

# *Privacy in the Workplace: Do's and Don'ts*



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# What is privacy?

The Office of the Privacy Commissioner of Canada defines privacy as:

“The right to control access to one’s person and information about oneself”

## Is privacy good business sense?

- People expect to have some privacy at work, even if they are on their employer's premises and using the employer's equipment
- However, working for someone will mean giving up some privacy
- Employers need basic information about their employees for things like pay and benefits and they have to be able to ensure that work is being done efficiently and safely

## How much privacy is enough?

- The possibilities for infringing on privacy in the workplace are greater than ever before
- Psychological tests, web-browsing records, video surveillance, keystroke monitoring, genetic testing: stories about all of these items could probably be found in newspapers in the last two weeks and suggest that the information an employer can potentially have about employees is limitless
- How do we draw the line?

## Finding a balance:

How do you balance an employer's "need to know" with an employees "right to privacy?"

- Employers must ensure that they collect, use and disclose personal information about their employees for appropriate purposes only

# The Legislation

- ***Freedom of Information and Protection of Privacy Act (FOIPPA Act)***
- ***Personal Information Protection Act (PIPA) of BC***
- ***Personal Information Protection and Electronic Documents Act (PIPEDA)***

# The Legislation

- FOIPPA covers “all” personal information in the custody or control of a public body, so this includes employee information
- PIPA covers employment information, and includes working under an unpaid volunteer working relationship
- PIPEDA does not extend to employment unless the organization is a federal work, undertaking or business
- Provinces that do not have substantially similar legislation will not have private sector employment privacy coverage

## Other ways privacy is protected

- In addition to privacy legislation applying to employee information, employers often make a commitment in collective agreements to observe privacy practices
- Whether privacy is protected by law or contract, respecting privacy in the workplace makes good business sense

## Some Key Differences

- The Freedom of Information and Protection of Privacy Act, which covers the provincial public sector, protects personal information that is “**recorded**”
- “Recorded” can be in any way, including written, oral, or video
- PIPEDA and PIPA cover personal information, **recorded or not**, about an identifiable individual



## Common ground:

PIPEDA and PIPA (BC and Alberta) all share the same explicitly stated purpose: To govern the collection, use and disclosure of personal information by private sector organizations in a manner that recognizes both the right of the individual to have his or her personal information protected and the need of the organization to collect, use and disclose personal information for purposes that a reasonable person would consider appropriate

## Common key principles

- All three laws may collect, use or disclose personal information only for a purpose that a reasonable person would consider appropriate in the circumstances
- All of these laws apply to “organizations” and incorporate the following principles:

# Common Key Principles

- Organizations are accountable for the protection of personal information under their control
- The purposes for which the personal information is collected must be identified during or prior to the collection
- Personal information may only be collected, used or disclosed by an organization with the knowledge and consent of the individual , with limited exceptions as specified in the legislation
- The collection of personal information is limited to what is necessary for the identified purposes and will be collected by fair and lawful means
- Personal information must only be used and disclosed for the purposes for which it was collected, except with consent or as required by law
- Personal information must be as accurate, complete and up-to-date as possible

# Common key principles

- Personal information must be protected by adequate safeguards
- Information about an organization's privacy policies and practices must be readily available to individuals upon request
- An individual has a right of access to personal information about himself or herself and has the right to seek correction
- Organizations must provide the means for an individual to challenge an organizations' compliance of the above principles

# PIPEDA

- If your organization is a federal work, undertaking or business (FWUB), PIPEDA applies to all commercial personal information flows and to employee personal information
- If your organization operates in a province without substantially similar legislation, and you are not a FWUB, PIPEDA applies to all commercial activities but not to employee information in your organization
- If your organization operates in a province with substantially similar legislation, and has to follow that law, PIPEDA only applies to interprovincial and international transactions

## Key Points

- Provincial PIPAs apply to provincially regulated private sector organizations
- Employee information held by provincially regulated organizations in Alberta and BC is covered by the provincial PIPAs

## Key Points:

- PIPEDA applies to federal works, undertakings or businesses (FWUBs)
- PIPEDA applies to the collection, use and disclosure of personal information in the course of a commercial activity and across borders
- PIPEDA also applies within provinces without substantially similar private sector privacy laws
- PIPEDA applies to employee information only in connection with a FWUB

## Which law applies?

- What province do you operate in?
- Look at the definition of “organization” in the statutes you think might apply
- Look at the “application” of the statute



## Question:

What law applies if my organization, that is subject to PIPA in BC, contracts out the administration of an employee benefit program to a PIPEDA organization within the same province?



## Question:

How would an employee know to which privacy office to make a privacy complaint?

# Definitions

- Personal information – major difference in the definition between public and private sector laws is whether or not the information has to be recorded
- Employee personal information – not defined in FOIPPA
- Contact information – common definition in public and private sector privacy laws

# What is personal information?

Personal information means information about an identifiable individual, which includes any factual or subjective information about the individual.

- Name
- Medical history
- Opinions about the individual
- Religion
- Birth date
- Political affiliations and beliefs
- Income
- Physical description
- Gender
- Address
- Education
- Employment
- Visual images such as photographs and videotapes where individuals may be identified

# Employee Personal Information

Special rules recognize true nature of employee relationship – not consent-based



## Employee Personal Information

- Legislation recognizes the true nature of employee relationships- that it is not consent based
- Employers may collect, use and disclose employee personal information for reasonable purposes that are necessary to establish, manage or terminate the employment relationship, without consent, as long as the employee is notified
- There are some limited exceptions to notification, such as investigations or proceedings, medical emergencies, etc

# Break

We will break for 20 minutes.

## Exercise

Your organization has decided to require new employees to complete the following form. As the Privacy Officer for Fountain of Youth Regional District you have been asked to review it, because “there might be some privacy issues”.

Do you have any concerns with the form?

Are there any changes that you would like to see?

How would you handle this with your boss?



## Collection of Employee Personal Information

What personal information can an employer collect about her employees?

## Collection of Employee Personal Information

Normally, an employer must collect personal information directly from the employee. However, personal information can be collected indirectly in some cases, for example, to determine whether you are eligible for a program, benefit, honor or award, or for the purpose of collecting a debt.

# Collection of Employee Personal Information

Reasonableness

How do you determine “reasonableness?”

# Collection of Employee Personal Information

## Notification

When must notification be given?

# Collection of Employee Personal Information

## Consent

A best practice is that express consent should be obtained where possible. For example, where an application form is used employers should ensure the application form includes notice and consent.

## Collection of Employee Personal Information

Can personal information be collected about an employee in an internal investigation without his/her permission?

# Who Needs to Know?

- Organizational measures (security clearances, “need to know” policy)



# Use of Employee Personal Information

- Can it be used for social purposes?
- Can it be used to promote a good cause?

# Disclosure of Employee Personal Information

What can be disclosed to unions?

# Disclosure of Employee Personal Information

What can be disclosed from investigation files?

## References

- Is consent necessary?
- What information can an employer disclose?

## References (cont'd)

Who can an employer obtain reference information from?

# Unsolicited Resumes and Applications

What happens to unsolicited resumes and applications?



## Question:

Can an employer use a head-hunting firm to identify possible job candidates without their knowledge?

# Access Rights

## **What information can be provided to unsuccessful job applicants after the competition has been completed?**

- Candidates can generally see all of their own personal information, provided that personal information about other candidates is severed from the records. Other information which could be disclosed includes factors used in assessment, and ratings and rankings provided no personal identifier is disclosed.
- Candidates can generally access their references' comments, since this is information about them. However, if the references were supplied in confidence, the information may be withheld.

# Medical Information

## Doctor's Notes

- Employers have the right to ensure that employee absences are justified or to confirm that an employee is fit to return to work. A doctor's certificate attesting to the need for sick leave or for modified duties upon a return to work may be regarded as personal employee information. While it is generally reasonable for an employer to know what accommodations are needed for an employee to be able to return to work, an employer would rarely need to know the medical diagnoses and treatment.

# Medical Information

Disability claims – what is necessary?

# Video Surveillance

Under new privacy laws, is any video surveillance by private organizations illegal?

## Discussion:

Jamie has a medical condition that has kept him from working for several months. Jamie's doctor has informed him that he should expect to be away from work for several more weeks. Jamie's employer has a long-term disability plan that requires proof of disability be provided to the carrier of the plan. The terms of the plan also allow the carrier to confirm to the employer that an employee is disabled and unable to return to work and the expected length of absence from work.

## Discussion:

Jamie qualifies for and wants to apply for long term disability benefits. As the employer what should you do to assist?

Is there any information that must not be disclosed between the parties?

What happens if Jamie makes a complaint to the union?



## Discussion:

While Jamie is off on disability your organization receives a phone call from a credit agency asking for financial information about Jamie. How would you handle this call?