic technology is used only for acceptable ends."[9]

- The IPC lent full support to the Federal Privacy Commissioner's report in its own submission to the Ontario Law Reform Commission's Project on Genetic Testing. (As of this writing, that project is still ongoing.) The IPC also put forward six general principles when assessing genetic testing from a privacy perspective:[10]

  1. As a general rule, there should be no mandatory testing of individuals.
  2. No individuals should be advised of their genetic traits or disorders, absent their consent.
  3. Genetic screening or monitoring of individuals in employment situations should be permitted only if the individual volunteers to be tested, and retains complete control over the use and disclosure of the resulting genetic information.
  4. No individual should be denied any benefits or services for refusing to undergo genetic testing.
  5. The establishment of databanks containing genetic information relating to an entire population should be prohibited.
  6. Governments should abide by the principles of the 'Code of Fair Information Practices' as entrenched in Ontario's *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act*, when collecting, retaining, using, and disclosing genetic information in their custody and control.

- On September 9, 1992, the Ontario Law Reform Commission released its paper, *Report on Drug and Alcohol Testing In The Workplace*. The Commission made three strong recommendations:

    1. The provincial government should promulgate legislation relating to drug and alcohol testing in the workplace. The legislation should have application to private and public sector employees, to unionized and non-unionized employees and to job applicants.

    2. A legislative ban should exist on drug and alcohol testing of bodily samples by employers of all current and prospective employees in Ontario.

    3. In cases where impairment on the job poses a risk of physical injury or death to the employee, to co-workers or to members of the public, performance testing of the employee is justified. Performance testing evaluates the psychomotor skills of employees by means of mechanical aptitude tests and computer programs. It is the most effective and least intrusive means of measuring impairment. The Commission is therefore of the view that even in the case of safety-sensitive positions, the taking of bodily samples is not justified.[11]

A wider gaze on the privacy panorama indicates that already in this decade, attention to privacy issues is being concretely reflected through the development of legislation, codes, practices, and opinion surveys. This attention to privacy matters is not only a result of the expanding technologies available, but perhaps also as a result of a shift in societal thinking on the right to privacy and on the importance of privacy as a social value. Although not directly focused on the workplace, these developments influence and contribute to the public "right to privacy" agenda. Some notable Canadian developments:

- In December 1992, the Province of Quebec introduced Bill 68, *An Act Respecting the Protection of Personal Information in the Private Sector*. The explanatory notes preceding the text of the Act indicate that:

    > The object of this bill is to establish, with respect to the exercise of the rights and obligations resulting from the provisions of the Civil Code of Quebec concerning the protection of personal information, special rules applicable to personal information on other persons that is collected, held, used or communicated to third persons by a person in the course of operating an enterprise in the private sector.[12]

- The Canadian Direct Marketing Association established a Code of Ethics and Standards of Practice for its members effective February 1991, and more recently, announced in February 1993, a Privacy Code.

- The Canadian Bankers Association introduced its "Model Privacy Code for Individual Customers" in late 1990. This code endeavours to emulate the Organization for Economic Co-operation and Development (OECD) *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

- The Equifax Canada Report on Consumers and Privacy in the Information Age was released in January 1993; this survey is the Canadian version of similar surveys done in the United States in 1990, 1991, and 1992. One of the major findings was that the Canadian public is very concerned about threats to personal privacy. In March 1993, another survey on the issue of privacy (sponsored by Amex Bank of Canada, the Canadian Bankers Association, Equifax Canada, Stentor Telecom Policy Inc., Communications Canada, Consumer and Corporate Affairs Canada, the Privacy Commissioner of Canada, and Statistics Canada) was released by Ekos Research; this survey found that Canadians are very much concerned with personal privacy issues.

- In December 1992, the Federal Minister of Communications announced the *Telecommunications Privacy Principles*[13] and as well, the establishment of a Telecommunications Privacy Protection Agency.[14] Shortly thereafter, the Minister of Justice and Attorney General of Canada, introduced legislative amendments about police use of electronic surveillance and communications privacy over radio-based telephone services.[15]

Dramatic developments directly related to the workplace and testing have occurred since the mid-1980s:

- As the Ontario Law Reform Commission has noted:

  > Since 1986, the number of Canadian companies which have instituted mandatory drug and alcohol testing has significantly increased both in the private and public sectors. Air Canada, Imperial Oil, the Ontario Racing Commission, the Toronto-Dominion Bank, Canadian National Railway, Canadian Pacific, and American Motors (Canada), are some of the employers who have introduced testing programs in their respective workplaces.[16]

- Despite wide-spread public criticism, the Department of National Defence has begun its program of random drug-testing of members of the Canadian Armed Forces. The military has now completed the baseline phase for the testing of marijuana, cocaine, opiates, amphetamines and PCP (hallucinogens).[17]

All of the above developments reflect recent movement by both the public and private sectors on issues about privacy; from a privacy perspective, some are more positive than others. But, the acceleration of advances within a variety of technologies requires making sense of a different kind of world, and indeed of a different kind of workplace. Making sense of and designing the future **now** must be the imperative of the 90s.

Stakeholder Comments

Copies of *Workplace Privacy: A Consultation Paper* were sent to 26 stakeholder groups in Ontario in early June 1992. This stakeholder population represented umbrella labour, business, and advocacy groups with an interest in workplace issues. In addition to the stakeholder group, copies of the consultation paper were also sent to over 70 interest groups, for information purposes.

A variety of comments, positions and recommendations were put forward in the respondent stakeholder group submissions. The respondents fell into three groupings: labour groups, government organizations, and the business sector. (However, the IPC received only one response from one umbrella group within the business sector.) The content of the submissions is cited below by group type in two categories: General Comments and Recommendations.

The comments provide a cross-section of the sentiments expressed by the respondents; some of the comments represent a summary of more extensive comments made and some of the excerpts, that is, those in quotation marks, represent direct quotations from submissions.

Labour Groups

General Comments

- Workplace Privacy is of significant concern to a large number of Ontario workers and to the labour movement in general.
- "Workers need effective protection from abuses by employers that lead to invasions of workers' privacy. Where workers are organized, collective bargaining will play a role, however, to protect workers effectively, collective bargaining cannot be the only option in confronting this issue. Furthermore, the majority of Ontario workers are not organized, and the most vulnerable cannot be left unprotected."
- Employers may need, under certain circumstances, to collect and use information to improve business operations and to provide a safe workplace. However, these practices should not be carried out under the premise that all workers are guilty of an offence of some form or other.
- Monitoring without consent is not an acceptable practice.
- "…It seems trite to say that a happy worker is likely a productive worker; that a worker who is accorded respect is likely to return it.... On the other hand, a worker who must produce in an atmosphere of distrust and lack of consideration seems more likely to treat her or his employer in kind. If the employer does not presume honesty of purpose by its employees, why would it hold itself to a higher standard in choosing its own actions. Suspicion breeds suspicion."

- Voluntary guidelines are not an effective way to deal with protecting workers.
- Drug testing as a condition of employment is a violation of fundamental human rights and should be banned.
- Genetic testing is "reprehensible".
- "…Electronic monitoring, which is already widespread, should be banned. It doesn't enhance productivity. It fails to measure quality of service. It increases the number of repetitive strain injuries. The practice exists because many employers still hold to the archaic belief that driving employees increases productivity.... Electronic monitoring is used primarily to track the productivity of women in sedentary jobs. Presumably, the next step will be the monitoring of more mobile employees."
- "Employers should not have a right to collect unnecessary or irrelevant personal information. Legislation is needed to protect workers from the disclosure of personal information."

Recommendations

Widespread support was indicated for the areas below.

- "If employment practices which intrude upon the privacy of employees represent a threat to the fabric of society, government should regulate those practices in both the public and private sector."
- It is time to introduce new legislation to deal comprehensively with the issues, rather than through piecemeal amendments to the existing legislation.
- Ban genetic testing.
- A legislative ban on testing in which prospective and current employees are required to provide urine samples or any other samples of bodily fluids should be enacted.
- There should be a ban on "the installation by employers of electronic monitoring equipment that is intended to assist in remote supervision or control of employees, or in their performance appraisal."
- Legislation should be introduced to prevent employers from collecting irrelevant information about employees.
- "Lifestyle testing", that is, employment discrimination, based on off-duty behaviour which has no bearing on work performance and is not a prohibited ground under human rights legislation, should not be permitted.

Government Organizations

General Comments

- Agree with the concern that there is a need to "find a balance between the employee's right to privacy and dignity in employment, and the employer's right to a safe, efficient and productive workplace."
- "…Many of the problems which employers seek to solve through monitoring/testing, such as low productivity and accidents, result from factors which monitoring/testing have not been designed to address, for example, fatigue due to overwork and lack of sleep, and unharmonious labour relations."
- "…There is a strong link between many of the privacy concerns discussed … in the paper, and the potential counter-productive results of monitoring/testing. The loss of personal autonomy, the lack of consent to intrusive measures and the invasion of privacy, can all lead to job stress, poor morale, lower job satisfaction and possible employee resistance, all of which … can adversely affect productivity."
- Workplace information needs also to extend to the employees' bargaining agent. As such, any future restrictions should not compromise labour relations and the role of the bargaining agent.
- Workplace privacy is a concern for employment equity with respect to the requirements for record keeping.
- "Electronic monitoring without the individual's consent and without legal authority appears to violate basic rights to privacy. But in any proposed regulatory scheme a distinction must be made between electronic monitoring for security reasons or for protection of the employee and electronic monitoring of the individual for other purposes."
- Drug testing of employees is not a privacy issue. Rather, it concerns the rights and freedoms which are already provided in the *Charter of Rights and Freedoms* and the *Human Rights Code*.

Recommendations

- Further study is needed before regulatory or legislative changes can be undertaken.
- There is a recognition of "the need to proceed as soon as possible on many of these issues, and that it is important to ensure that efforts are directed at those areas which have not yet had sufficient study."

- "Governments have taken a lead over the past decade in requiring employers to collect and use personal employee information, under such initiatives as accommodation under the *Human Rights Code* and appropriate numeric representation in the workplace for designated groups under the future *Employment Equity Act*. Any new privacy measures should, of course, be consistent with these obligations."

Business Sector

General Comments

- "Privacy rights must be balanced against other valid rights; specifically in this case the rights of employers. One cannot protect privacy rights at the expense of the health and safety of employees or the general public. It is essential that employers have all the information necessary to ensure that proper health and safety practices are being implemented at all times. Health and safety considerations must be paramount."

- "An employer has the right to monitor the work practices it deems necessary. Why is consent necessary in such a situation?"

- "…The paper overstates this issue as a problem of pressing concern for employees, employers and the general public.... It would seem that the Information and Privacy Commissioner/ Ontario (IPC) is making more of an issue out of this, and looking for problems where none need exist."

- The issues raised in the consultation paper are not fairly discussed from a business point of view.

Recommendations

- It was strongly suggested that "…the government expend its resources on more productive matters than on areas where no real problem exists. There is a staggering list of laws, regulations and issues that the employers of Ontario must deal with already. These include: employment standards, pay equity, labour relations, workers' compensation, occupational health and safety, human rights, employment equity, etc., etc. There is no need to add to the list. Employees are well protected under current legislation. More legislation and or regulation would just be another disincentive in attracting new investment to Ontario."

The preceding comments illuminate the divergent positions of the respondent groups. This divergence focuses the challenge — the challenge of finding a way, and of finding a balance to deal with a complex array of issues.

The IPC Position on Workplace Privacy

General Position

The IPC regards workplace privacy as a significant and growing issue in Ontario. Ultimately, all employees in Ontario have a right to a privacy safety-net. This privacy safety-net should help to safeguard against problems in the workplace respecting, but not limited to, electronic monitoring, employee testing, and the misuse of employment records. At present, the IPC believes that an adequate safety-net does not exist.

The IPC rejects the use of voluntary guidelines as *the* mechanism to address workplace privacy issues — changes to address workplace privacy issues now and in the future cannot be effectively brought about and maintained through voluntary guidelines.

Alternately, the IPC endorses the need to move forward to legislative action. However, such action should be carried out within the context of a genuine multi-sector consultation process and should also embody appropriate research and study. Although consultation is time-intensive, reasonable regulatory changes which reflect a true balance of the needs and rights of both employees and employers can only be reached through the voices of all those affected.

In the privacy invasive area of genetic testing in the workplace, the IPC offers a distinct warning. Although the extent of genetic testing in the workplace in Canada is believed to be minimal at present, gradually, the practice of genetic monitoring will find its way into workplaces, as a check on environmental and occupational hazards. The fear is that, while this initial testing may well be for benevolent purposes, the next logical extension would be that of genetic screening for the purpose of selecting a workforce free of all potential genetic liabilities. The temptation afforded by these technologies makes the potential for such an actuality perilously imminent.

Towards a Workplace Privacy Safety-Net

The IPC considers the following elements as fundamental components of a workplace privacy safety-net for all employees in Ontario.

A. General

- A legislative prohibition in all workplaces and in all pre-employment situations for *mandatory* genetic testing, drug testing, and HIV/AIDS testing.
- The workplace privacy issues to be addressed through a province-wide multi-sector consultation process should include electronic monitoring, employee testing, and the misuse of employment records.
- The basis for the legislation should be the principles of the OECD's 'Code of Fair Information Practices'.
- Regulatory changes should be visionary and agile enough in scope to capture the application of future as well as current technologies. The scope should be broad enough to anticipate the whole environment of workplaces in the 21st century and the global realities of the borderless electronic frontier.
- An expansive rather than a narrow interpretation of "work" and "workplace" should be considered to reflect the constantly evolving non-traditional meaning of work and workplace locations.
- The well-being of employees, as defined by employees, should be considered.
- A mechanism for conflict resolution and mediation should be created.
- The evaluation of a worker's ability to perform in his/her job should be drawn from a performance test rather than from a drug test designed to measure impairment.
- Explicit language on employees' and employers' rights should be included.
- All existing and future workplace privacy legislation in Ontario should be consolidated.

B. On Electronic Monitoring

- Unless extraordinary circumstances exist, and there is demonstrable cause for or suspicion of guilt, covert surveillance devices should not be used to monitor employees. In these situations the burden of proof for the need to monitor should lie with the employer.
- Overt monitoring should be strictly controlled through established standards. This includes ground rules about notification, purpose, and methods of electronic monitoring being used or expected to be used.
- Overt and covert monitoring should be designed and used in ways which do not collect personal information that is not related to work and work performance.

C. On Employee Testing

- A general prohibition on mandatory genetic, drug, and HIV/AIDS testing in the workplace.
- Genetic screening or monitoring of individuals in employment and in pre-employment situations should be permitted only if the individual volunteers to be tested and retains complete control over the use and disclosure of the resulting genetic information:
  - · No individual should be advised of his/her genetic traits or disorders without his/her consent;
  - · No disclosure of the results of genetic testing should be made to anyone without the individual's consent;
  - · No individual should be denied employment, benefits or services for refusing to undergo genetic testing;
  - · The establishment of databanks containing genetic information relating to an entire population should be prohibited.
- The privacy issues and principles discussed in the IPC's report, *HIV/AIDS in the Workplace*, (December 1989) should be taken into consideration in formulating workplace privacy legislation, for both the public and private sectors. A summary of these principles is provided in Appendix B of this report.
- Provincial standards should be established for psychological testing.

D. On Employment Records

- Employees in the private sector should be extended the same rights of privacy protection and access to their personal information afforded to employees covered under the *Municipal Freedom of Information and Protection of Privacy Act* and *Freedom of Information and Protection of Privacy Act*.

Recommendations

In 1968, the psychoanalyst Erich Fromm wrote:

> A specter is stalking in our midst whom only a few see with clarity … It is a new specter: a completely mechanized society, devoted to maximal material output and consumption, directed by computers; and in this social process, man himself is being transformed into a part of the total machine, well fed and entertained, yet passive, unalive, and with little feeling.

> With the victory of the new society, individualism and privacy will have disappeared; feelings toward others will be engineered by psychological conditioning and other devices, or drugs which also serve a new kind of introspective experience.[18]

The foregoing passage highlights the fact that several decades ago social scientists anticipated the impact of technological developments on the human aspects of a technological society. At one end of the spectrum of opinion, some have concluded that the workplace of the 90s and beyond may well be the product of technology unmanaged.

The public policy agenda on privacy issues is ever-evolving. Intervention to control the workplace respecting electronic monitoring, employee testing, and the misuse of employment records is a critically important public policy goal. The rapidly expanding availability of invasive technologies for the workplace dictates an urgency for action and for change.

Globally, legislative responses to evolving technologies and their applications are in a formative phase. In Ontario, where some, albeit piecemeal provisions for the protection of employees' privacy do exist, it is necessary to expand these protections and to look ahead to assuring that future generations of employees work in workplaces distinguished by respect for the individual's right to privacy.

To advance this vision the IPC recommends:

1. That the Government of Ontario move to an immediate legislative ban on all forms of mandatory genetic, drug and HIV/AIDS testing in the workplace and in pre-employment situations for all employees in Ontario; and further that, pending the enactment of this legislative ban, that the Government of Ontario prohibit, through new policy-based initiatives, any form of mandatory genetic, drug, and HIV/AIDS testing in all Government of Ontario workplaces.

2. That the Government of Ontario protect, by legislation arrived at through a province-wide multi-sector consultation process, all employees in Ontario in the areas of (but not limited to) electronic monitoring, employee testing, and the misuse of employment records in employment and in pre-employment situations.

3. That the Government of Ontario consider the fundamental elements of a workplace privacy safety-net proposed by the IPC, in combination with the views garnered through the multi-sector consultation process in the design and consolidation of workplace privacy legislation.

Appendix A — Executive Summary, *Workplace Privacy: A Consultation Paper* (June 1992)

Executive Summary

Although the right to privacy is not explicitly guaranteed in the *Canadian Charter of Rights and Freedoms*, it has been recognized as a fundamental value in a number of recent Supreme Court of Canada decisions. Privacy is difficult to define because its meaning may change from one context to another. Nevertheless, three distinct types of privacy have emerged: territorial privacy, privacy of person, and informational privacy, each of which is relevant to this paper. The convergence of a variety of social, economic and technological trends has placed workplace privacy in jeopardy.

Privacy in the workplace is a relatively new area of inquiry and concern. Today, people are coming to believe that the rights associated with citizenship in society, such as free expression, privacy, equality, and due process, should also be available in the workplace. However, the potential for conflict exists as employees begin to assert their right to privacy at a time when employers are probing more deeply into workers' activities, habits and health than ever before.

To explain why workplace privacy is a growing concern, this paper examines three central issues: the use of electronic monitoring, employee testing, and the misuse of employment records.

Practices and Techniques

The marriage of computers and telecommunications to surveillance practices has quantitatively and qualitatively changed the nature of monitoring in Canadian workplaces. For the purposes of this discussion, electronic monitoring means the collection, storage, analysis, and reporting of data on employee performance and work activity through the use of computer and telecommunications devices (e.g., telephones). Electronic monitoring in the workplace is the daily reality of hundreds of thousands of Canadian workers.

Visual surveillance devices, such as closed circuit television systems, are often considered the most commonly used in the workplace. Telephone surveillance, in the form of call management systems and service observation, is being used to monitor employee telephone activity and to collect performance data. Computer-based monitoring uses specifically designed software to collect performance data for employees working on computers from the time they log on to the time they log off. Access control systems, such as cardkeys and keypads, are also used for surveillance purposes. Some access control devices utilize biometric technology to verify an individual's identity.

A final type of monitoring is electronic vehicle tracking which tracks vehicles by using a transmitter or transponder attached to the vehicle.

Advances in technology, medicine and the social sciences have lead to the development of a number of employee testing practices into the workplace. The main testing practices are:

- **Drug testing** to determine if an individual is currently using or has recently used drugs or alcohol.
- **Genetic testing** to detect an individual's genetic predisposition to various conditions.
- **Lie detectors** to measure an individual's physiological responses, in an effort to determine if the individual is telling the truth.
- **Psychological testing** to measure an individual's psychological traits.

Today, employers are relying on these techniques to supplement their knowledge about prospective and current employees.

Employers maintain personnel files and other types of employment records for a wide variety of reasons. Some of this information relates directly to employment decisions (e.g., job applications and performance reviews). However, employment records may also contain sensitive information such as credit ratings, letters of recommendations, and confidential medical information.

New employment practices are being used in the workplace to achieve goals ranging from higher productivity, better employee health and safety, to lower rates of accidents. However, while employers argue that they need to use these practices for valid business reasons, opponents argue that they may destroy the quality of work life.

Privacy Concerns

Privacy advocates maintain that certain employment practices are highly intrusive and a threat to workplace privacy. Their main concerns regarding electronic monitoring, employee testing and the misuse of employment records are as follows:

- **Loss of Personal Autonomy**: There is a concern that intrusive employment practices, such as electronic monitoring, can result in a loss of personal autonomy for the affected workers.
- **Lack of Consent**: Employment practices such as electronic monitoring or employee testing may be introduced without consultation with affected employees. In these instances, workers are not given the opportunity to consent to the practice or to the subsequent collection of their personal information.

- **Invasion of Privacy of Person**: One of the most critical privacy issues relating to both drug and genetic testing is that they are seen as an invasion of the body and a direct violation of the privacy of the person.

- **Invasion of Informational Privacy**: Central to the concept of informational privacy is the ability to determine when, how, and to what extent information about oneself is communicated to others. While this issue is by no means confined to the workplace, some maintain that the loss of control over personal information is perhaps the most significant of all privacy issues.

  The code of fair information practices is an internationally recognized standard regarding the protection of informational privacy. However, intrusive employment practices have the potential to contravene the code. Specific concerns revolve around:

  · the collection of unnecessary and irrelevant personal information;

  · the monitoring of non-work-related activities;

  · the use of inaccurate personal information;

  · the unauthorized use and disclosure of personal information; and

  · the denial of access and right to correct employment records.

- **Expansion of Practices**: The impact of the practices discussed in this paper on individual employees, the workplace in general and on society as a whole, has yet to be fully realized. Many privacy advocates fear that the use of intrusive employment techniques will only increase as new applications are devised and the cost of the technology decreases.

- ***Charter* Issues**: In addition to these specific privacy issues, there is a concern that basic legal principles are being compromised by the use of intrusive techniques in the workplace. Some think that these practices may also raise issues under the *Canadian Charter of Rights and Freedoms* including: presumption of innocence, due process, search and seizure, and equal protection.

Current and Future Considerations

Unchecked technological development is becoming a major threat to personal privacy. Highly sophisticated technology allows for the penetration of physical barriers that, in the past, served to preserve privacy. It also renders traditional legal protections largely inadequate.

Over the past decade or so there has been a growing awareness that workplace privacy issues must be addressed. Some limited measures have already been taken to regulate telephone monitoring, lie detectors, drug testing, and the use of employment records. Newer techniques such as computer monitoring and genetic testing do not yet have any form of government regulation.

The legislative regulation of potentially intrusive employment practices is piecemeal, at best, thereby providing insufficient protection against potential abuses. Although guidelines and court decisions are helping to further define workplace privacy rights, some privacy advocates are concerned that the pace of these developments is too slow.

In unionized workplaces, employment practices may be restricted through collective agreements. Although labour arbitration cases have developed a right to privacy in the workplace, the collective bargaining process is viewed as not being a sufficiently far-reaching and powerful tool to regulate employment practices such as employee testing and electronic surveillance.

The call for legislative action and the cessation of certain practices has been heard for sometime. The most recent call regarding drug testing was the February 1992 submission to the Ontario Minister of Labour by the Canadian Civil Liberties Association (CCLA). The CCLA urged the Minister to introduce legislation that would prohibit employers, on a universal or random basis, from requiring employees or prospective employees to provide urine samples or other bodily fluids for drug testing.

Some observers think that the use of practices such as electronic surveillance in the workplace has already achieved such an inexorable momentum that it may be impossible to stop. They see the real issue as not whether a practice should be used, but rather how its use can be the least damaging for employees. If the status quo is determined to be unsatisfactory, there are a number of different ways in which to proceed.

1. Voluntary Guidelines

The development of voluntary guidelines could take several forms. The Ontario government could:

- encourage employers to create their own guidelines;
- develop guidelines in concert with labour and employer groups, and then encourage employers to adopt them; and/or
- designate an agency (e.g., the Office of the Information and Privacy Commissioner or the Human Rights Commission) to review independently developed guidelines to ensure that they met minimum standards set by the government.

Government initiatives in setting guidelines or minimum standards would help ensure that the needs of all affected parties were addressed and a consensus among the stakeholders reached on a number of issues such as: who would be covered (public or private sector, or both), how the guidelines would be introduced, how they would be enforced, and whether there would be an appeal mechanism.

2. Draft Legislation

Another approach would be to regulate employment practices like employee testing, electronic monitoring, and the misuse of employment records through legislation. As several pieces of legislation already address certain employment practices in Ontario (e.g., the *Employment Standards Act*, the *Labour Relations Act*, and the Ontario *Human Rights Code*), this option may be seen as a logical extension. As the scope of each of these pieces of legislation is different, the advantages and disadvantages of each must be carefully examined in order to determine which statute(s) should be amended.

How legislative regulation is introduced could vary:

- the different practices could be addressed separately under different statutes, or dealt with in a single piece of legislation; or
- existing statute(s) could be amended or new legislation introduced.

Due to the limitations of the existing legislation (e.g., some are only applicable to the public sector, and some do not have regulatory agencies with order-making powers), the most appropriate option may be to draft legislation to specifically address this new generation of employment practices.

3. Further Study

As limited research has been conducted on the extent and impact of these new workplace practices, it may be premature to attempt any form of regulation at this time. Accordingly, further study of these issues in the form of a government initiative with consultation with business, labour and advocacy groups, is another option. After such a study, the government would be in an excellent position to determine what, if any, regulatory scheme would be most appropriate.

Appendix B — Summary of Privacy Principles, *HIV/AIDS in the Workplace* (December 1989)

Summary of Privacy Principles

Workplace Privacy Principle 1

Mandatory HIV antibody testing of prospective or current employees is not permitted.

Workplace Privacy Principle 2

Employees or persons seeking employment are under no obligation to disclose HIV/AIDS-related personal information to obtain or continue employment.

Workplace Privacy Principle 3

Employees have no right to acquire HIV/AIDS-related personal information about their co-workers. Employers have no right to disclose such information to an infected employee's co-workers.

Workplace Privacy Principle 4

Employers should educate employees about the nature of HIV/AIDS, the consequences of mishandling HIV/AIDS-related personal information for the affected person, and the obligations imposed by legislation, constitutional guarantees and general privacy principles about the handling of HIV/AIDS-related personal information.

Workplace Privacy Principle 5

Information volunteered by a person about him or herself should only be retained where it meets criteria similar to those that apply under subsection 38(2) of the *Freedom of Information and Protection of Privacy Act*, with respect to the collection of personal information. HIV/AIDS-related personal information should be retained only if at least one of the following three criteria is satisfied:

- retention is expressly authorized by statute;
- retention is necessary for the purposes of law enforcement; or
- retention is necessary to the proper administration of a lawfully authorized activity.

Workplace Privacy Principle 6

HIV/AIDS-related personal information that is volunteered about an employee by a third party should not be collected, used, disclosed or retained by an employer.

Workplace Privacy Principle 7

Employers who collect HIV/AIDS-related personal information should ensure that strict security precautions are taken to protect the information from accidental or unauthorized use or disclosure.

Workplace Privacy Principle 8

Employers should be aware of the risk that a person who has received a negative HIV antibody test may subsequently become seropositive, and that the statistical probability of this happening may increase over time. Employers should also be aware of other deficiencies inherent in both positive and negative HIV antibody test results.

Workplace Privacy Principle 9

Workplace policies should state that employees generally have a right of access to HIV/AIDS-related personal information under subsection 47(1) of the *Freedom of Information and Protection of Privacy Act, 1987*. These policies should also set out their rights under subsection 47(2) to request correction of the information, require the insertion of a statement of disagreement, and require other bodies to be notified of the correction or statement of disagreement.

Workplace Privacy Principle 10

Under Section 41 of the *Freedom of Information and Protection of Privacy Act, 1987*, HIV/AIDS-related personal information may only be used in the following circumstances:

- where the person to whom the information relates has identified that information in particular and consented to its use;
- for the purpose for which it was obtained or compiled;
- for a purpose consistent with the purpose for which it was obtained or compiled; or
- for a purpose for which the information may be disclosed to the institution under section 42 of the Act.

Due to the extreme sensitivity of HIV/AIDS-related personal information, we recommend that the approval of the head of the institution (or his/her designate) be obtained in determining what constitutes a "consistent purpose" under section 41.

Workplace Privacy Principle 11

Employers must not disclose HIV/AIDS-related personal information except in accordance with section 42 of the *Freedom of Information and Protection of Privacy Act, 1987*. The disclosure provisions of section 42 should be supplemented in some cases to require the consent of the person affected by the disclosure of HIV/AIDS-related personal information. Where the person does not or cannot consent, the head of the affected institution (or his/her designate) should be required to approve any such disclosure.

Specifically, consent to disclosure should be sought for disclosures under the following subsection of section 42: (a), (c), (d), (e), (h), (i). Where the person does not or cannot consent, the head of the institution (or his/her designate) should be required to approve disclosures under these subsections. Where, for purposes of law enforcement, consent cannot be sought, the head of the institution (or his/her designate) should be required to approve disclosures under subsection 42(f) and (g).

Unless consent of the affected person has been obtained, HIV/AIDS-related personal information must be disclosed under subsections 42(l), (m), (n), (p), (q) and (r).

Due to the mandate of the Information and Privacy Commissioner, neither consent of the affected person nor approval of the head of the institution are required to disclose HIV/AIDS-related personal information to the Information and Privacy Commissioner, under subsection 42(o).

Workplace Privacy Principle 12

When deciding whether to approve disclosure, the head of an institution (or his/her designate) should consider the following:

- why disclosure is necessary;
- the potential adverse consequences of the disclosure for the person(s) to whom it relates;
- the likelihood that the person or body requesting the information will maintain its confidentiality;
- the likelihood that the person or body requesting the information will use it only for the purpose for which it is being sought; and
- how accurate and up to date the information is.

Note: The report proposed these principles prior to the implementation of the *Municipal Freedom of Information and Protection of Privacy Act*.

Endnotes

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

2. Karen Nussbaum, "Workers under surveillance," *Computerworld*, Vol. XXVI, No. 1, January 6, 1992, p. 21.

3. A full discussion of these concepts is provided in *Workplace Privacy: A Consultation Paper*, Part 2, pp. 23-37.

4. Excerpt from a stakeholder respondent's comments received by the IPC in response to *Workplace Privacy: A Consultation Paper*.

5. Associated Press, "Job stress epidemic, U.N. says," *Toronto Star*, March 23, 1993, p. A2.

6. Associated Press, "Job stress a global phenomenon, U.N. report says," *Toronto Star*, March 9, 1993, p. D1.

7. Steelcase Inc., *Office Environment Index Summary Report — Canada* (Summary Series), 1991, p. 5.

8. Privacy Commissioner of Canada, *Genetic Testing and Privacy*, (Ottawa: Minister of Supply and Services Canada, 1992), p. 3.

9. *Ibid.* p. 3.

10. Information and Privacy Commissioner/Ontario, *Submission to the Ontario Law Reform Commission Project on Genetic Testing*, September 1992, pp. 3-4.

11. Ontario Law Reform Commission, *Report on Drug Testing and Alcohol Testing In The Workplace*, 1992, p. 121.

12. Quebec, Bill 68, *An Act respecting the protection of personal information in the private sector*, Thirty-fourth Legislature, Second Session, 1992. Explanatory notes introducing the Act.

13. Communications Canada, *Telecommunications — Privacy Principles*, December 1992.

    The six Telecommunication Privacy Principles were released by the Department of Communications on December 7, 1992. The Principles were devised for use by all providers of telecommunications services. This includes regulated telecommunications carriers, resellers, enhanced service providers and private network operators. The six Principles are:

1. Canadians value their privacy. Personal privacy considerations must be addressed explicitly in the provision, use, and regulation of telecommunications services.

2. Canadians need to know the implications of the use of telecommunications services for their personal privacy. All providers of telecommunications services and government have a responsibility to communicate this information, in an understandable and accessible form.

3. When telecommunications services that compromise personal privacy are introduced, appropriate measures must be taken to maintain the consumers' privacy at no extra cost unless there are compelling reasons for not doing so.

4. It is fundamental to privacy that there be limits to the collection, use and disclosure of personal information obtained by service providers and generated by telecommunications networks. Except where clearly in the public interest, or as authorized by law, such information should be collected, used and disclosed only with the express and informed consent of the persons involved.

5. Fundamental to privacy is the right to be left alone. A balance should exist between the legitimate use of unsolicited telecommunications and their potential for intrusion into personal privacy. All parties have a responsibility to establish ground rules and methods of redress so that Canadians are able to protect themselves from unwanted and intrusive telecommunications.

6. Privacy expectations of Canadians may change over time. Methods of protecting telecommunications privacy must be reviewed from time to time to meet these changing expectations and to respond to changing technologies and services.

14. The Telecommunications Privacy Protection Agency will be funded by industry and run by consumer groups, privacy experts and representatives from industry. The Agency will receive public complaints, launch investigations and take disciplinary action. Decisions of the Agency are to be binding and public.

15. Department of Justice, Government of Canada, News Release — "Electronic Surveillance Bill Introduced," December 11, 1992.

16. Ontario Law Reform Commission, *Report on Drug and Alcohol Testing in the Workplace*, (Toronto: Ontario Law Reform Commission, September 1992), p. 1.

17. Warren Gerard, "Fighting back against a urinary witch-hunt," *Toronto Star*, January 30, 1993, p. D1.

18. Erich Fromm, *The Revolution of Hope — Towards a Humanized Technology*, (New York: Harper and Row Publishers, Inc., October 1968), p. 1.

Bibliography

Canadian Charter of Rights and Freedoms. Part I of the *Constitution Act, 1982*.

Canada, Communications Canada. "Telecommunications — Privacy Principles." Ottawa: Minister of Supply and Services Canada, December 1992.

Canada, Department of Justice. News Release — "Electronic Surveillance Bill Introduced," December 11, 1992.

Fromm, Erich. *The Revolution of Hope — Towards a Humanized Technology*. New York: Harper and Row Publishers, 1968.

Gerard, Warren. "Fighting back against a urinary witch-hunt." *Toronto Star*, January 30, 1993, p. D1.

Information and Privacy Commissioner/Ontario. *Submission to the Ontario Law Reform Commission Project on Genetic Testing*. Toronto: Information and Privacy Commissioner/Ontario, September 1992.

Information and Privacy Commissioner/Ontario. *Workplace Privacy: A Consultation Paper*. Toronto: Information and Privacy Commissioner/Ontario, June 1992.

"Job stress a global phenomenon, U.N. report says," *Toronto Star*, March 29, 1993, p. D1.

"Job stress epidemic, U.N. says," *Toronto Star*, March 23, 1993, p. A2.

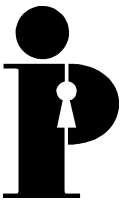
Nussbaum, Karen. "Workers under surveillance." *Computerworld*, Vol. XXVI, N°. 1, January 6, 1992, p. 21.

Ontario Law Reform Commission. *Report on Drug Testing and Alcohol Testing in the Workplace*, Toronto: Ontario Law Reform Commission, September 1992.

Privacy Commissioner of Canada. *Genetic Testing and Privacy*, Ottawa: Minister of Supply and Services Canada, 1992.

Quebec. Bill 68, *An Act respecting the protection of personal information in the private sector*.

Steelcase Inc. *Office Environment Index Summary Report — Canada* (Summary Series). Grand Rapids (Michigan): Steelcase Inc., 1991.



Information and Privacy Commissioner/Ontario

2 Bloor Street East
Suite 1400
Toronto, Ontario
M4W 1A8

416-326-3333
1-800-387-0073
Fax: 416-325-9195
TTY (Teletypewriter): 416-325-7539
Website: www.ipc.on.ca