

Privacy and the Workplace

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Outline

- What law, if any?
- Pre-employment screening
- Workplace investigations
- Employee blogs
- Facebook

Is you in or is you out?

- PIPEDA only applies if you're a FWUB: Federal work, undertaking or business
- From PIPEDA:
 4. (1) This Part applies to every organization in respect of personal information that ...
 - (b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

Are you a FWUB?

- Defined in PIPEDA:

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament. It includes

- (a) a work, undertaking or business that is operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
- (b) a railway, canal, telegraph or other work or undertaking that connects a province with another province, or that extends beyond the limits of a province;
- (c) a line of ships that connects a province with another province, or that extends beyond the limits of a province;
- (d) a ferry between a province and another province or between a province and a country other than Canada;
- (e) aerodromes, aircraft or a line of air transportation;
- (f) a radio broadcasting station;
- (g) a bank;
- (h) a work that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces;
- (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces; and
- (j) a work, undertaking or business to which federal laws, within the meaning of section 2 of the *Oceans Act*, apply under section 20 of that Act and any regulations made under paragraph 26(1)(k) of that Act.

Non-PIPEDA Provinces

- Employee information is covered under the provincial privacy laws of Alberta, British Columbia and Quebec.

General Rules

- PIPEDA, PIPAs are consent based, but ...
 - Consent in the workplace is problematic
- Not a “consensual” relationship during employment – always an element of coercion
- PIPEDA:
 - Consent, notice, reasonableness (s. 5(3)) or consent exceptions
- PIPAs:
 - Reasonableness, relevance and notice, or consent exceptions
- Best practices:
 - Reasonableness, relevance and notice, or consent exceptions

Pre-employment screening



References and background checks

- Pre-employment screening is often reasonable
- Application process lends itself to notice and consent
- Notify the prospective employee that you'll be checking references and get written consent

Employment Issues

- **References**

- Seeking a reference is a collection of personal information (requires consent)
- Giving a reference is a disclosure of personal information (requires consent)

Employment Issues

- References- What to do
 - Make sure you get consent to check more than just the references provided
 - Make it part of the hiring process or place a consent as part of the job application form
 - Be prepared to provide a copy of the consent to reference providers
 - Before giving a reference, confirm that the reference seeker has consent to obtain it.
 - “In order to confirm the applicant’s qualifications and suitability for the position applied for, the applicant hereby consents to the collection of personal information for this purpose by AcmeCo, including obtaining references from the applicant’s former employers, supervisors, clients and colleagues, confirmation of any criminal convictions for which a pardon has not been granted, results of aptitude tests, and verification of educational attainment. I consent to the indefinite retention and periodic update of such information, if hired.”

Credit checks

- Make sure this is relevant to the position
- Always get written consent
- Just because you have consent, beware of other laws – consumer reporting legislation in the relevant province

Criminal records checks

- If relevant, privacy laws may allow with consent, but be very careful about human rights legislation
- Ontario *Human Rights Code* prohibits discrimination on the ground of “record of offences”: i.e. applicant cannot be asked whether he or she has had any kind of a criminal record.
- Can ask whether applicant has been convicted of a federal offence for which he or she has not received a pardon, whether they are bondable if reasonable requirement of job.

Workplace Investigations



The General Rule: Consent

4.3 Principle 3 -- Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

Consent Exceptions

- Section 7 of PIPEDA sets out the allowed exceptions to the general consent rule
- **Warning:**
 - Many are not very easy to follow.
 - May not allow you to do what you want.
 - Adult supervision required!

Consent Exceptions

- S. 7(1) – Allows some collection
- S. 7(2) – Allows some use
- S. 7(3) – Allows some disclosure

- Be careful that allowed collection may not lead to allowed use → at least not according to the statute.

Consent Exceptions

- S. 7(1)(b) – “it is reasonable to expect that the collection with the knowledge or consent of the individual **would compromise** the availability or the accuracy of the information and the collection is reasonable for purposes **related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.**”
 - Can be collected and used (but only if collected under s. 7(1)(b)).
 - The employment “contract” is an agreement. A legitimate investigation is likely an investigation of a breach of that agreement or of a legal violation.

Blogging and Facebook

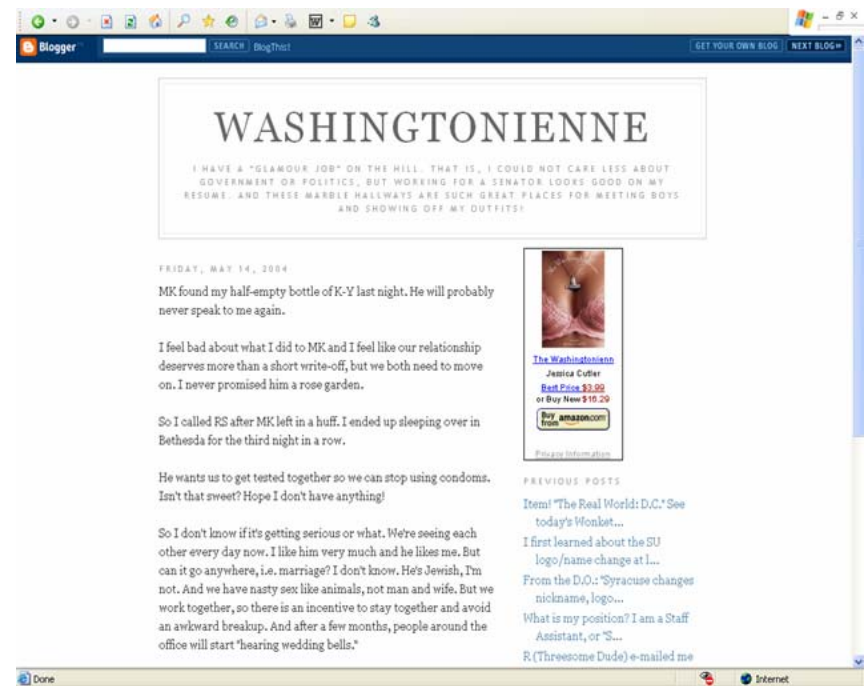


blurring the line between work and home

- Employees can be disciplined for off-duty conduct
- Usually if ... conduct is prejudicial to the employer
- Even “unofficial blogs” can cause problems for employers and consequences for employees

washingtonienne

- Anonymously written by Jessica Cutler
- Low-level staffer on Capitol Hill
- Wrote about her amorous ventures
- Exposed when people connected the dots
- Eventually fired
- Wrote a book



Diary of a flight attendant

- Anonymous flight attendant for an unnamed airline
- Exposed as flight attendant for Delta Airlines
- Eventually fired for posting “inappropriate pictures” of her in her uniform online



Diary of a fired flight attendant

The screenshot shows a web browser window with a pink background. At the top, the title "Diary of a Fired Flight Attendant" is displayed in a typewriter font, with "Fired" written in large, pink, hand-drawn letters above it. Below the title is a blue banner for the movie "The Aviary" with the text "Finally, a movie about flight attendants made by one..." and "DVD Available Now!". To the left of the banner is a small image of a woman. Below the banner is a yellow cartoon airplane icon. The main content area has a pink header "My Book Cover" and a sub-header "posted 01/17/06". The text of the post reads: "So this week I am working on the cover of my book. The graphics are not ready yet, but here is the text I have written for the front flap. A novel in blog format, *Diary of a Dysfunctional Flight Attendant* brings blogging to the 'real world' of ink and paper and recreates for the unenlightened masses the addictive voyeurism of the genre. The book is based on the controversial true story of Ellen Simonetti, whose 2004 firing from Delta Air Lines made headlines around the world and caused an international debate about the limits of free speech. In fact, the book is remarkably similar to the first year of Ms. Simonetti's blog... 'Queen of Sky' is the alter ego of Elena Guaio, a fun-loving, light-hearted and slightly eccentric flight attendant for 'Anonymous International Airlines.' She begins her blog with enthusiasm, quickly allowing it to morph into her new confidant."

On the left side of the page, there is a "POLL" section with the question "Would you like to buy my book in Hard Cover or Paperback format?" and two radio button options: "Hard Cover" and "Paperback". Below the poll is a "Submit Vote" button and a "Current Results" link. At the bottom of the poll is a "Powered by SPARKLOGO" logo. Below the poll is a section titled "LIBERTY WAITS ON YOUR FINGERS -" with a small image of a woman in a flight attendant uniform sitting at a typewriter.

On the right side of the page, there is a box titled "I Support Bloggers' Rights!" with the text "Support Bloggers' Rights!". Below that is a box titled "Blogads" with a link "Advertise here". At the bottom right, there is a section titled "Ads by Google" with two links: "Online Degree Programs" and "Flight Attendant movie".

The browser's address bar at the bottom shows the URL "http://www.elf.org/bloggers/faq" and the Internet Explorer logo.

What are the privacy issues?

- Reviewing employee blogs and Facebook pages is a collection of personal information.
- Using such information for discipline is a use of personal information.
- There's no caselaw about collection and use of such materials from a privacy perspective
- If the blog is publicly accessible, likely implied consent to the collection
- Reading the blog would not be an unreasonable invasion of privacy

Privacy law implications?

- If the blog is harmless and the employer doesn't have a blogging policy, employer isn't likely to use it.
- If the blog violates the employment agreement, it can be used without consent under s. 7 of PIPEDA and 17(d) of PIPA (AB).

Facebook

The image shows a screenshot of a Facebook profile page. At the top, the Facebook logo is on the left, and navigation links for Profile, Friends, Networks, and Inbox are in the center. On the right, there are links for home, account, privacy, and logout. The profile header includes the name "David Fraser" and a "Profile" dropdown menu. Below the name is a status update: "is in Toronto and tired after fourteen hours of meetings. Updated 11 hours ago edit." To the left of the profile is a large photo of a man in a dark jacket looking out a window. Below the photo are links for "View Photos of You (7)" and "Edit My Profile". A status indicator says "You are online now." with a small icon. The main content area on the right shows a list of posts from friends, each with a profile picture, name, and a blurred text preview. On the left sidebar, there is a search bar, a list of applications (Photos, Groups, Events, Marketplace, Mobile, Trips), and a "3D Chat Bubbles" section featuring a virtual avatar and the text "Meet new friends".

Facebook

- Clearly personal information
- Beware of the users' privacy preferences
- Users can control who has access to their profiles
 - If anyone can have access, may be just like a blog with no reasonable expectation of privacy
 - But if their settings preclude public access, there may be a reasonable expectation of privacy
- Employer use may violate terms of service, but this likely isn't fatal to your ability to use it for discipline.

Problems

- New technology
- No clue of the expectations
 - For employees and employers
- No clear rules unless you make them
- Employees may think they have something called “freedom of speech”

Advice to employers

- Set some ground rules
 - Don't have to be anti-blog
- Advise employees that you routinely search for mentions of your company online
- Regularly Google your company name
- Act promptly
- Be consistent

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David leads McInnes Cooper's Privacy practice, working with large and small clients to implement compliance programs for federal and provincial privacy laws. He regularly provides opinions related to Canadian privacy law for Canadian and foreign organizations and is a frequently invited speaker on this topic.

He is also the author of “The Canadian Privacy Law Blog”, an online privacy blog at <http://www.privacylawyer.ca/blog>.

In addition, David is the Chair of the Privacy Law Subsection of the Canadian Bar Association – Nova Scotia and the co-chair of the IT.Can Privacy Committee.

