



BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

Employee Privacy under BC's Personal Information Protection Act

**A SUBMISSION TO
THE INFORMATION AND PRIVACY
COMMISSIONER FOR BRITISH COLUMBIA
ON
THE DRAFT EMPLOYMENT PRIVACY GUIDELINES**

**BC Freedom of Information and Privacy Association
November 1, 2004**

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BC Freedom Of Information & Privacy Association

The BC Freedom of Information and Privacy Association (FIPA) was established in 1991 to facilitate the creation of FOI and privacy legislation in British Columbia, and to promote and defend freedom of information and privacy rights in Canada. FIPA is the only non-profit society in Canada devoted exclusively to privacy and freedom of information issues.

FIPA seeks to empower citizens by increasing their rights of privacy and access to government-held information. We serve a wide variety of individuals and organizations through programs of public legal education, public assistance, research, and law reform.¹

Introduction and Summary of Recommendations

FIPA commends the B.C. Office of the Information and Privacy Commissioner (“OIPC”) for its attention to the important issue of employee privacy. FIPA supports the OIPC’s commitment to ensuring that employees’ privacy rights are respected through the creation of guidelines to promote rational and consistent interpretation of PIPA, and to assist organizations and individuals in complying with their legal obligations.

FIPA is in support of a large part of the Draft Guidelines – on the whole, they are clear, reasonable, and support a meaningful interpretation of the legislation.

However, there are also several areas of concern, and these are brought to the attention of the OIPC in this submission with the hope that this will assist in the improvement of the Draft Guidelines throughout this consultation process. **FIPA asserts that employees in British Columbia deserve the highest possible protection of their privacy rights.**

To this end, FIPA recommends that the OIPC take the following actions in relation to the Draft Guidelines:

1. Recognize the status of privacy rights as fundamental, constitutionally protected rights.
2. Recognize that neither individual nor collective employment contracts can detract from an employee’s privacy rights.
3. Support the view that privacy rights generate benefits for both employers and employees.
4. Adopt a rigorous and contextual interpretation of what is “reasonable.”
5. Require a meaningful kind of “demonstration” of any justification for infringing on privacy rights, such as a written explanation, showing a logical justification for the action, and some evidence to support that justification.

¹ For more information, please see <http://www.fipa.bc.ca>.

6. Amend the Draft Guidelines to provide that employers must specify the aspect of an employment relationship that is being “managed,” and how, in order to justify the reasonableness of any invasion of employee privacy.
7. Adopt the Draft Guidelines relating to covert surveillance in full, reinforcing the limitation of covert surveillance to investigations of a reasonably founded specific allegation.
8. Adopt further measures to ensure the protection of any health or medical information about employees, including introducing an important role for health professionals whenever such information is collected, used or disclosed.
9. Adopt the Draft Guidelines on the notification requirement in full, and include concrete examples of what might qualify as notification. In different circumstances, the notifying document might be posted on a bulletin board, sent directly to all employees, or described during a meeting.
10. Amend the Draft Guidelines to explicitly state that any collection, use or disclosure of employee personal information without consent must meet both the reasonableness and notification requirements. Employers cannot fulfill their obligations under the *Act* by notifying employees of a surveillance practice, where it is unreasonable.
11. Add a provision to the Draft Guidelines affirming that information used for the purpose of managing an employment relationship is always subject to the reasonableness and notification requirements, regardless of whether that information is also related to an insurance or benefit plan.
12. Require employers to publish and distribute information about employee privacy rights and the role of the OIPC in all workplaces.

Approach to Privacy Rights in the Employment Context

Privacy rights as fundamental rights in Canadian democracy

The Purpose of the *Personal Information Protection Act* (“PIPA”) is stated in section 2:

The purpose of this *Act* is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need for organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

This statement of purpose points to a fundamental element of the law on employee privacy: the privacy *rights* of employees are to be balanced against the business *needs* of their employers. When determining the appropriate balance, it is essential to bear in mind the contrasting characterizations of the interests at state.

The “need for organizations to collect, use or disclose personal information” is a function of practical reality: organizations must be able to take these actions in order for certain business endeavours to succeed or for systems to function. Employers need to have a workable human resources regime in order to function effectively and fairly.

However, the business needs of employers can only be met to the extent that they respect and uphold the privacy rights of individual employees. Privacy rights are of fundamental importance in our society, both as exercised by individuals and as an essential feature of our democracy.

The Supreme Court of Canada has described the high value of privacy rights in Canada in the case of *Dagg v. Canada*:

The protection of privacy is a fundamental value in modern, democratic states.... An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy -- the freedom to engage in one's own thoughts, actions and decisions.²

The scope of privacy rights in Canada includes the right to control information about oneself. As described by Mr. Justice La Forest in *R. v. Dymnt*:

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.³

² *Dagg v Canada*, [1997] 2 S.C.R. 403 at para. 65, La Forest (dissenting but not on this point).

³ *R. v. Dymnt*, [1988] 2 S.C.R. 417 at 429-430.

The Supreme Court of Canada has also recognized that privacy rights are worthy of constitutional protection, including through sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).⁴

In the criminal law context, s. 8 of the *Charter* protects privacy rights by guaranteeing the right to be secure against unreasonable search and seizure by the state. In that context, an individual’s reasonable expectation of privacy imposes limitations on how the state can search for evidence of his or her wrongdoing.⁵ Police can only invade an individual’s privacy with prior judicial authorization in the form of a warrant, or in certain other specific circumstances. It is important to note the depth of privacy rights protected by section 8, even in a context where the state may have extremely compelling reasons to conduct a search.

When balancing employers’ commercial interests against employee privacy, it is important that privacy rights be given considerable weight. As noted above, under the *Charter*, even the state’s interest in investigating and prosecuting serious crime must be held in sufficient check to protect our right to privacy. Economic interests clearly must give even more ground to preserve privacy.

Further, it is important to note that the nature of the intrusion on an individual’s privacy in the employment context may be equally as serious as the intrusions occasioned by a criminal investigation, including electronic surveillance, interception and inspection of personal email, searches of personal belongings, and medical testing.

While the *Charter* does not apply directly to private sector employers,⁶ it is a well-established principle that the law should be interpreted in a manner consistent with the *Charter*.⁷

In this context, FIPA submits that the principles surrounding the constitutional protection of privacy rights in s. 8 of the *Charter* should inform the interpretation of privacy rights set out in PIPA and the guidelines that are used to apply them in the employment context. Moreover, the protection afforded to employees under PIPA should carry with it the weight of constitutional jurisprudence which protects the privacy of Canadians.

Recommendation 1:

Recognize the status of privacy rights as fundamental, constitutionally protected rights.

⁴ *Dagg*, *supra* note 2 at para. 66, *La Forest* (dissenting but not on this point).

⁵ Peter W. Hogg, *Constitutional Law of Canada*, Vol. 2, Loose-leaf Edition (Scarborough: Carswell, 1997) at 45.2.

⁶ *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

⁷ *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West)*, [2002] 1 S.C.R. 156 at para. 18.

Privacy rights cannot be removed by contract

FIPA submits that since the Draft Guidelines are created for the purpose of assisting in the interpretation of PIPA, it is important for the Draft Guidelines to specify that the privacy rights guaranteed by PIPA are guaranteed to *all* employees, whether their employment contract is an individual or a collective one, and regardless of the content of that contract. As set out by the Supreme Court of Canada in *Parry Sound*, the statutory rights of employees are implied into every collective agreement. Mr. Justice Iacobucci, speaking for the majority, held:

“[T]he substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights....[H]uman rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.”⁸

Therefore, FIPA proposes that the Draft Guidelines be amended to include a guideline explicitly drawing this essential characteristic of privacy rights to the attention of employers and arbitrators.

Recommendation 2:

Recognize that neither individual nor collective employment contracts can detract from an employee's privacy rights.

Respect for privacy rights generates benefits for both employers and employees

FIPA would like to stress the extent to which both employees and their employers benefit from the robust and substantial protection of individual employee privacy rights. While the PIPA does provide a framework in which employee rights are balanced *against* employer needs, there are very substantial ways in which respect for privacy rights enhances the interests of all involved. The discussion paper provides two examples: the employee and employer's shared interests in maintaining a safe and healthy work environment, and by promoting productivity by treating workers with respect. Similarly, employers will benefit from having rigorous protection of privacy practices because they will attract and retain the best employees, who are increasingly aware of their rights under the law.⁹

Recommendation 3:

Support the view that privacy rights generate benefits for both employers and employees.

⁸ *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324.*, [2003] 2 S.C.R. 157 at para. 28.

⁹ Murray Rankin, Q.C. “Workplace Privacy and the New Private Sector Privacy Legislation,” *Privacy: Materials prepared for the Continuing Legal Education seminar, Privacy*, held in Vancouver, B.C. on February 19, 2004 at p. 3.1.02.

Specific Issues and Concerns

Rigorous standards in determining what is reasonable

The criterion of “reasonableness” is at the heart of PIPA’s provisions on employee privacy, and of the Draft Guidelines. In particular, employee information can be collected, used or disclosed without consent if such action is “reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual.” The purposes identified in PIPA (“establishing, managing, or terminating an employment relationship”) are extremely broad in scope. Therefore, it is important that the criterion of reasonableness be substantial enough to protect the privacy rights of employees.

FIPA submits that, given the importance of what is at stake, it is appropriate that employers be required to meet a very high standard of “reasonableness” when their business interests invite them to infringe on the privacy of their employees.

Further, since privacy rights are fundamentally individual rights, the standard of “reasonableness” should be assessed from the employee’s perspective. When evaluating the appropriate level of infringement on their privacy, employees might ask: “What must I reasonably disclose to establish an employment relationship with my employer? What must I reasonably disclose to manage that relationship? What must I reasonably disclose to end that relationship?”

FIPA submits that when determining whether an employer’s action is “reasonable” for those specific purposes, the law must look to what a reasonable employee would accept in order to ensure the functioning of the employment relationship. This process is extremely context-dependent, and requires a careful consideration of the type of privacy invasion contemplated, as well as the importance of the business need at stake.

Recommendation 4:

Adopt a rigorous and contextual interpretation of what is “reasonable.”

Employers must “demonstrate” justification

Throughout the Draft Guidelines, the onus lies on employers to “demonstrate” that they can justify any infringement on the privacy of an employee. For example, Draft Guideline 1.0 (4) requires employers to demonstrate that pre-employment testing is accurate and relevant to the job concerned. Draft Guideline 2.1(4) requires that employers be prepared to demonstrate that any monitoring of employees is necessary in order to achieve their purposes, or at least that it will be substantially more effective than other methods of doing so.

FIPA submits that the requirement of “demonstration” is essential to fulfilling the goals of PIPA in relation to employee privacy. That is, it is insufficient for employers to merely

assert that monitoring will enhance productivity, or that testing assists in hiring. Rather, employers must make a reasonable case for how this will occur.

FIPA submits that in this context, “demonstration” will usually require a written explanation, showing a logical justification for the action, and some evidence to support that justification.

Recommendation 5:

Require a meaningful kind of “demonstration” of any justification for infringing on privacy rights, such as a written explanation, showing a logical justification for the action, and some evidence to support that justification.

“Managing” an employment relationship

PIPA provides that employee information can be collected, used or disclosed without consent if such action is “reasonable for the purposes of ...managing.... an employment relationship.” This characterization is extremely broad, and FIPA submits that the Draft Guidelines should be amended to provide further guidance on this issue. As stated, the purpose “managing an employment relationship” is much too vague to conduct a meaningful investigation into whether or not a privacy infringement for that purpose is reasonable.

Specifically, FIPA submits that the Draft Guidelines should be amended to state that employers should be required to specify what aspect of the employment relationship is being managed, and how.

Recommendation 6:

Amend the Draft Guidelines to provide that employers must specify the aspect of an employment relationship that is being “managed,” and how, in order to justify the reasonableness of any invasion of employee privacy.

Covert surveillance into a specific allegation

Throughout the consultation process leading up to the enactment of PIPA, FIPA has expressed great concern over the overly broad definition of “investigation” that appears in the Act. In the context of the Draft Guidelines, these concerns emerge in relation to the authority of employers to conduct covert surveillance of their employees. The Draft Guidelines, following s. 12(1)(c) of the Act, propose that an employer may only monitor employees without consent or notification where the employer can demonstrate that a) it is reasonable to believe that a breach of an employment agreement has taken place, and b) there is an ongoing investigation into a specific allegation.

FIPA submits that the Draft Guidelines go a considerable way towards limiting the scope of what an employer may do in the name of an “investigation.” In particular, it is important to insist on the part of the Draft Guideline which requires an ongoing investigation into a “specific” allegation. In FIPA’s submission, a “specific allegation” can only be just that: an allegation that a specific person has committed a specific act that may reasonably be a breach of their specific employment agreement.

Following the principles in PIPA and the Draft Guidelines, employers are not permitted to conduct covert surveillance on the basis of general concerns about the work environment as a whole, or on the basis of unreasonable allegations. This perspective is endorsed by recent decisions of the federal Privacy Commissioner,¹⁰ as well as arbitral law.¹¹

Recommendation 7:

Adopt the Draft Guidelines relating to covert surveillance in full, reinforcing the limitation of covert surveillance to investigations of a reasonably founded specific allegation.

Drug and alcohol testing

Drug and alcohol testing involves a major infringement of an individual’s privacy, and invokes the possibility of employers obtaining or using employees’ health information for purposes other than those carefully spelled out in PIPA and the Draft Guidelines. The Draft Guidelines specifically point to the prohibition on employers, for example, conducting a pregnancy test on a blood sample obtained for the purpose of a drug test.

In order to make certain that the health information of employees is protected to the highest possible standard, FIPA proposes an addition to the Draft Guidelines on drug and alcohol testing, stipulating that employers must not only take reasonable efforts to ensure that test results are accurate, but rather ensure that tests are conducted by properly qualified medical professionals who are independent from the employer, and that the tests are conducted according to accepted medical standards.

¹⁰ For example, in *PIPED Act Case Summary #265*, the federal Privacy Commissioner dealt with the case of two employees of a railway who complained that the company used video cameras ordinarily used for operational purposes to determine that they were leaving company property during regular working hours. In the decision, “the Assistant Commissioner noted that the company did not present any evidence that unauthorized absences from the workplace were a persistent problem with the complainants, or, for that matter, with other employees. The company did not present any evidence of other, less intrusive efforts it had taken to manage the problem of unauthorized absences. She concluded that a reasonable person would not consider it appropriate to use the cameras to manage a workplace performance issue.” Online: Privacy Commissioner of Canada <http://www.privcom.gc.ca/cf-dc/2004/cf-dc_040219_02_e.asp>.

¹¹ In *Ross v. Rosedale Transport Ltd.*, [2003] C.L.A.D. No. 237, the adjudicator held that an employer’s video surveillance of an employee was unreasonable and contrary to *PIPEDA* because the employee had no disciplinary record and had a doctor’s note confirming his functional impairment. The employer could have requested and independent medical examination rather than videotaping the employee at his home.

Further, any samples and the test results themselves should stay in the possession of those medical professionals so that they are protected by the confidentiality of the health care provider – patient relationship, except to the extent required to fulfill the specific purpose identified by the employer. The medical professional would report only that information specifically and reasonably identified by the employer, and would be prohibited from disclosing further information then or at a later time.

Recommendation 8:

Adopt further measures to ensure the protection of any health or medical information about employees, including introducing an important role for health professionals whenever such information is collected, used or disclosed.

Concrete examples of "notification"

PIPA requires that where an employers wishes to collect, use or disclose employee personal information without consent, the employer is required to *notify* employees. Section 2.2 of the Draft Guidelines provides excellent guidance on the details of this requirement. Section 2.2 states that notification should:

- state the purposes for collecting the information
- state the circumstances under which the information may be used or disclosed
- state the type of employee activity being monitored
- state the type of monitoring system employed
- state the degree of monitoring
- be brought to the attention of employees on a regular basis, including upon changes in policy
- explicitly state the policies or requirements with which the employer is monitoring compliance

These details give the concept of “notification” a reasonable and meaningful interpretation. However, FIPA submits that the Draft Guidelines should also include further details in order to ensure their application in practice. In particular, it would be very useful for the Draft Guidelines to provide some concrete examples of what might constitute proper notification. For instance, depending on the circumstances, notification may be fulfilled by posting a document containing all the information noted in Draft Guideline 2.2 on a bulletin board that is regularly viewed by employees. Other circumstances may require that the notifying document be sent directly to each employee. If the proposed surveillance would involve a very high degree of privacy invasion, it may be necessary for employers to meet directly with every employee, to ensure they are aware of the surveillance and its purpose.

Recommendation 9:

Adopt the Draft Guidelines on the notification requirement in full, and include concrete examples of what might qualify as notification. In different circumstances, the notifying document might be posted on a bulletin board, sent directly to all employees, or described during a meeting.

Notification does not guarantee reasonableness

The requirements of PIPA are clear that an employer may only collect, use or disclose employee personal information without consent where that collection, use or disclosure is reasonable for the purposes of establishing, managing or terminating an employment relationship. If this requirement is met, and the employer notifies the employee in advance, the employer may collect, use or disclose the information without the employee's consent.

FIPA submits that to assist employers and employees in fulfilling their legal obligations under the Act, the Draft Guidelines should be amended to explicitly state that any collection, use or disclosure of employee personal information without consent must meet *both* the reasonableness and notification requirements. In particular, fulfillment of the notification requirement alone is insufficient to justify the invasion of an employee's privacy. Employers cannot fulfill their obligations under the Act by notifying employees of a surveillance practice, where it is unreasonable.

This principle was affirmed by a recent decision of the Privacy Commissioner of Canada, in which the Commission held that an employer's video surveillance of employees was not reasonable in the circumstances, and was unjustified despite the fact that the employer had notified the employees of the surveillance.¹²

Recommendation 10:

Amend the Draft Guidelines to explicitly state that any collection, use or disclosure of employee personal information without consent must meet both the reasonableness and notification requirements. Employers cannot fulfill their obligations under the Act by notifying employees of a surveillance practice, where it is unreasonable.

Privacy in relation to insurance and benefits

Section 8(2) of PIPA provides for the deemed consent of some individuals who are beneficiaries under insurance or benefit plans to the collection, use or disclosure of their personal information. It is essential that this provision not be used to negate the privacy rights of employees who are covered by group insurance plans at their workplace, or participate in other employment-related benefit programs.

FIPA submits that insofar as information for the purpose of enrolment or coverage under a plan is also for the purpose of managing an employment relationship, an employer continues to be bound by all of the appropriate requirements under PIPA, including reasonableness and notification.

¹² *PIPED Act Case Summary #279*, online: Privacy Commissioner of Canada http://www.privcom.gc.ca/cf-dc/2004/cf-dc_040726_e.asp.

Recommendation 11:

Add a provision to the Draft Guidelines affirming that information used for the purpose of managing an employment relationship is always subject to the reasonableness and notification requirements, regardless of whether that information is also related to an insurance or benefit plan.

Employee knowledge of rights and remedies

As with any other regime of legal rights, employee privacy rights will only be meaningful to the extent that employees are aware of those rights, and have access to mechanisms to enforce them.

Therefore, FIPA proposes an additional guideline to be added to the Draft Guidelines, which would require employers to publish and distribute information about employee privacy rights and the role of the OIPC in all workplaces.

Recommendation 12:

Require employers to publish and distribute information about employee privacy rights and the role of the OIPC in all workplaces.

Conclusion

The workplaces of today's employees are filled with technologies that have the potential to improve workplace safety, foster communication, make routine tasks more efficient and provide outlets for creativity. However, these same technologies also present the possibility of increasingly persistent and ongoing invasions of employee privacy. The business interests of employers may at times require that employees relinquish some of their privacy in order for the organization to function efficiently and safely. However, these business interests must at all times be measured against the rights of employees, which reflect the fundamental and constitutionally protected value of personal privacy.

No individual should have to give up his or her right to privacy in order to have a job. The OIPC Draft Guidelines are an excellent starting point for the protection of employee privacy in B.C. However, FIPA also submits that the Draft Guidelines have some significant shortcomings, many of which would be addressed by adopting the proposed recommendations.