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**Information
Privacy Laws
and
Medical
Departments**


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Overview

- Fundamental concepts:
 - Privacy
 - Personal Information
- Canada's overlapping, intersecting and confusing privacy laws
- How privacy affects clinical administrators



Key Concepts: What is Privacy?

- Often equated with confidentiality.
- Has been characterised as the right to be left alone, to be secure in one's home and free from unwanted interference.
- In the context of the new laws, privacy means having control over one's personal information
 - Choice of whether to disclose information at all
 - Control over with whom it is shared
 - Control over how it is used
 - Don't lose control once you've released your information "into the wild"

Key Concepts: Personal Information

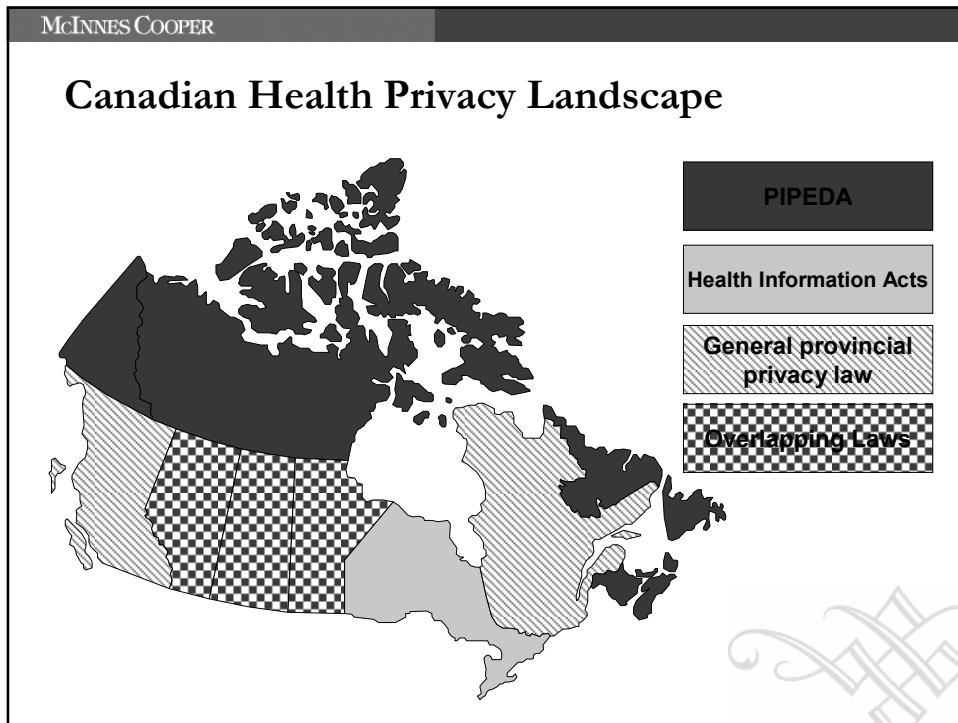
- From PIPEDA:
 - "Information about an identifiable individual"
 - E.g. name, address, income, health information, diagnosis, health number, demographics, preferences, birth date, SIN, tissue samples
- Includes
 - analysis or opinions about an individual
 - information that *may be traced back* to an individual (supposedly anonymized)
- Generally does not include
 - "Work product"

History of Privacy Laws

- Public sector laws date back 20+ years
 - *Privacy Act* – protection of personal information held by federal government
 - *Freedom of Information and Protection of Privacy Act* (NS) – protection of personal information held by the provincial governments
 - *Hospitals Act* (NS)
- No private sector laws until recently
 - Only Quebec - *Act Respecting the Protection of Personal Information in the Private Sector* (1994)!
- In private sector, only had self-regulation
 - Canadian Standards Association Model Code for the Protection of Personal Information
 - Canadian Bankers' Association Privacy Code
 - Canadian Association of Internet Service Providers Privacy Code
 - **CMA Health Information Privacy Code**

Background: History of Privacy Laws

- Some jurisdictions have specific health information legislation.
 - *Health Insurance Portability and Accountability Act* (USA)
 - *Health Information Act* (Alberta)
 - *Personal Health Information Act* (Manitoba)
 - *Health Information Protection Act* (Saskatchewan)
 - *Personal Health Information Protection Act* (Ontario)



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Nova Scotia


- Clinical/Medical departments in Nova Scotia have to think about:
 - The *Freedom of Information and Protection of Privacy Act* (FOIPOP)
 - The *Hospitals Act*
 - The *Personal Information Protection and Electronic Documents Act* (PIPEDA)

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The Freedom of Information and Protection of Privacy Act


Nova Scotia Public Sector



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FOIPOP

- Hospitals and universities are considered to be a “local public body” for the purposes of this statute
- S. 71 of the *Hospitals Act* prevails over FIOPOP
- Heavily restricted disclosure:
 - Health related info is presumed to be an unreasonable invasion of a 3rd party’s privacy
- Blanket exclusions to the access rule:
 - Any information that is subject to solicitor & client privilege; Peer Review documentation (gathered for the purpose of education or improvement of healthcare)



FOIPOP

- Security for Personal Information
- S. 24(3):
 - “The head of the public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.”



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Hospitals Act

Nova Scotia
Hospitals



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Hospitals Act

- Patient records and information must be kept confidential and shall not be made available to any person or agency except with the consent of the patient




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Consent of the Patient


- The patient must have the mental capacity to consent
- The consent should be in writing and it must be fully informed



Disclosures without consent

- Under the *Hospitals Act*, a patient record may be disclosed without consent to:
 - Staff of the hospital, for medical purposes
 - Qualified medical practitioner of the patient
 - A person authorized by court order or subpoena
 - A person or agency otherwise authorized by law
 - The Minister (of Health) or persons designated by him
- 

Disclosures without consent


- Under the *Hospitals Act*, a patient record may be disclosed without consent to:
 - Statistical information
 - transfer of records from hospital to hospital
 - information required by municipalities to establish settlement
 - Can provide general information unless patient expressly forbids it
- 

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The Personal Information Protection and Electronic Documents Act


National Private Sector



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PIPEDA

- *Personal Information Protection and Electronic Documents Act,*
- Phased in
 - January 1, 2001 – Federal private sector
 - January 1, 2004 – Private sector in provinces that do not have substantially similar laws
 - Alberta, Quebec, British Columbia



How PIPEDA applies

- *PIPEDA*, s. 4(1):
 - “... applies to every organization in respect of personal information that
 - (a) the organization collects, uses or discloses in the course of commercial activities; or
 - (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.”



What are “Commercial Activities”?

- “... in the course of commercial activities...”
 - Defined in the Act to mean:
 - “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 list”



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What are “Commercial Activities”

- But, finding #340 ...
- Commissioner found that a law firm, acting for a client, was engaged in “commercial activity”, so actions on behalf of client were caught by PIPEDA.
- This has implications for healthcare....
 - Most physicians are private contractors, many are separately incorporated.



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Is healthcare a commercial activity?

- Depends upon the context
- Source of funding is not relevant
- Little doubt that:
 - Public hospitals are generally not commercial
 - Private practice medicine is commercial
 - Medical school is not commercial
- Grey areas:
 - Contract physicians in hospital
 - Private practice Dr. working in hospital
 - Community clinics with Dr. under contract



PIPEDA Ten Principles

- Based on the best practices from the *Canadian Standards Association Model Code for the Protection of Personal Information*:
 1. Accountability
 2. Identifying purposes
 3. Consent
 4. Limiting collection
 5. Limiting use, disclosure and retention
 6. Accuracy
 7. Safeguards
 8. Openness
 9. Individual access
 10. Challenging compliance

Aside: Consent Principle

- Consent must be informed (“knowledge and consent” and principle 2)
- Consent can take many forms:
 - **Explicit consent** – affirmative indication that the patient assents;
 - Can be written (consent form) or oral
 - **Implied consent** – consent is implied from the actions of the patient;
 - **“Opt-out” consent** – consent is assumed unless the patient indicates otherwise;

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Implied Consent

- You cannot rely on implied consent in healthcare.
- Health information is sensitive, so higher level of consent required.
- Implied consent has to be based on the understanding of the customer and not all customers understand what ordinarily happens in a pharmacy.



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How privacy affects clinical administrators

- You wear multiple hats
 - University administrators
 - Hospital administrators
 - Educators
 - Healthcare providers
 - Physician coraller
 - Scheduler
 - Counselor
- All of these involve personal information



What to do?

- Adopt privacy best practices
- Most privacy laws are based on core principles
- Even if patient/doctor/student doesn't have specific rights under law, they will always think they do
- Fair information practices should be the minimum



Best practices ...

1. **Appoint someone to take the lead on privacy**
 - Likely a senior administrator
2. **Develop communications tools**
 - How to tell patients, students, faculty, others how information will be used
3. **Develop a consent strategy**
 - How will you obtain consent for the way you handle personal information?
4. **Develop a privacy policy**
 - Every organization that collects, uses and discloses personal information must make this available to anyone who asks.
 - Offers guidance to staff and sets the minimum standards to be followed
5. **Allow individual access**
 - Requires pre-release screening to make sure only appropriate information is released, and to the right person
6. **Implement safeguards**
7. **Train all staff and build information privacy into curricula**



Examples

- Visitors
- Peer review/rounds
- Student information
- Faculty/physician information
- Research use of personal information
- References – employment, academic



About the Author

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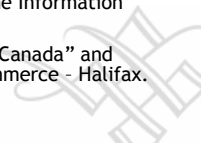


David is the chair of McInnes Cooper's Privacy Practice Group, working with large and small clients to implement compliance programs for the *Personal Information Protection and Electronic Documents Act* (PIPEDA). He regularly provides opinions related to Canadian privacy law for Canadian and foreign corporations and is a frequently invited speaker on this topic. In addition, David is the Vice Chair of the Privacy Law Subsection of the Canadian Bar Association - Nova Scotia.

David is also the principal legal advisor to National Privacy Services Inc. (<http://www.privlaw.com>), where he designs privacy compliance and training programs, and supports the company's contract privacy officers. He is the author of the *Physician's Privacy Manual*, a publication of NPSi, and "The Canadian Privacy Law Blog", an online privacy blog at <http://www.privacylawyer.ca/blog>.

In 2002, David was invited to be an associate of the Institute of Law and Technology. He is a member of the faculty of Dalhousie Law School, where he teaches Internet and Media Law, Law and Technology, and Law and Policy for Electronic Commerce. He is on the editorial board of the *Canadian Journal of Law and Technology*. Active in the Halifax technology community, David is secretary and director of advocacy for the Information Technology Industry Alliance of Nova Scotia (ITANS).

In 2006, David was included in the inaugural edition of "Best Lawyers in Canada" and was named "Outstanding Young Canadian" by the Junior Chamber of Commerce - Halifax.



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The Canadian Privacy Law Blog

http://www.privacylawyer.ca/blog

Canadian Privacy Law Blog

The Canadian Privacy Law Blog. Developments in privacy law and writings of a Canadian privacy lawyer, containing information related to the Personal Information Protection and Electronic Documents Act (aka PIPEDA) and other Canadian and international laws.

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About this page and the author

The author of this blog, **David T.S. Fraser**, is a Canadian privacy lawyer who practices with the Canadian firm of **McInnes Cooper**. He is counsel to **National Privacy Strategies Inc.**, and the author of the **Physicians' Privacy Manual**. He has a national and international practice advising corporations and individuals on matters related to **Canadian privacy laws**.

For full contact information and a brief bio, please see [David's profile](#).

Please note that I am only able to provide legal advice to clients. I am not able to provide free legal advice. Any unsolicited information sent to David Fraser cannot be considered to be solicitor-client privileged.

Small Print

Thursday, October 12, 2006

Incident: Hacker steals personal information from Brock University computers

I have generally stopped reporting privacy and security incidents, since the sheer numbers are overwhelming. But I'll make an exception for this one, since it involves a Canadian university...

Hackers steal personal information from Brock University computers:

The personal information — including some credit card and bank account numbers — of about 70,000 people who gave money to Brock University has been stolen from the school's computers by a hacker.

Terry Boak, Brock's vice-president academic, said the digital intruder had the secret passwords needed to access the file listing of possibly every individual to ever donate to the university.

"It wasn't just someone who hacked in by playing around with it," Boak said. "So, you start thinking about how these passwords were obtained."

Boak said the hacker tapped into the system on Sept. 22 at 5:27 p.m. ET, taking only four minutes to make off with the file containing thousands of names, birthdates and e-mail addresses.

About 90 credit card numbers and some 270 bank account details were also in the file.

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- ◆ [Indian call center staff 'sift' data, TV show says](#)
- ◆ [The ISP Privacy Probe](#)
- ◆ [Matthew Englander's suggestions for PIPEDA reform](#)
- ◆ [Ontario court considers "powerful authority" under PIPEDA](#)
- ◆ [Alberta Commissioner urges Calgary to be diligent about surveillance cameras](#)
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- ◆ [The current debate over privacy and electronic health records in Canada](#)
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