The Essential Privacy, Access to Information, CASL Forum

Chaired by:

Priscilla Platt and Bonnie Freedman
BLG Privacy and Access to Information Group

November 24, 2014

Borden Ladner Gervais LLP
Toronto, Ontario

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1. Access to Information – A Year in Review

Speakers:
David Dowe and David Goodis
Chaired by:
Priscilla Platt

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1(A): The New Harms Test for Exemptions

“Could reasonably be expected”

- Probability vs. Possibility
- Reasonable expectation of probable harm
- The risk of harm must be beyond merely possible or speculative, but need not be proved on a balance of probabilities

***Ontario (MCSCS) v. Ontario (IPC)*, 2014 SCC 31**

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1(B): What is “Advice” and are Drafts Exempt?

“Advice” is broadly construed

- “Advice” and “recommendations” are different; “advice” is broader
- Full, free and frank participation of public servants and consultants in the deliberative process is protected
- No suggested course of action required, no need to prove communication–drafts (even earlier ones not included in the final) and policy options, are widely exempt

***John Doe v. Ontario (Finance)*, 2014 SCC 36**

See: IPC, PO-3365, July 23, 2014

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1(C): Procurement and the “Supply” Test

To be exempt, information must be:

- Commercial/financial etc.
- Supplied in confidence; and
- Result in a reasonable expectation of harm if disclosed

Note:

- Contract information that is “mutually generated” or “negotiated,” has been held not to be “supplied”

Implications:

- Expectations in the Tender process

***HKSC Developments v. Ontario (IPC)*, 2013 ONSC 6776 (Div Ct)**

***Miller Transit v. Ontario (IPC)*, 2013 ONSC 7139 (Div Ct)**

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1(D): Notice to Third Parties

To notify or not to notify? That is the question.

- The threshold for giving notice is low—"might" be exempt
- A head must give notice re PI or Commercially valuable third party information if:
  - (1) The head is in doubt about whether the information is exempt;
  - (2) The head intends to disclose exempted material to serve the public interest; or
  - (3) The head intends to disclose third party information by severing non-exempt information

***Merck Frosst Canada Ltd v. Canada (Health)*, 2012 SCC 3**

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Exclusions

- **“relating to” and “in relation to” only require “some connection”**
  - *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.)
  - But see: IPC PO-3365, July 23, 2014, where research exclusion was narrowed.

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1(G): Employment Related Records

Implications of *LCBO v. Magnotta Winery*, 2010 ONCA 681

- Branch 2 of litigation privilege extends to settlement discussions
- Settlement minutes, releases, and employee severance agreements if in contemplation of litigation are exempt:
  - Order MO-2713-R, April 4, 2012
  - Order MO-2921, July 29, 2013

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1(G): Employment Related Records

Exclusion does not apply:

- Records containing full names of employees
- Records were part of “normal business” of the office and did not relate to labour relations or employment-related matters

***Ontario (MCSS) v. John Doe*, 2014 ONSC 239 (Div Ct), appeal pending before the Court of Appeal**

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1(G): Employment Related Records

Exclusion for records relating to individuals with hospital privileges (s.65(6)5) of FIPPA

- Applied to a physician with hospital privileges who sought access to records of complaints made about him—Order PO-3336, April 28, 2014

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1(E): When is a Deleted record a "Record"?

Reformatted records--Production vs. Creation

- "Record" is one that can be produced by the institution by means of technical expertise normally used by the institution
- ***Toronto Police Services Board v. Ontario (IPC)*** **(2009), 93 OR (3d) 563 (CA)**

Deleted records

- Deleted records may be the subject of an access request (Order PO-3050, February 9, 2012)
- What about disaster recovery?

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1(E): When is a Deleted record a "Record"?

Deleted records

- **IPC Reports: "Deleting Accountability: Records Management Practices of Political Staff," June 5, 2013 & Addendum, August 20, 2013**
  - Recommendations included:
    - The development of records management policies and procedures
    - Create a legislative duty to document business-related communications and activities
    - Make it an offence to destroy records that may be or are subject to an access request

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1(E): When is a Deleted record a "Record"?

Retention

- **Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014*, Schedule 6 – tabled July 8, 2014 and in Second Reading (Nov 3/14), amending *FIPPA* and *MFIPPA***

  - Reasonable measures to be in place to preserve records
  - Offence to alter, conceal or destroy a record

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1(E): When is a Deleted record a "Record"?

Implications

- Disaster recovery systems and access requests
- The US IRS' irrecoverable e-mails and the *Federal Records Accountability Act of 2014*
  - The Washington Post: "House moves to make destroying e-mails a quick way to delete that federal job of yours," July 28, 2014
- What must you keep, and how long must you keep it for?

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1(F): “Custody or Control”

- City employees’ personal e-mails not business related not in the custody or under control of City despite use of City’s equipment—no right of access

  ***City of Ottawa v. Ontario*, 2010 ONSC 6835**

(1) Does the record relate to a departmental matter?

(2) If so, could the government institution reasonably expect to obtain a copy upon request? At this stage, consideration must be given to:

- The substantive content of the record;
- The circumstances in which it was created; and
- The legal relationship between the government institution and the record holder

***Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25**

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2. Privacy – Essential Update

Speakers:
Ira Nishisato and Robin Gould-Soil
Chaired by:
Bonnie Freedman

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2(A): Establishing Viable Privacy Programs

Guiding principles

1. Proactive and preventative, not reactive and remedial
2. Privacy as the default setting
3. Privacy embedded into design
4. Full functionality – positive-sum, not zero-sum
5. End-to-end security – full lifecycle protection
6. Visibility and transparency
7. Respect for the user, customer or citizen

IPC, "Operationalizing *Privacy by Design*: A Guide to Implementing Strong Privacy Practices," December 2012

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2(B): Breach Management

- **IPC, "Privacy Breach Protocol: Guidelines for Government Organizations" December 1, 2006, revised May 2014**
  - Containment
  - Notification (affected individuals, IPC)
  - Investigation
  - Education and training
  - Cooperation
- **Bill S-4, Second Reading, in Committee, Oct 20, 2014: mandatory breach notification under *PIPEDA***
- **Injunctions**

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COMMON TYPES OF DATA BREACHES

- **Employee crime: employee steals personal information and sells it for profit**
- **Hacking: third party hacks in and accesses personal information (e.g. Sony)**
- **Misadventure: lost or dumped computers/media containing personal information, deficient security in handling of personal information**
- **Business policy: collection of data without permission and/or deficient handling and protection of data**

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BREACH MANAGEMENT – LEGAL REMEDIES

- **PREVENTION: Know your data! What do you have? Why do you have it? How and where is it stored? Who has access to and control over it?**

- **IN RESPONSE TO A BREACH:**
  - Speak to counsel and insurer immediately to ensure you understand your obligations – preservation of evidence, disclosure, protection of privilege, defence and indemnity
  - External Investigators – to bring specific expertise in data breach methods and assist in getting to the bottom of the issues quickly

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RESPONSE TO A BREACH, CONT'D

- Disclosure Orders – to identify wrongdoers and obtain evidence of wrongdoing
- Injunctions – to restrain breaches from continuing and compel removal or return of stolen information
- Civil Search and Seizure Orders – to recover stolen information and obtain/preserve evidence of wrongdoing
- Legal Actions – to recover damages, including investigative, accounting and legal costs

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PRIVACY BREACHES IN THE NEWS

Kmart (October 2014)

- **Hackers breach Kmart's payment data system to steal credit and debit card numbers of an undisclosed number of customers.**

Home Depot (September 2014)

- **Hackers breach payment data systems compromising 56 million payment cards used at US and Canadian stores.**

JP Morgan (September 2014)

- **Names, phone numbers, and addresses for up to 76 million households and 8 million small businesses were exposed. The same hackers may have targeted up to 13 financial institutions.**

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PRIVACY BREACHES IN THE NEWS

eBay (May 2014)

- **Hackers gained access to the personal data of 145 million customers. Stolen information included names, encrypted passwords, email addresses, birth dates, mailing addresses and phone numbers.**

Michaels (April 2014)

- **Hackers used malware installed on point-of-sale machines to steal credit and debit card information from 3 million customers.**

Target (December 2013)

- **Hackers used malware installed on point-of-sale registers to steal 40 million credit and debit card numbers, along with 70 million other pieces of customer information including names, mailing addresses, email addresses, and phone numbers.**

PLUS Dairy Queen, Goodwill, PF Chang's, Neiman Marcus…

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2(C): The IPC's Order-Making Powers for Privacy

- **Under section 59 of *FIPPA* and section 46 of *MFIPPA*, the Commissioner has the authority to order an institution to:**
  - Cease a collection practice that contravenes the *Act*; and
  - Destroy collections of personal information that contravene the *Act*

- **PO-3356-R, June 25, 2014 (JR application pending)**
  - Commissioner ordered the LCBO to stop collecting, and destroy, the personal information of wine club members who ordered through the LCBO's private ordering system
  - See also: MO-2225, July 11, 2007; PO-2826, October 5, 2009

2(D): Employee Privacy Policies

- **Impact of exclusion under M/FIPPA**
- **Is there or should there be an Expectation of Privacy for:**
  - Illegal activity; defamatory actions; conducting personal business?
- **Police search of staff computer and phone:**
  - The expectation of privacy requires a review of policies, practices and customs in the workplace
  - Whether they diminish privacy depends on a consideration of the totality of the circumstances (see R. v. Cole, 2012 SCC 53 and *R. v. Spencer*, 2014 SCC 43)

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2(E): Photocopiers and other Equipment can contain PI

- **Note: Personal information can be hiding in your photocopiers, medical equipment etc.**
- **Duty to ensure PI not left on recycled and lease expired equipment**
- **Be pre-emptive: if leasing, negotiate your rental contract to be inclusive of costs for wiping all information upon return to owner**

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3. Judicial Review, Lawful Access and Class Actions

Speakers:
David Dowe and Barry Glaspell
Chaired by:
Priscilla Platt

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3(1): Judicial Review

Limits of judicial review

- Court cannot consider new arguments or evidence not made or provided to the IPC in the appeal.

  ***Whitney v.* IPC, 2013 ONSC 996 (Div Ct)**

  ***Saiyegh v. Ontario* (IPC), 2014 ONSC 741 (Div Ct)**

Reconsideration vs. Judicial Review

- **Procedural fairness--**fairness necessitates that affected parties have the opportunity to make submissions

  ***LCBO v. Vin de Garde Wine Club*, 2013 ONSC 5854 (Div Ct)**

  ***MCSCS v. IPC*, 2014 ONSC 3295 (Div Ct)**

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3(2): What to do when the Police come Knocking?

Many privacy statutes, including M/FIPPA, have discretionary authority to disclose PI to law enforcement

Warrant requirements

- If police want to use PI as part of a prosecution, if there is a reasonable expectation of privacy, they likely need a warrant
- Special search warrant for computers and cell phones

***R. v. Vu*, 2013 SCC 60**

***R. v. Spencer*, 2014 SCC 43**

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3(3): Ontario's New Tort for Invasion of Privacy

Intrusion upon seclusion

- ***Jones v. Tsige*, 2012 ONCA 32**
  - Damages without proof of harm
  - Individuals can sue if:
    (1) The breach of privacy was intentional or reckless;
    (2) There was an invasion of the plaintiff's private affairs or concerns without lawful justification; and
    (3) A reasonable person would regard the invasion as offensive and causing distress, humiliation or anguish
  - The court also noted, in *obiter*, that the tort could apply to PHIPA
  - Note: Subsequently the courts have certified class actions based on this tort.

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3(3): Ontario's New Tort for Invasion of Privacy AND PHIPA

Class actions

- ***Hopkins v. Kay*, 2014 ONSC 321 (SC)**
  - Employees of the defendant hospital inappropriately accessed the personal health information of patients
  - The hospital terminated the employees and notified patients of the privacy breach
  - A proposed class action was issued in March 2013

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3(3): Ontario's New Tort for Invasion of Privacy AND PHIPA

Class actions, cont'd

- ***Hopkins v. Kay*, 2014 ONSC 321 (SC)**
  - The hospital moved to dismiss or stay the action on the basis that the patients cannot commence a civil action unless the PHIPA complaint and appeal route has been exhausted
  - The hospital argued that the common law tort and the statutory right to sue for breach of privacy, which requires proof of actual harm, could not co-exist
  - The motion judge dismissed the hospital motion
  - The hospital's appeal will be heard on December 15, 2014

4. CASL Update

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4(1): The CRTC's CASL FAQ, July 11, 2014

Coming into force

- Majority of legislation: July 1, 2014
- Private right of action: July 1, 2017

Transition

- Consent to send CEMs is implied until July 1, 2017 where there is an existing business or non-business relationship that includes communication of CEMs
- Express consent obtained before July 1, 2014 remains valid until the recipient withdraws that consent

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4(1): The CRTC's CASL FAQ, July 11, 2014

Liability

- Individual: maximum penalty, per violation: $1 million
- Business: maximum penalty, per violation: $10 million

General

- A CEM is a message, sent to an electronic address, with a purpose to encourage participation in commercial activity
- An electronic address is an email account, a telephone account, an instant messaging account, and any other similar account
- CASL does not apply to CEMs sent to an individual with whom the sender has a "personal relationship"
- CASL does not apply to persons sending CEMs to other persons within their organization, where the CEMs concern the activities of the organizations
- CASL does not apply to persons at another organization, where the CEMs concern the activities of that other organization and the organizations have a relationship

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4(1): The CRTC's CASL FAQ, July 11, 2014

General requirements

(1) Consent

(2) Identification information

(3) An unsubscribe mechanism

Consent

- Two types: express and implied
- Express consent must be obtained through an opt-in, not opt-out mechanism
- Consent may be implied where sender and recipient have an existing business or non-business relationship

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4(1): The CRTC's CASL FAQ, July 11, 2014

Identification

- You must identify yourself, and the persons on whose behalf a CEM is sent
- Where it is not practicable to include identification information in the body of a CEM, then a hyperlink to a webpage including that information is acceptable

Unsubscribe

- You must include an unsubscribe mechanism in the CEM
- This mechanism must be "readily performed" – simple, quick and easy for the end-user

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4(1): The CRTC's CASL FAQ, July 11, 2014

General enforcement approach

- Enforcement response will be based on various factors, including the nature, seriousness and impact of the violation, history of non compliance, and measures taken to prevent from taking place

More information

- For more information, please review our bulletin "Overwhelmed by Canada's Anti-Spam Law? Start Here with the Basics" and visit www.blg.com/antispam

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5. Trends and Closing Remarks

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