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IPC PERSPECTIVES

INFORMATION AND PRIVACY COMMISSIONER / ONTARIO

ANN CAVOUKIAN, Ph.D., COMMISSIONER

Special conference marks *PHIPA*'s anniversary

A special conference is being held to mark the first birthday of Ontario's newest privacy Act - the *Personal Health Information Protection Act (PHIPA)*. The first *PHIPA Summit*, organized by the Office of Information and Privacy Commissioner/Ontario (IPC), will provide an opportunity for members of the health provider community to share their own experiences with *PHIPA* over the past year, to learn best practices and to participate in discussions with field leaders.

"It has been a highly successful inaugural year," said Commissioner Ann Cavoukian, "but there is much to review and future challenges to discuss. I am very pleased with the quality of speakers and panel members that we have been able to attract."

The conference is being held Thursday, November 3, at the Metro Convention Centre in Toronto. More information, including how to register, is available at <http://www.governmentevents.ca/hipa2005/>.

PHIPA has attracted a lot of attention during its first year. The IPC has received more than 4,000 *PHIPA*-related phone calls and e-mails. Additionally, more than 400,000 copies of the 20-plus special *PHIPA* publications the IPC has produced – ranging from brochures to fact sheets to major papers – have been sent out. Thousands of copies have also been downloaded from the IPC's website, www.ipc.on.ca.



Commissioner Ann Cavoukian with one of the popular "short notices" posters. See story on page 3.

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The theme of the summit is *PHIPA: A Balancing Act*. "PHIPA is built on a very careful balance," said Commissioner Cavoukian. "Effective health information privacy legislation must strike the right balance between allowing health care providers to quickly pass on the information needed for patient care to other health providers, while restricting unauthorized disclosure."

There will be an opportunity at the summit for attendees to participate directly in breakout sessions featuring discussions on *PHIPA* regarding Consent, Permissible Disclosures, Health Research Issues, Privacy Breaches and Implementation Challenges.



Recent IPC Publications

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

Commissioner's PHIPA Highlights: Here's what health professionals are asking about Ontario's new health privacy legislation. March 2005.

Fundraising under PHIPA, a PHIPA fact sheet. April 2005.

Reporting Requests under PHIPA, a PHIPA fact sheet. April 2005.

Consent and Form 14, a PHIPA fact sheet. April 2005.

Section 45 Entities under the Personal Health Information Protection Act, a status report. May 2005.

Section 39(1)(c) Registries under the Personal Health Information Protection Act, a status report. May 2005.

Your Health Information and Your Privacy in Our Office, a PHIPA short notices brochure and poster. June 16, 2005.

Your Health Information and Your Privacy in Our Hospital, a PHIPA short notices brochure and poster. June 16, 2005.

Your Health Information and Your Privacy in Our Facility, the third PHIPA short notices brochure and poster. June 16, 2005.

2004 Annual Report. June 22, 2005.

Fact Sheet on Adoption Information Disclosure. June 29, 2005.

Disclosure of Information Permitted in Emergency or other Urgent Circumstances, a fact sheet. July 2005.

Lock-box Fact Sheet. July 2005.

A Review of the Literature on Adoption-Related Research: The Implications for Proposed Legislation. August 2005.

Alert for Birth Parents. An adoption identification alert. September 2, 2005.

Identity Theft Revisited: Security is Not Enough, which focuses on the role and responsibility of organizations in preventing and dealing with identity theft. September 2005.

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

Upcoming Presentations

October 27. Commissioner Ann Cavoukian is participating in a plenary panel at the International Association of Privacy Professionals 2005 Privacy Academy in Henderson, Nevada. Her topic is *The Perfect Privacy Storm: Why Privacy Supports Security*.

November 3. Commissioner Cavoukian, Ken Anderson, Assistant Commissioner (Privacy) and Brian Beamish, Assistant Commissioner (Access) are all addressing the first PHIPA Summit, *PHIPA: A Balancing Act*, at the Metro Toronto Convention Centre.

November 29. Commissioner Cavoukian is the keynote speaker at *Sun Microsystems' Identity Management Executive Seminar* at St. Andrew's Club & Conference Centre, Toronto. She is speaking about identity theft.

December 19. Commissioner Cavoukian is the keynote speaker at the *Privacy Compliance in Healthcare* conference at the Sheraton Centre Hotel, Toronto. Her topic will be Ontario Initiatives in Privacy Compliance: Role of Privacy Officer.



Making it easier for patients

Notifying patients and clients how their personal health information will, and can, be collected, used or disclosed is an important element of privacy protection. Yet, most privacy notices are difficult to understand unless you are a lawyer or a policy analyst. Faced with lengthy notices full of legal jargon and endless clauses, sub-clauses and the proverbial “fine print,” many people just read the first few lines of a privacy notice and then put it down.

Commissioner Ann Cavoukian, concerned that a majority of Ontarians did not have a clear understanding of their privacy and access rights under the province’s new *Personal Health Information Protection Act (PHIPA)*, approached the Privacy and Health Law sections of the Ontario Bar Association (OBA) about starting a special project. The IPC then formed a working group with representatives of the OBA, the Ministry of Health and Long-Term Care and the Ontario Dental Association to develop “short notices.”

Essentially, a short notice is a condensed privacy notice, in clear simple language, informing patients or clients of their privacy rights. The working group decided to use a multi-layered approach that has proven to be highly successful.

A privacy notice should contain information that conveys who the notice covers; the types of information collected directly from the individual and indirectly from others about the individual; the uses or purposes for the data collected; the types of entities that may receive the information (if it is shared); information on choices available to the individual to limit use and exercise any access or other rights, and how to exercise those rights; how to contact the organization for more information or to file a complaint.

The challenge was providing this information in a brief, highly readable way.

Readable short notices ensure that patients or clients are well informed and empowered with a choice regarding how their personal information will be used. Additionally, short, clear notices also provide benefits for health information custodians.

First, short notices allow for effective communication with patients, clients and members of the public, allowing for the growth of a relationship based on trust. Second, it makes it easier for health information custodians to comply with *PHIPA*, as the *Act* requires custodians to take reasonable steps to inform the public about their information practices and how patients may exercise their rights.

The short notices developed by the working group include separate notices for each of three health care groups: primary care providers (including doctors, chiropractors, etc.); hospitals; and long-term care facilities.

A fact-packed, but easily readable, multi-coloured poster was created for each of the three groups. The second layer is a more detailed, but still easily readable, brochure for each of the three groups, with the same colour scheme as the respective posters.

The posters and brochures have been in high demand. More than 200,000 copies of the brochures and more than 100,000 copies of the posters have already been distributed to health information custodians.

The posters are hung on office walls or elsewhere in a hospital or other facility. The brochures are given to those patients or clients who, after reading the poster, would like additional information.

The posters and brochures can be downloaded from the IPC’s website, www.ipc.on.ca.



Summaries

“Summaries”
is a regular col-
umn highlight-
ing significant
orders and
privacy
investigations.

Order MO-1947 Appeal MA-050184-1 City of Toronto

The requester, CBC Radio-Canada, filed four access-to-information requests with the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to all records regarding civil lawsuits involving four city departments that the city had settled with third parties from 1998 to 2004. The records sought dealt with information about the number of lawsuits, dates settled and dollar amounts.

The city denied access, citing the exemptions in sections 11(c) and (d) of the *Act*. Section 11(c) allows an institution to refuse disclosure of a record that contains information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution. Section 11(d) allows an institution to refuse disclosure of a record that contains information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

The requester (now the appellant) appealed the city’s decision to the IPC. In its representations, the city submitted it was reasonably likely to face the following financial and economic harms if the information at issue was disclosed:

- the number of claims made against the city was reasonably likely to increase; and
- premiums were reasonably likely to increase or the city might lose its insurance coverage.

In her order, the Commissioner stated that for sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Commissioner found that the city had not adduced any fact-based evidence to support its assertion that the release of claims information often sparks

widespread public debate and discussion as to when a person may commence an action against the city, which, in turn often leads to a sudden rise in claims. Moreover, given that the city had not adduced any fact-based evidence to support its assertion that the release of the types of claims information sought by the appellant could reasonably be expected to lead to a “sudden rise in claims” against the city, it did not logically follow that its insurer would demand increased premiums or that the city would lose its insurance coverage altogether.

The Commissioner concluded that the city had not discharged the burden of proving that the records at issue fall within the exemptions in sections 11(c) or (d) of the *Act*. The evidence adduced by the city amounted to speculation about possible harm, which was insufficient to meet the requirements of sections 11(c) or (d). Consequently, she ordered that the records at issue be disclosed to the appellant.

At the end of her order, the Commissioner stated that she was pleased that Toronto Mayor David Miller is committed to open and transparent government and urged him to ensure that there is a shift in the city bureaucracy from a protective mindset to a culture of openness. This culture shift should be based on the principles that information should be available to the public, and that necessary exemptions from the right of access should be limited and specific. Exemptions should not simply be claimed because they are technically available in the *Act*; they should only be claimed if they genuinely apply to the information at issue.

Within hours of the release of the Commissioner’s order, the city disclosed the records at issue to the appellant. In addition, Mayor Miller stated publicly that he was pleased with the order and told reporters the city was continuing to take steps to change the culture.

Order PO-2410 Appeal PA-040034-2 Ministry of the Environment

The requester had previously received data from the Ministry of the Environment (the ministry) relating to its *Drive Clean* database. He filed a new access-to-information request with the ministry under the *Freedom of Information and*



IPC's O'Donoghue likes new challenges

Since her initial role as an appeals officer, Mary O'Donoghue has been both witness and key participant in the transformation of the office of the Information and Privacy Commissioner/Ontario from a fledgling organization of about 25 people in 1988 during its start-up phase to its current stature and size of around 85 employees.

In her current position as Manager of Legal Services, O'Donoghue oversees a department of 13, including lawyers, an articling student, summer students, paralegals, and support staff. As well as assigning files and ensuring the workflow moves along smoothly, she is responsible for long-term planning for her department. As a Senior Legal Counsel, O'Donoghue also provides legal advice on major projects.

After joining the IPC as an appeals officer in late 1988, she was appointed as a legal counsel in November 1990. She was seconded to the Ministry of Attorney General for part of 2000 to assist with the Integrated Justice project. She was appointed Manager of Legal Services in 1999.

When asked to describe the best thing about her job, an exuberant O'Donoghue cites the variety of issues and topics she deals with. "It's exciting to be involved in so many different areas of law and new and challenging legal policy issues. This agency is at the leading edge in the development of privacy law, because the Commissioner has a keen interest in new developments at the forefront of the privacy arena" she observes. Finding time for her own legislative work is a particular challenge, "especially when we are extra busy responding to new issues and inquiries." She calls the IPC "a dynamic, hard-working and wonderful place to work, if you're interested in a wide variety of policy topics, which is why, after coming here initially for a temporary five-month assignment, I've stayed for nearly 17 years!"



Mary O'Donoghue, Manager of Legal Services

Assistant Commissioner Ken Anderson, to whom O'Donoghue reports, is enthusiastic in his praise for her contributions to the IPC. "She brings a richly varied legal expertise, coupled with a keen insight."

O'Donoghue, who hails from Dublin on the Irish Sea, left the Emerald Isle at 25. Most of her family still lives there, and she frequently travels to Ireland to visit. She attended Trinity College, Dublin, earning a degree in Economics and History. After immigrating to Canada, she attended Osgoode Hall Law School, York University, which her husband, Paul Reinhardt, now a judge of the Ontario Court of Justice, also attended. They have two children. Daughter Francesca, 22, a novice parliamentary intern in Ottawa, is also a graduate of Trinity College, Dublin, as well as a Licensee from the Université Robert Schumann, Strasbourg, France. Son Charles, 20, graduated from high school in Ireland, and is currently attending the

University of Toronto.

An avid reader, O'Donoghue's other passion is travel. She especially enjoys visiting Italy – Rome in particular, which she wistfully calls "only the most beautiful place in the world."

She is an active member of the Canadian Bar Association Council and is currently chair of the OBA Constitutional, Civil Liberties and Human Rights section, former chair of the Administrative law section and current Executive member of the Privacy law section.

"Short notices," a recent major project O'Donoghue spearheaded, has been a source of great personal satisfaction for her. One requirement of Ontario's new *Personal Health Information Protection Act, 2004 (PHIPA)* is for health



Mediation success stories

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

The IPC encourages parties in mediation to interact directly with one another, through a face-to-face meeting or through teleconference, as part of the new interactive mediation process. Here are two cases where the police participated in this new process with very positive results for all parties.

MFIPPA: Police participation achieves better mediated solutions

Success story No. 1

The Stratford Police Services Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a workplace-related fatality. The police granted partial access. The requester, now the appellant, appealed to the IPC the police service’s decision to deny access to the remaining records.

During mediation, the IPC mediator had extensive discussions with the police FOI co-ordinator on the possible application of the exemptions claimed and the benefits of an index of records. The police then prepared and provided an index of records to the appellant, which the appellant found to be very helpful. The police service also reviewed its earlier decision on access and issued a supplementary decision, granting access to additional records.

The mediator shared relevant orders with both parties and suggested they also review the IPC’s *Practice* guidelines on mediation. By reading relevant orders, the appellant gained a more realistic perspective on the records requested and the application of the *Act*.

The parties then engaged in a productive teleconference where each party shared its perspective and then examined how each might contribute to a successful mediated solution. The police agreed to review the file with a view to further disclosure where possible. The appellant, for his part, agreed not to pursue certain records that were not priorities.

Upon receipt of the additional records, the appellant subsequently advised the mediator that he was satisfied with the results of mediation and the appeal file was closed.

In this appeal, the initial steps of co-operation set the tone for more co-operation. The first efforts put in by both parties resulted in them approaching the teleconference with a spirit of working together to come towards resolution. The discussions and sharing of information and perspectives at the teleconference contributed directly to a better understanding between the parties and led to a positive outcome. The appellant appreciated the time spent and the efforts made by the police to make the process more transparent and to disclose additional records. The police service felt satisfied that it had used its best efforts to assist the appellant, within the framework of the *Act* and the new interactive model of mediation. A win-win for all!

Success story No. 2

The Ottawa Police Service received a request under the *Act* for witness statements and police officer notes regarding a motor vehicle accident involving the requester. The police granted partial access to the records and withheld the remainder. The requester, now the appellant, appealed the decision to deny access.

During a background meeting with the mediator, the appellant had an opportunity to tell her story, express her frustrations and clarify what her priority interests were. The mediator had discussions with the police, who agreed to review the earlier decision on access and disclose further records.

The mediator advised the witnesses that their statements to the police fell within the records that were subject to the appeal and sought their consent to disclosure of the records. The witnesses declined to give consent for the disclosure of their statements. The mediator explained to the appellant that, under the *Act*, information relating to another individual could not be disclosed without his/her consent.

The parties then participated in a joint teleconference with the mediator. The mediator reviewed the progress to date, which created a positive climate for a meaningful discussion between the parties. Through discussions with the appellant at the teleconference, the police gained a clearer understanding of the context for the request. The police explained that if the appellant was contesting the ticket she had received as a result



**Mediation
success stories**

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of an accident, it was likely that she might receive full disclosure of the related records from the Provincial Offences Office. The appellant agreed to pursue this alternative avenue, and not proceed with the appeal.

By participating in the new interactive mediation process and discussing the issues in the appeal directly with the appellant and suggesting a possible solution, the police service showed itself to be a responsive partner in problem resolution.

**PHIPA: Challenges included
notifying “unidentified” patients**

A private laboratory advised that a computer was found missing after a break-in. Stored on the computer were electrocardiogram (ECG) data and each patient’s name, address, birth date, treating physician, and relevant medical history. There was an estimated two and a half years of data on the hard drive, with no back-up copy elsewhere. These factors made identifying the number of patients affected and determining their contact information very difficult.

The IPC worked closely with the lab to develop a notification program to fit the circumstances of the loss and reach as many patients as possible. The program agreed upon provided for the following:

(a) A letter to area physicians, with a public notice enclosed:

The lab forwarded a letter and “public notice”

to all area family physicians and cardiologists who regularly sent clients for testing. The letter advised the physicians of the loss and requested they post the public notice in their office. The notice described the loss and provided the lab’s contact information. The letter also asked the physicians to provide a copy of the public notice to any patients believed to be affected. With the agreement of the Ontario Medical Association (the OMA), the letter included a statement indicating the OMA was supportive of the doctors helping to make patients aware of the incident.

(b) Posting a public notice at the lab where the theft occurred:

The lab posted a copy of the public notice at its facility as there was significant potential for affected patients to return to the lab for further testing.

(c) A news release to local media outlets:

The lab also issued a news release containing similar information to that set out in the public notice.

Looking ahead, the lab advised that it would ensure data is properly backed up, securely stored and deleted from the computer used to collect the diagnostic data. As well, password protection was implemented for all computers at the lab and a monitored security alarm system installed.

The lab also determined it would develop and implement a data sharing agreement, in consultation with the IPC, to address its relationship with the private company that provides diagnostic analysis of patient ECG data.

**IPC’s
O’Donoghue
likes new
challenges**

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professionals to communicate with consumers and clients about their rights under this *Act*. Privacy notices, however, says O’Donoghue, often “are ineffective because they are too complex and they don’t use language that the clients can understand.”

Privacy commissioners around the world are trying to encourage the use of short, easily read privacy notices and Commissioner Ann Cavoukian challenged the Ontario Bar Association (OBA) to collaborate with the IPC in developing short privacy notices that can be used by health practitioners, hospitals and long-term care facilities to inform patients about their rights and choices. The Commissioner, who has great confidence in O’Donoghue, appointed her to lead the project

for the IPC.

In this project, she co-ordinated efforts by a group of lawyers from the OBA (Health and Privacy Law sections), the Ontario Dental Association and the Ministry of Health and Long-Term Care. The varied expertise of the group members was important in creating multi-layered privacy notices – colourful, easy-to-read and understand posters, and more in-depth, but still easy-to-read brochures, which were released in June. Demand for the popular posters and brochures has exceeded all expectations.

“I was very pleased to be a part of this successful project,” said O’Donoghue.



Protection of Privacy Act (the *Act*), seeking access to an electronic copy of information from the database, including vehicle identification numbers (VINs) and test identification numbers (TINs).

The ministry issued a decision letter, granting partial access to the requested information, withholding the vehicle identification numbers (VINs) and the test identification numbers (TINs). The ministry claimed the exemption under section 21(1) (unjustified invasion of personal privacy) to deny access to all VINs and TINs, and the exemptions under sections 14(1)(e) (endanger life or safety) and 14(1)(i) (security) to deny access to all law enforcement related information.

The requester (now the appellant) appealed the ministry's decision to the IPC. During the adjudication process, the appellant withdrew his request for the TIN, or its Ontario equivalent, the VCIN. Therefore, the only remaining data element at issue in the appeal was the VIN.

In his order, the Assistant Commissioner for Access found that the VIN is accurately described as information about a vehicle rather than about a vehicle's owner in a personal capacity. The VIN is information that is tied to the vehicle, not the owner; when ownership of the vehicle changes, the VIN remains the same. Consequently, he concluded that the VIN did not qualify as personal information as defined in section 2(1) of the *Act*.

As the personal privacy exemption in section 21(1) can only apply to information that qualifies as personal information under section 2(1), the Assistant Commissioner found that it was not necessary for him to determine whether section 21(1) applied. As no other discretionary or mandatory exemptions applied to the non-law enforcement related VINs, he ordered that they be disclosed to the appellant.

Two issues were raised in the appeal with regard to law enforcement:

- The ministry and three affected-party, law-enforcement agencies claimed that all information in the *Drive Clean* database that related to unmarked law enforcement vehicles registered to law enforcement agencies were exempt from disclosure

under the discretionary exemptions in 14(1)(e), (i) and (l). This included the make, model and year of the unmarked vehicles, VINs, results of emissions tests and identification number of the garage performing the tests.

- The ministry also claimed that information related to its own covert vehicles used as part of the *Drive Clean* program was exempt from disclosure under the discretionary exemption in 14(1)(c).

The Assistant Commissioner found that that disclosure of the VINs of unmarked law-enforcement vehicles, in combination with the other data elements in the *Drive Clean* database, could be linked back to the police agency that owns those vehicles, thus identifying a vehicle and ultimately endangering the safety of an undercover police officer and potentially members of the general public. Consequently, he concluded that the information at issue about unmarked law-enforcement vehicles contained in the *Drive Clean* database was exempt from disclosure under section 14(1)(e).

However, he found that the ministry did not provide persuasive information that disclosure of the VINs or other information in the *Drive Clean* database about covert test cars would reveal an investigative technique or procedure. Accordingly, he found that the disclosure of information relating to covert vehicles used by the ministry as part of the *Drive Clean* program was not exempt from disclosure under section 14(1)(c).

In summary, the Assistant Commissioner ordered the ministry to provide the appellant with an electronic copy of all data elements from the *Drive Clean* database previously disclosed to the appellant, and in addition, all vehicle identification numbers (VINs), with the **exception** of any information relating to unmarked law-enforcement vehicles registered to law-enforcement agencies, including make, model and year of unmarked vehicles, VINs, results of emissions tests and identification number of the garage performing the tests.

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