

February 12, 2008



Special Committee to Review the Personal Information Protection Act
Office of the Clerk of Committees
Room 224
Parliament Buildings
Victoria BC
V8V 1X4

Attention: Ron Cantelon, Chair

Re: Review of the Personal Information Protection Act

The Canadian Bar Association nationally represents over 35,000 members. The British Columbia Branch (the "CBABC") has approximately 6,000 members who practise law in many different areas. The CBABC has established 67 different Sections which provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform.

The Freedom of Information and Privacy Law Section provides a forum for the exchange of information, networking and education of lawyers practising or interested in the area of access to information and privacy law. Members have disparate interests, backgrounds and practises. Some deal primarily with the Federal legislation such as the Personal Information and Electronic Documents Act ("PIPEDA"), the Privacy Act and the Access to Information Act. Others work for or represent public bodies governed by the BC Freedom of Information and Protection of Privacy Act ("FIPPA"). Many act as privacy and access advocates on behalf of individuals or public interest groups. Many more advise private sector businesses and organizations on the Personal Information Protection Act ("PIPA").

Due to these varying interests and perspectives, it is difficult for the Section to make submissions to the all party committee reviewing the PIPA which reflect the perspective of all members. Rather than try to reconcile disparate points of view, the Section Executive decided to solicit and record input from members in a letter to the committee. Accordingly, the following comments reflect the views of individual Section members and are not necessarily the views of the CBABC or the Section as a whole.

Mandatory breach reporting

Some members do not believe the PIPA should be amended to include mandatory breach reporting or notification provisions. They think mandatory reporting is unnecessary and will not result in any great net benefit. They suggest it will be difficult to articulate a clear threshold requirement for reporting and, as a result, any mandatory requirement will cause uncertainty for organizations and will likely result in over-



reporting of breaches and notification fatigue for the public. This could have the effect of undermining the goals of the statute. Others taking this position say the duty to safeguard personal information set out in Section 34 of the PIPA already implies a duty to notify individuals of breaches in particular circumstances. Further, the guidelines and tools published by the Commissioner on breach notification and assessment are sufficient to assist organizations in assessing their responsibilities in this regard, making amendments to the Act unnecessary.

Other members disagree and support a mandatory reporting and notification requirement. They view mandatory breach reporting as a corollary of the principle of consent, which they see as implying a right to know when a breach has occurred.

Still others take a pragmatic approach. They say if a mandatory reporting requirement is inevitable, the substance of the requirement should be the same for PIPEDA, Alberta PIPA and BC PIPA and that extensive consultation should occur on the content of the requirement in order for it to be as clear and workable as possible for organizations. No blanket requirement should occur without a consideration of such issues as threshold reporting requirements in terms of numbers of individuals affected; categories of information lost; who to notify; timelines and methods for notification; etc.

Given the Alberta Special Committee's recommendation that breaches be reported to the Commissioner, the question arises as to who would then decide on whether notification to individuals was required on a case-by-case basis. Does the BC OIPC have sufficient resources to take on this task?

Public Interest Discretion

Some members are strongly in favor of amending the PIPA to clearly allow the Commissioner discretion to dismiss complaints and/or not to hold inquiries when it is not in the public interest to do so. It is felt that a great deal of the limited resources available to the Commissioner are spent on a minority of applicants who are pursuing individual interests which do not further the purposes and goals of the Act.

Settlement and Confidential Discussions

Some members suggest there should be an exception to the right of access where the information is required (or possibly authorized) by law to be kept confidential. This approach appears to be consistent with the consent exceptions [e.g. ss. 12(1)(h), 15(1)(h) and 18(1)(o)]. While section 3(5) indicates PIPA rights are generally paramount, these consent exceptions indicate exceptions can be considered.

Similarly, some members feel strongly that there should be an exception to the right of access for communications which are sent "without prejudice" (e.g. grievance settlement discussions, settlement privilege documents) as there is for solicitor-client privilege. The proposed exception would promote the full and frank discussion of issues and encourage parties to resolve disputes at an early stage, without litigation.



Business transactions

Although section 20 has generally worked well, the exception currently is limited to personal information about "employees, customers, directors, officers or shareholders" of the organization. It has been suggested that limiting the exception to these classes of information is arbitrary and does not reflect the intention of the provision, which is to allow organizations to disclose personal information that is reasonably necessary to proceed with the business transaction, subject to the protections stipulated in the section. This may include information about other classes of individuals such as candidates for employment, employees of other organizations with which the disclosing organization conducts business, etc. Accordingly, some members have suggested that the exception be expanded to cover all personal information under the custody or control of the organization that is reasonably required to be disclosed in connection with the business transaction.

Cross-Border Data Flows

In the event the committee is asked to consider either express restrictions on cross-border data flows or express disclosure requirements (as has been recommended in Alberta), it is suggested that current obligations to safeguard information are sufficient and the PIPA does not require amendment to prescribe special rules for cross-border data flows. This is consistent with the recommendation of the PIPEDA Review Special Committee and government response.

Amending PIPA to impose particular restrictions or requirements on cross-border data flows may result in inconsistency among the various Canadian private sector privacy legislation and the creation of unnecessarily prescriptive requirements for business (as has been the case with European Union restrictions). Some members suggest that businesses are in the best position to determine the nature and content of appropriate safeguards in particular circumstances. As has been noted by the BC Commissioner, the policy rationale for amending FIPPA in this regard (i.e., imposing specific restrictions due to consumers' lack of alternatives in receiving government services) may not apply in the private sector where consumers generally can choose where they obtain products or services.

Publicly Available Information

Some members are of the view that the exceptions in PIPA for the collection, use, and disclosure of publicly available information without consent are too broad. Specifically, as currently drafted the provisions provide, in effect, that once information becomes publicly available from a prescribed source, such information may be collected, used, and disclosed by an organization for any and all purposes without limitation. This is of particular concern as technological advances have not only increased the scope of public disclosures of large amounts of information, including in electronic form, but also the ability of organizations to use technology for the wholesale copying and 'mining' of such information.

It has been suggested that such exceptions should be brought in line with PIPEDA's provisions which generally allow publicly available information to be used only for the purposes for which the information was made public.



The issue is summarized in the Regulatory Impact Analysis Statement for the applicable PIPEDA Regulation as follows:

"The Regulation is based on a recognition that some personal information is publicly available for a legitimate primary purpose, often with the individual's tacit agreement (e.g., the telephone directory, announcements). In these circumstances, it is reasonable to allow organizations to collect, use and disclose this information without adding the requirement to obtain consent. To require an organization to obtain consent to use this information for its primary purpose would not contribute to the protection of the individual's privacy, would add to the organization's costs and could frustrate some public policy purpose. However, it is also reasonable to insist that any purpose other than the primary one should be subject to the consent requirement." [emphasis added]

Accordingly, some members suggest that the "publicly available" provision in PIPA be limited to the collection, use, and disclosure without consent only for the purposes for which the information was published.

Some members disagree that the "publicly available" provision should be amended. These members feel it is too limiting to confine the collection, use and disclosure without consent to the original purpose and that the suggested amendment would result in an unnecessarily narrow interpretation of the provision.

In sum, members generally feel the PIPA is working well and requires only minor amendments. We would be pleased to discuss our submission further with any members of the committee should they wish. Further, there is a strong interest on the part of some members to participate in a working group providing input on any draft amendments in the event this is of interest to the legislative drafters.

Yours truly

Janina Kon
Co-Chair
Freedom of Information and Privacy Law Section
Canadian Bar Association, BC Branch
Contact Information:
Streamline Counsel Inc.
Tel.: 604-676-1450

And

Cappone D'Angelo
Co-Chair
Freedom of Information and Privacy Law Section
Canadian Bar Association, BC Branch
Contact Information:
McCarthy Tetrault
Tel.: 604 643-7100

Serving the Lawyers of British Columbia
10th Floor, 845 Cambie Street, Vancouver, British Columbia, V6B 5T3
604-687-3404 Toll Free: 1-888-687-3404 Fax: 604-669-9601
Toll Free Fax: 877-669-9601 Email: cba@bccba.org Web: www.bccba.org