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Misconceptions about privacy must be addressed: Cavoukian

There are common misconceptions about the privacy/security conundrum that both cause confusion and waste resources that could be devoted to protecting privacy, says Ontario Information and Privacy Commissioner Ann Cavoukian.

"Organizations that use personal information increasingly confront the issue of privacy," she told the *Privacy and Security: Totally Committed* conference at the University of Toronto in early November. "While many of them commit to addressing privacy, one particularly confusing and troublesome issue they face centres on the complex and largely undefined relationship between the disciplines of privacy protection and information security."

Commissioner Ann Cavoukian.

In her opening address to the conference, the third annual privacy and security workshop jointly sponsored by the IPC and the University of Waterloo's Centre for Applied Cryptographic Research, the Commissioner announced that the IPC is working with Deloitte & Touche on a joint paper that will address the common misconceptions. The paper will also suggest several business, organizational and technical approaches that would not just help companies meet regulatory compliance, but enhance their information programs.

"We hope to provide sufficient encouragement to senior management to rethink the placement, priorities and resources devoted to security and privacy throughout their enterprises," said the Commissioner.

Privacy and security are not the same thing, she stressed. "Security is an organization's ability to control access to the information it holds, while privacy is an individual's ability to control the uses of his or her personal information. Keeping something 'secure' does not guarantee privacy! An organization may have a database with extensive access controls, but if it uses the personal information in that database for secondary purposes for which the individual has not consented, then there is zero privacy."

"All organizations need to be made aware that privacy can be a minefield – it is an issue that must be fully addressed," said the Commissioner.

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Recent IPC publications

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

Privacy Review: Chatham-Kent IT Transition Pilot Project, a review by the IPC of the Chatham-Kent IT Transition Pilot Project. April 2002.

2001 Annual Report. June 2002.

Security Technologies Enabling Privacy (STEPs): Time for a Paradigm Shift. Many security technologies can be redesigned to minimize or eliminate their privacy invasive features, yet remain highly effective tools. June 2002.

Opening the Window to Government: How e-RD/AD Promotes Transparency, Accountability and Good Governance. This paper outlines how governments can use electronic routine disclosure and active dissemination techniques to further the goals of open government. June 2002.

Submission to the Standing Committee on General Government regarding Bill 58, an Act to amend certain statutes in relation to the energy sector. This submission, in the form of a letter from Commissioner Ann Cavoukian to Steve Gilchrist, chair of the Standing Committee on General Government, outlines the access implications associated with Bill 58, the *Reliable Energy and Consumer Protection Act, 2002*. June 2002.

Privacy Assessment: The University Health Network's Response to Recent Breaches of Patient Privacy. This report reviews the UHN's efforts to ensure that the inappropriate access of electronic patient records of May 2002 does not reoccur. July 2002.

Processing Voluminous Requests: A Best Practice for Institutions. This publication provides strategies to assist institutions in processing voluminous requests. The paper was a joint project of the IPC and the Information and Privacy Unit of the Ministry of Natural Resources. September 2002.

Privacy and Digital Rights Management (DRM): An Oxymoron? This paper outlines the factors that gave rise to DRM technology, the impact of DRM on the privacy rights of consumers, proposes how to embed privacy into DRM technologies and offers privacy tips to consumers. October 2002.

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

Privacy misconceptions

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Among the other highlights of the conference – which attracted speakers and delegates from across North America – were a number of sessions that examined privacy and security in the post 9-11 world, and a mock public health inquiry based on a specially crafted scenario – a breach of a patient scheduling system. The case involved electronic personal health information (including two appointments a man had made at a regional cancer centre) being garnered by a hacker and ultimately posted to a health chat room on the Internet. The information ended up with an insurance company that the man was seeking to obtain insurance from. The mock inquiry (set up as if it were being conducted by the IPC) included the participation of a number of special guests, including Justice Horace Krever, well known in the privacy field for his landmark, three-volume report in 1980 on the confidentiality of health information.

The mock public health inquiry concluded with recommendations for best practices for the collection, use and disclosure of personal health information held in electronic form.

Changing places: A mediator exchange between Ontario and Nova Scotia

Someone named Susan is sitting in Giselle's chair at the office of the Information and Privacy Commissioner/Ontario. And Susan has even moved into Giselle's Toronto home. But Giselle doesn't mind – she is thousands of kilometres away, living in Susan's Nova Scotia home and working in Susan's office.

Giselle Basanta, a mediator with the IPC, and Susan Woolway, a mediator/investigator with the Nova Scotia Freedom of Information and Protection of Privacy Review Office in Halifax, have swapped roles – and homes – for eight months. This mediator exchange, launched at the beginning of September, continues until May 1.

Giselle Basanta (left) of the IPC and Susan Woolway of the Nova Scotia Freedom of Information and Protection of Privacy Review Office have traded jobs – and homes – for eight months.

Basanta, a member of the IPC's provincial mediation team who has held a number of roles at the IPC, was the driving force behind the mediator exchange program.

In 2001, Woolway spent a week in Toronto meeting with IPC staff and observing how the Tribunal Services Department functioned. After subsequent telephone discussions with Woolway, Basanta suggested the possibility of a full mediator exchange.

The two offices have an excellent relationship. When Nova Scotia was setting up its Freedom of Information and Protection of Privacy Review Office, Diane Frank, the IPC's manager of mediation, served on the panel that interviewed candidates for Woolway's mediator position.

There are major differences between the two offices, one of them being size. Woolway is the only mediator in the Halifax office, while Basanta is one of 11 mediators at the IPC. As well, the Nova Scotia Review Office is based on an ombudsman model rather than a commissioner model. The Review Officer is an independent ombudsman appointed by the Governor in Council. Though not an officer of the legislature, he can be removed from office only by a vote of the legislature. Ontario Commissioner Ann Cavoukian is an officer of the legislature.

The Review Officer will accept appeals, known as *requests for review*, from applicants who are not satisfied with the response they receive from an application to a public body covered under the legislation. The Review Officer will consider the arguments of both parties and may make recommendations to the public body. Unlike Ontario's Information and Privacy Commissioner, Nova Scotia's Review Officer does not have the power to make binding orders. But he does have the authority to require a public body to produce, for his review, any document that he feels is relevant to a request for review. He may also enter and inspect any premises occupied by a public body.

Both the Ontario and Nova Scotia offices place an emphasis on trying to resolve appeals informally through mediation.

For Basanta and Woolway, the mediator exchange provides a hands-on opportunity to work on access and privacy issues in another jurisdiction, as well as to experience life in another province.

Woolway hopes to acquire additional skills while serving as part of a much larger team, while Basanta has the opportunity to work in a number of diverse roles at the Halifax office.

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Summaries

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

Interim Order MO-1539-I
Appeal MA-010196-1
Windsor-Essex Catholic District School Board

The appellant appealed a decision by the Windsor-Essex Catholic District School Board denying access to certain information relating to accounts rendered by a named solicitor. During the course of the inquiry conducted by the IPC, the board objected to sharing certain portions of its written representations with the appellant. The board also expressed concerns about the use to which the appellant would put its representations, and in particular, that the appellant would publish them in his newspaper.

The adjudicator issued an interim order to rule on the issues of whether these portions of the board's representations should be shared, and whether the adjudicator could impose conditions on the appellant's use of the board's representations.

The adjudicator reviewed the IPC's *Practice Direction 7*, which sets out the procedures for sharing parties' representations during an inquiry. She agreed that some portions of the board's representations were no longer relevant to the issues in the appeal and should not be shared. She found that other portions, however, did not qualify under any of the three criteria for withholding representations as set out in *Practice Direction 7*.

First, none of the information "would reveal the substance of a record claimed to be exempt." The adjudicator reasoned that simply referring to the type or nature of a record without specific details as to its contents does not reveal the record's "substance."

Second, the information would not "be exempt if contained in a record subject to the *Act*." The adjudicator rejected the board's argument that disclosing certain portions of its representations would provide the appellant with information he had not requested. While a request may influence whether or not representations are relevant to the issues in the appeal, if the representations are relevant and are not otherwise confidential, as in this case, they will be shared.

Finally, the adjudicator found that the board had not established that any of the information should not be disclosed "for any other reason." She noted that the sharing of representations procedure was implemented "to enhance fairness in the inquiry, to improve the processes for gathering and testing evidence, and to provide decision makers with better quality, more relevant and more focused representations."

Accordingly, in order to afford the appellant the opportunity to know the case he had to meet and to assist him in making meaningful representations, the adjudicator decided to share certain portions of the board's representations with the appellant, and to withhold other portions.

The adjudicator also denied the board's request that she place conditions on the appellant's use of its representations. She dismissed the board's argument that an inquiry under the *Act* should be treated like an examination for discovery under the *Rules of Civil Procedure*, which imposes limits on the use of information exchanged. Rather, she found that an inquiry is analogous to a hearing, whose purpose is to receive and test evidence and argument and to render a decision by an impartial decision-maker.

The adjudicator referred to Interim Order PO-2013-I, a recent order by Assistant Commissioner Tom Mitchinson, which explained the rationale for the Commissioner's discretion under section 41(13) of the *Act* to deny parties full access to all proceedings and documents used in the inquiry process. Processing an appeal under the *Act* raises unique confidentiality concerns, such as ensuring that the contents of a record at issue are not disclosed during an appeal. *Practice Direction 7* was drafted to address these unique confidentiality considerations in any decision by the Commissioner to share the representations of one party with another.

The adjudicator found that parties are generally free to use representations shared with them, subject to any other legal recourses that might be available outside the *Act*. In this case, she was not persuaded that the use of the board's representations should be restricted simply because the

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board was concerned that they might "be used to embarrass it or publicize its arguments beyond this proceeding."

Order PO-2028
Appeal PA-000239-1
Ministry of Northern Development and Mines

The Ministry of Northern Development and Mines received a request for records connected to a Northern Ontario Heritage Funding Corporation (NOHFC) project that involved a significant contribution by the fund to an identified corporate third party.

After notifying the third party, the ministry provided access to most of the responsive records, but denied access to four records. The requester appealed the decision. During IPC-led mediation, all issues were resolved except the application of the section 13 (advice or recommendations) exemption to portions of one record.

The remaining record was a *project evaluation report* (the report) prepared by an employee of the ministry and provided to the board of directors of the NOHFC. This board had the authority to make a decision on funding.

The ministry stated that the report is the mechanism by which staff evaluate proposals and provide advice to the board. The funding decision is made by the board, which may or may not act on the advice in the report.

Assistant Commissioner Tom Mitchinson reviewed the application of section 13 to the record and found that a number of the requirements under this section were met. The only issue remaining was whether the record contained "advice" for the purpose of section 13.

The Assistant Commissioner reviewed the authorities dealing with the phrase "advice or recommendations" and rejected the ministry's position that "advice" includes "information, notification, cautions, or views where these relate to a government decision-making process." He stated that in interpreting and applying the word "advice," one must consider the specific circumstances, and determine which information reveals actual advice. It is only the disclosure of advice, not other types of information, which could reasonably be expected to inhibit the free flow of information within the deliberative process of government for the purpose of section 13(1).

The key findings in the appeal relate to two paragraphs of the record listed under the heading "potential issues," and three funding "options" which also list the pros and cons of each option. The Assistant Commissioner decided that the two paragraphs under "potential issues" simply drew matters of potential relevance to the decision-maker's attention, and did not qualify for exemption. Concerning the three "options" with the corresponding pros and cons, the Assistant Commissioner stated that, where the record contains no specific advisory language or an explicit recommendation, careful consideration must be given to determine which portions of a record contain "mere information" and which, if any, contain information that actually "advises" a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, then section 13(1) applies.

The Assistant Commissioner noted that, in this appeal, the role of staff did not extend to "recommending a particular course of action." He then found that the description of each option was "mere information" that identified the various factual components of each option broken down into various pre-determined categories. It did not contain information that could be said to "advise" the NOHFC in making its decision on funding. As well, the "pros and cons" accompanying each option did not contain any explicit advice. There was no statement recommending that NOHFC choose a particular option, and no explicit indication as to which option was preferred.

The Assistant Commissioner also found that, when considered as a whole and in the context of the roles played by ministry staff and the board, the disclosure of the information would not permit accurate inferences to be drawn as to the nature of any advice implicitly contained in these portions of the record.

Accordingly, section 13(1) did not apply to any portion of the report.

Mediation success stories

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

Interest-based mediation

The Ministry of Finance received a request for records pertaining to viatical life settlements, senior settlements, life settlements, living benefits or accelerated death benefits (in general, or to named companies and individuals), contained within the files of the Ontario Securities Commission (the OSC), from January 1994 to the present.

The ministry identified 311 records as responsive to the request and granted partial access, while denying access to the remaining records on the basis that they are: advice or recommendations, law enforcement, relations with other governments, third party, personal information or publicly available.

The requester, a named company, appealed the ministry's decision, noting that the only records released were copies of previously published materials.

During mediation, the appellant expressed concerns about its own dealings with the OSC and was seeking guidance regarding the viatical settlement industry. On this basis, the appellant agreed to remove information regarding other companies and individuals from the scope of the appeal and to focus on information relating to the appellant. The mediator then discussed with the appellant alternatives to obtaining access to the records. The appellant agreed that it would be useful to pursue answers to its questions and concerns, as opposed to seeking access to the records requested.

The ministry agreed to the approach suggested by the appellant and the mediator. The ministry provided the appellant with information, other than the records at issue, and answers in response to the appellant's questions and concerns.

The appellant was satisfied with the information and answers provided by the ministry and the appeal was resolved on that basis.

Teleconference leads to finding records

The Ministry of the Environment received a request for records relating to environmental concerns (from 1990 to the present) pertaining to a property described as a landfill at the intersection of two named streets. The requester, a named company, said there was no municipal address but provided a detailed description of the property as it appeared on the registered notice to a Certificate of Prohibition, along with owner information.

The ministry's decision was that no records exist in response to the request, but that records which pertain to an inspection on a closed landfill were located and access was granted to them.

The requester appealed the ministry's decision on the basis that the few records provided with the decision letter were not responsive to the request and that responsive records should exist. The requester (now the appellant) explained that the reason other records should exist is that a title search had revealed a Notice of a Certificate of Prohibition, which was registered on title on or about January 12, 1996. Based on this, there would have been other documents, in connection with the property, which gave rise to the registration.

In the course of mediation, a teleconference was held with the ministry's Freedom of Information co-ordinator, his assistant, the mediator and the appellant. The focus was to determine the exact address of the property for which records were being requested. After exchanging information, the co-ordinator agreed to conduct a further search for responsive records.

As a result of this new search, the ministry located 1824 responsive records and issued an access decision. The ministry's decision letter went on to explain that a large file was located (at a district office) pertaining to the landfill site and the adjacent properties. Documents in the file,

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Mississauga-Brampton Educational Initiative set for November 19

Under its *Reaching out to Ontario* program – one of the foundation stones on which the IPC's outreach program has been built – an IPC team visits four or five regions each year for a series of meetings and a public information session.

On November 19, an IPC team will be visiting Peel Region for the *Mississauga and Brampton Educational Initiative*. Other initiatives this year have included Barrie-Orillia, Windsor and Sault Ste. Marie.

Among the key sessions will be a presentation by Commissioner Ann Cavoukian to a special breakfast meeting of the Mississauga Board of Trade. That evening, an IPC team led by Assistant Commissioner Tom Mitchinson is holding a public information meeting (7 p.m., Committee Room B, Mississauga Civic Centre, 300 City Centre Drive, 2nd Floor).

Other events include a seminar for municipal freedom of information and privacy co-ordinators from throughout Peel and Toronto, a presentation to the staff of the Mississauga Community Legal Services, presentations to three Grade 5 classes in Brampton, a meeting with both elementary and secondary school educational consultants from the Dufferin-Peel Catholic District School Board and the Peel District School Board and meetings with local media.

Assistant Commissioner Tom Mitchinson, Diane Frank (left), the IPC's manager of mediation, and Mona Wong, team leader of the municipal mediation team, will be conducting the public information meeting the IPC is holding Nov. 19 in Mississauga.

Upcoming presentations

November 26. Director of Policy and Compliance Brian Beamish will address the Canadian Life and Health Insurance Association on the topic of privacy in the life and health insurance industry, in Toronto.

December 10. Commissioner Ann Cavoukian is a keynote presenter at an Insight Information e-healthcare conference on privacy issues related to electronic health records in Toronto.

December 11 – 12. Senior Privacy Development and IT Officer Mike Gurski will take part in an Ottawa panel addressing the issue of integrating privacy and security into government online, entitled *Dispelling Myths About Privacy, Security and e-Government*.

December 12. Commissioner Ann Cavoukian will deliver the opening address to an information meeting of the Ontario Hospital Association in Ottawa.

January 30 – February 1. Director of Policy and Compliance Brian Beamish will address the Ontario Library Information Technology Association Super Conference at the Metro Toronto Convention Centre.

January 30. Director of Legal Services Ken Anderson will speak on privacy issues in the workplace at an Insight Information conference entitled *Privacy Law and Effective Investigations in Ontario Workplaces*, in Toronto.

Mediation success stories

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explained the ministry, refer to the site as (another name and address) adjacent to closed landfill site (identified by number); and that all of these records are housed together in one file under the heading (address).

The appellant indicated that she was satisfied with the further search conducted by the ministry and considered the appeal of the reasonableness of the search to be resolved.

Custody or control

The County of Norfolk received a five-part request for records relating to the county's purchase of sand and salt mix from a named company.

The county issued a decision letter addressing all five parts of the request. With respect to part four of the request (a copy of a particular road superintendent's daily work log journal for a three-month period), the county's decision was that the record was not in its custody or control as it was considered the personal property of the owner.

The requester appealed the county's decision only with respect to part four of the request. He took issue with the county's position that the logbook was personal property, maintaining instead that the superintendent was a public employee and that the journal relates to employment activities.

The mediator contacted the county's Freedom of Information and Privacy co-ordinator and discussed previous orders of this office that set out the criteria for determining custody or control. The county then agreed that custody or control was no longer an issue, but rather the issue was whether its search for the record was reasonable.

With the agreement of the co-ordinator, the mediator contacted the (now former) superintendent, who was no longer an employee of the county. The former superintendent advised that he did not have the logbook and that he left it at work when he left his employment; but, should it be located, he had no objection to the logbook being released.

The co-ordinator then personally undertook additional searches and checked all relevant departments. While the co-ordinator did not find the former superintendent's logbook, she did locate the notes of the foreman – a record entitled "Supervisor's Daily Work Report." Included with that record was a page listing the sand purchased for the year in question.

The county granted access to that record, subject to severances of personal information. Although the record released to the appellant was not the record he had originally requested, it contained the information the appellant was seeking and the appeal was resolved to his satisfaction.

Changing places

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This is not the first staff exchange the IPC has been involved in. Several years ago, David Goodis, then an IPC lawyer and now manager of adjudication in Tribunal Services, spent a year in Sydney, Australia, in an exchange with a lawyer from the then office of the Privacy Committee of New South Wales. The two switched houses for the duration of the exchange. That secondment agreement was modified for the mediator exchange.

Giselle Basanta and Susan Woolway would like to acknowledge the encouragement and support of IPC Assistant Commissioner Tom Mitchinson (head of Tribunal Services) and Review Officer Darce Fardy throughout the process.

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