

COMMUNIQUÉ

for the Health Industry



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PRIVACY UPDATE

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Our Health Industry Practice group continues to monitor privacy developments across the country and will provide periodic updates, tailored to the needs of our clients.

ANNOUNCEMENTS

New Federal Privacy Commissioner appointed

Jennifer Stoddart has been appointed as Canada's Information and Privacy Commissioner, effective December 1, 2003. Formerly, Ms. Stoddart was the Access to Information Commissioner for Québec.

LEGISLATION

British Columbia Private Privacy Legislation in Force

Bill 38, the British Columbia *Personal Information Protection Act* received Royal Assent on October 23, 2003 and comes into force on January 1, 2004.

Alberta Privacy Legislation in Force

Bill 44, the Alberta *Personal Information Protection Act* received Royal Assent on December 4, 2003 and comes into force on January 1, 2004.

Québec Exemptions – Substantially Similar

The federal government has exempted Québec organizations subject to *An Act respecting the protection of personal information in the private sector* from the application of Part I of PIPEDA. The exemption applies for all collection, use or disclosure of personal information that occurs within the province of Québec. PIPEDA will continue to apply to the collection, use or disclosure of personal information outside the province and to the operations of a federal work or business in Québec. See SOR/2003-374, published in the December 3, 2003 Canada Gazette Part II, Vol.137, No. 25.

Amendments to the Regulations Specifying Investigative Bodies

The *Personal Information Protection and Electronic Documents Act* (PIPEDA) establishes rules to govern the collection, use and disclosure of personal information by organizations in the course of commercial activity. PIPEDA requires an organization, which discloses personal information, to obtain the

Note:

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individual's consent in most circumstances. There are exceptions under sections 7(3)(d) and (h.2) of the Act, which permit the disclosure of personal information to and by an "investigating body", without the knowledge or consent of the individual. Those organizations designated as "investigative bodies" are found in the Regulation Specifying Investigative Bodies under PIPEDA. Up until recently, it has been quite limited in scope.

In response to submissions, Industry Canada has accepted that the consent requirements under PIPEDA could potentially jeopardize the ability of a number of professional regulatory bodies to obtain voluntary information in the reporting and investigation of professional practice concerns. As such, on November 8, 2003, it submitted proposed amendments to the Regulations, adding for example, the health profession regulatory Colleges of Ontario, law societies, insurance adjusters, and private investigators.

It is anticipated that the regulation will come into force on January 1, 2004. It is likely that a number of other organizations will apply for status as well. To view the regulatory impact analysis statement with proposed amendments, please see <http://canadagazette.gc.ca/index.html>.

Information on PIPEDA for Health Care Sector Organizations

A number of health associations, organizations and Colleges have opposed the federal government's decision to include the health sector under PIPEDA and have continued to lobby for its exclusion or for the exclusion of specific groups. It appears that these organizations have resigned themselves to the fact that federal privacy legislation is here to stay. In response, Industry Canada has committed to developing tools which will assist the health sector in understanding the scope and requirements of PIPEDA. We will be watching closely for the release of these guidelines.

Industry Canada has developed "Questions and Answers" for the health sector which provide some useful information. For example, once patients/clients are made aware of their privacy rights through the posting of notices, brochures and pamphlets, and/or discussions with the care provider (i.e. knowledge requirement), Industry Canada confirms that implied consent is appropriate for the direct care and treatment of the patient/client. It also provides basic information on issues such as consent for health care emergencies and research.

This information is posted at <http://e-com.ic.gc.ca/english/privacy/health/index.html> and <http://strategis.ic.gc.ca/privacy/health>.

F E D E R A L P R I V A C Y C O M M I S S I O N E R F I N D I N G S

Conditions for Opt Out Consent

There has been a great deal of debate about the appropriate use of the opt out form of consent (i.e. the individual is taken to have consented to the collection, use or disclosure of information unless he or she specifically indicates refusal of consent). This is particularly an issue in the area of fundraising, where these practices are more prevalent.

In two recent findings, the Interim Federal Privacy Commissioner, Robert Marleau, provided guidance about the four conditions that must be met in order for an organization to justify relying on the opt out form of consent (see findings #192 and 203), namely:

1. The personal information must be demonstrably non-sensitive in nature and context.
2. The information-sharing situation must be limited and well defined as to the nature of the personal information to be used or disclosed and the extent of the intended use of disclosure.

3. The organization's purposes must be limited and well-defined, stated in a reasonably clear and understandable manner, and brought to the individual's attention at the time the personal information is collected.
4. The organization must establish a convenient procedure for easily, inexpensively, and immediately opting out of, or withdrawing consent to, secondary purposes and must notify the individual of the procedure at the time the personal information is collected.

These conditions are quite narrowly construed. Organizations should satisfy themselves that these conditions are met before instituting this form of consent.

ABOUT THE AUTHOR

Kathryn Frelick is a lawyer practicing in our Health Industry Practice Group and is general counsel for the Legal Retainer Program. She is particularly interested in administrative law, regulatory law and health policy issues.

Our National Health Industry Practice group is dedicated to providing comprehensive and integrated legal services to health industry clients. For more information about our group, visit our website at www.millerthomson.com or contact one of our regional contacts listed below.

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