

INFORMATION SHEET

Canadian privacy laws in the private sector

Privacy laws in Canada have become widely applicable to the private sector and have a significant impact on how businesses collect, use and disclose personal information of customers, potential customers and employees.

At the federal level in Canada, the *Personal Information Protection and Electronics Document Act* (the "PIPEDA") was introduced and became effective January 1, 2001. Many provinces in Canada, such as British Columbia, Alberta and Quebec, have also enacted provincial legislation addressing personal information and privacy rights in the private sector. PIPEDA and similar provincial privacy statutes, govern the collection, use and disclosure of personal information by all types of private businesses. PIPEDA and its provincial equivalents create mandatory obligations and therefore every business is required to comply with this legislation.

In general, the federal PIPEDA legislation applies to activities of organizations in the private sector with respect to activities within the federal realm including inter-provincial activities. The federal legislation also applies to intra-provincial activities of a private sector business to the extent that provincially enacted legislation is not substantially similar to the federal legislation.

Personal information. PIPEDA sets out rules for the collection, use and disclosure of personal information. Personal information is broadly defined in PIPEDA to mean any information about an identifiable individual, although it does not include the name, title, business address or telephone number of an employee of an organization. This exemption enables companies to produce employee phone lists without running afoul of privacy obligations. However, entities must nevertheless be careful with how they deal with even personal information such as email addresses and potentially other personal contact

information, as recent decisions have held that even these forms of information constitute personal information, which if publicly available for a particular purpose (e.g. so that clients can contact the individual to obtain services or products from the individual), may not be collected, used and disclosed for other purposes (e.g. in order to market products or services to the individual). The provincial definitions of "personal information" can be slightly different; for example, in British Columbia, the definition of "personal information" specifically excludes "work product information."

Organizations. In general, PIPEDA applies to any organization that collects, uses or discloses personal information in the course of commercial activities or in relation to its employees. The definition of an organization under PIPEDA includes an "association, partnership, person (including corporations as well as individuals), and a trade union." This definition is broad enough to include private businesses of all sizes.

Commercial activities. PIPEDA applies to commercial activities or matters in relation to an organization's employees. Pursuant to PIPEDA, commercial activity means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

Basis of PIPEDA. PIPEDA incorporates ten principles from the Canadian Standards Association's Model Code for the Protection of Personal Information. The Model Code was developed by business, consumers, academics and government under the auspices of the Canadian Standards Association. At the core of the Model Code are the premises that (i) an organization is responsible for the protection of personal information and the fair handling of it at

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all times, throughout the organization and in dealings with third parties, and (ii) care in collecting, using and disclosing personal information is essential to continued consumer confidence and goodwill.

Obligations under PIPEDA. The ten principles from the Moral Code are as follows:

1. **Accountability:** An organization is responsible for personal information under its control and shall designate an individual or individuals who is/are accountable for the organization's compliance with the following principles.
2. **Identifying Purposes:** The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.
3. **Consent:** The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except when inappropriate.
4. **Limiting Collection:** The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.
5. **Limiting Use, Disclosure and Retention:** Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by the law. Personal information shall be retained only as long as necessary for fulfillment of those purposes.
6. **Accuracy:** Personal information shall be accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.
7. **Safeguards:** Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.
8. **Openness:** An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.
9. **Individual Access:** Upon request, an individual

shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

10. **Challenging Compliance:** An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals for the organization's compliance.

These ten principles form the foundation of PIPEDA and they should be used as a guide by organizations in the development of their privacy policies and procedures.

Obligations under PIPEDA. Under PIPEDA, a private sector business is obligated to explain to individuals, both employees and customers, the purposes for which personal information is being collected, used and disclosed, and to obtain from individuals their consent before collecting, using and/or disclosing their personal information. Businesses are also obliged not to collect more information than is necessary to fulfill the stated purposes that they have provided to their customers and employees, to destroy personal information once it is no longer needed to achieve the stated purposes, to ensure personal information is accurate and complete and provide access to an individual's personal information upon that individual's request, to protect personal information with technological and physical safeguards appropriate to the sensitivity of the personal information, and to make personal information management policies and practices available upon request from third parties.

Compliance with PIPEDA. In order to comply with privacy legislation, every business should take the following steps:

Take status — conduct a privacy audit. A thorough audit should be conducted to identify all of the personal information collected by the organization, to assess how personal information is managed and safeguarded, to identify what types of uses and disclosures made or are desired, and to identify deficiencies that need to be corrected.

Develop and implement a privacy policy. Every business should have a clear privacy policy that advises customers and employees about the practices of the business with respect to the handling and protection of personal information. This policy should be readily available to customers and employees. Those companies that conduct their business online should ensure that their privacy policies are easily accessible on their websites and that their Terms of Use are consistent with such privacy policies. Note that it is not enough to simply have a privacy policy. In order to comply with the legislation, businesses must also implement appropriate internal procedures for properly managing the collection, use and disclosure of all personal information within the organization and in activities with third parties, including foreign affiliates.

Appoint a Privacy Officer. Organizations subject to PIPEDA must appoint an individual (i.e. a Privacy Officer) to be accountable for the organization's privacy obligations. The Privacy Officer's roles should include implementing the privacy policy and responding to questions and concerns from individuals. He or she should be familiar with the relevant legislation and must have the authority to control the organization's practices with respect to the management of personal information.

Obtain all necessary consents. Consent should be obtained for any collection, use or disclosure of personal information of individuals. The type of consent that is appropriate will depend on the sensitivity of the information and the circumstances.

Draft appropriate contracts. Every business

should, in applicable circumstances, have agreements in place with any third parties that have access to personal information in the records of the business. These agreements should obligate the third parties to respect the privacy policies and practices of the business. Where commitments are not currently in place with third parties, an assessment needs to be made as to what steps the business should take in order to secure agreement to comply from the third parties.

Amendments to PIPEDA. Privacy laws in Canada are not static. In 2010, a Federal bill was introduced in the House of Commons to amend the PIPEDA. The proposed amendments included, for example, an exclusion of business contact information from protected personal information. Due to a Federal Election in 2011, this legislation was not enacted. However, minor amendments were made to PIPEDA effective April 1, 2011 based on the enactment of Canada's new anti-spam legislation. The new amendments provide the Commissioner with the power to discontinue a complaint in certain circumstances. It remains likely that further amendments to PIPEDA will be proposed in the future.

Summary. There are numerous obligations businesses now have with respect to the handling of personal information in light of PIPEDA and equivalent provincial legislation. These obligations must be handled carefully in order to comply with the requisite legislation. At Smart & Biggar, we regularly assist our clients in meeting their compliance obligations in the privacy arena. For more information, please contact one of our offices.