

MEMORANDUM

TO: David Kelly, Executive Director
Ontario Federation of Community Mental Health and Addiction Programs

FROM: Kathryn Frelick and Rachel L. Blumenfeld
Miller Thomson LLP

DATE: December 22, 2003

SUBJECT: Privacy issues

We confirm our recent discussion regarding the applicability of federal privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) to your members.

It is our understanding that you have a wide range of member organizations that provide community-based mental health and addiction services across Ontario. Many are not-for-profit organizations that receive funding from the Ministry of Health and Long-Term Care for programs and services. Some organizations have organized revenue-generating enterprises such as restaurants or catering companies. As well, some members are registered charities and undertake fundraising activities, through foundations or otherwise.

Why Privacy?

Health professionals and organizations have long dealt with the concept of confidentiality. Through the course of their duties, they are entrusted with sensitive client information, collected for a specific purpose (i.e., to provide care). There is a corresponding duty to protect the confidentiality of that information. Confidentiality is an ethical, legal, professional and employment obligation of every health professional.

Confidentiality obligations dealing with the disclosure, access to and storage of information are set out in the common law, as well as facility-specific legislation and professional codes. In addition, there are profession-specific requirements for regulated health professionals.

Traditionally, there has been no right to privacy (or “right to be let alone”) in Canada. In recent years, with increased globalization, use of computers, and the internet, there has been heightened concern regarding the information collected about individuals and its use. While confidentiality rights arise out of the special relationship between the client and the health care provider, privacy rights are general rights of all persons to limit access to information about themselves. Confidentiality and privacy rights often co-exist. Health care providers must comply with the rules arising out of both confidentiality and privacy rights.

Personal Information Protection and Electronic Documents Act (PIPEDA)

Federal privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) was promulgated and came into force on January 1, 2001. PIPEDA protects the “personal information” of the individual. It is premised upon the principle that personal information should not be collected, used or disclosed without the prior knowledge and consent of the individual concerned.

The application of PIPEDA in Canada has come in stages: beginning January 1, 2001, PIPEDA applied to personal information of clients and employees in the federally-regulated private sector (e.g., airlines and banks) and to other organizations that disclose personal information in the course of commercial activities outside a province or the country. PIPEDA defines commercial activities as “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 fund-raising lists”.

On January 1, 2002, the Act also applied to personal health information for those organizations and activities that were covered in the first stage. Personal health information is defined as information about an individual’s mental or physical health, including information concerning health services provided and information about tests and examinations.

PIPEDA will apply to any and all provincial commercial activities as of January 1, 2004, unless the province enacts substantially similar legislation. To date, Ontario has failed to enact such legislation, and therefore as of January 1, 2004, PIPEDA will apply to all private sector entities in Ontario that collect, use or disclose personal information in the course of commercial activities.

In determining whether or not PIPEDA applies to an organization, it is not enough to simply look at whether or not its activities are for-profit or not. Whether a particular activity will be caught by the Act will depend upon the nature and the purpose of the project or initiative. The Act may apply to some activities of your member organizations and not others. For example, while the “core” services provided by your members may not be considered commercial in nature, they may be involved with revenue-generating activities that are commercial in nature and would likely be caught by the Act. Related businesses operated by your member organizations, such as gift shops, restaurants, coffee shops, commercial pharmacies and catering services are commercial in nature. Personal information collected in the course of such activities would be protected by PIPEDA. Similarly, while most fundraising activities may not be caught by the Act, some may, such as the sale of raffle or dinner tickets and, as specified in PIPEDA, the “selling, bartering or leasing of donor, membership or other fundraising lists.”

That said, the application of PIPEDA to a charitable organization is open to constitutional challenge. While the federal government has relied on its “trade and commerce” power in instituting *PIPEDA* by limiting its application to personal information collected, used and disclosed in the course of an organization’s “commercial activities,” the regulation of charities is clearly reserved to the provinces by section 92(7) of the Constitution.

Moreover, and of utmost significance to your member organizations, it must be noted that Ontario has just introduced draft legislation that would be applicable to all health information custodians. Bill 31, the *Health Information Protection Act, 2003* passed first reading in the Ontario legislature on December 17, 2003. The Ministry of Health and Long-Term Care has indicated that there will be a period of public consultation, however the extent of this consultation is not yet known. While it is anticipated that this legislation will be pushed through the legislature on an expedited basis, it is not yet certain how quickly this can or will be achieved. In the meantime, health industry organizations ought to be cognizant of their federal privacy legislation obligations, including the January 1, 2004 deadline. Even if passed, any provincial legislation will need to be found to be “substantially similar” to PIPEDA and to offer at least as much privacy protection as the federal legislation in order to supplant it for those organizations to which PIPEDA applies. ■

We will be following further developments very closely and will provide additional information about this legislation and its potential applicability to your members in follow-up correspondence.

Given the uncertainty in terms of application, and to ensure that there are not different standards for an organization depending upon whether the particular activities are covered by PIPEDA or not, the health sector, as a whole, is to a large degree self-regulating with respect to privacy. It is our understanding that many health organizations and foundations are adopting, to the extent possible, the fair information practices contained in Schedule 1 to PIPEDA.

As well, the CSA Model Code provisions have formed the basis for the health association and health professional privacy codes. They have become **the** national standard against which all health organizations and professionals will be measured. As such, from a best practice and risk management perspective, it is prudent for your organizations to adopt these standards formally.

Any provincial privacy legislation must be substantially similar to PIPEDA and will therefore very likely include these privacy standards. It appears that provincial legislation will be coming and it makes good business sense to begin to put the principles into practice.

Finally, consumers are demanding privacy protection. It makes good business sense, and may protect the organization from complaints and negative publicity, to demonstrate openly the organization’s high regard for privacy of clients.

Until we have more guidance on this issue from the federal privacy commissioner, the provincial government and other sources, we do not believe that we can provide a more definitive answer. Having said this, we strongly encourage federation members to adopt a high privacy standard into their practices.