



March 4, 2003

Mr. George Radwanski  
Privacy Commissioner  
Office of the Privacy Commissioner of Canada  
Place de Ville  
112 Kent Street, Suite 300  
Ottawa, ON K1A 1H3

Dear Commissioner:

**Re: *Personal Information Protection and Electronic Documents Act***

We are writing on behalf of the National Working Group on Privacy Law of the Canadian Bar Association (the CBA Working Group) concerning implementation of privacy compliance programs under the *Personal Information Protection and Electronic Documents Act* (PIPEDA). The CBA Working Group is comprised of representatives of a number of CBA Sections whose areas of interest may be affected by Canada's evolving privacy laws, including PIPEDA.

The CBA Working Group asks that you consider adopting a more proactive approach in advising organizations on the implementation of privacy compliance programs under PIPEDA. Our recommendation has the twin objectives of assisting organizations to comply with PIPEDA and easing the investigative burdens on your Office.

**Issue: Assisting Organizations to comply with PIPEDA**

Since PIPEDA was enacted, organizations that have sought in good faith to implement privacy compliance programs have needed significant assistance in interpreting and applying PIPEDA.

While counsel can provide some assistance, the legislation is new, complex, and in some respects ambiguous. For example, the interrelationship between the generally worded CSA Model Code Principles, attached as Schedule 1, and the statutory language in Part 1 is unclear. As such, PIPEDA is open to differing interpretations. Of these, the interpretation of your Office will be the most definitive.

For many organizations, implementing privacy compliance programs will require a tremendous commitment of resources over a significant period of time. Each organization requires some level of comfort, ideally prior to expending these resources, that its proposed compliance program will materially comply with the requirements of PIPEDA, as interpreted by your Office.

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However, when an organization currently seeks guidance from your Office on the acceptability of their privacy compliance program, your Office has generally declined to provide a response to this question. Rather, your Office has focused its resources on making basic guidelines available, and investigating consumer complaints.

The current approach of the OPC raises a number of significant concerns:

1. *Uncertainty for the Individual*  
It is of benefit to the individuals affected that an organization's privacy compliance program be in material compliance when it is implemented. Otherwise, each individual may face uncertainty, especially when the organization has, without the benefit of feedback from your Office, misinterpreted the legislation. The organization would be forced to restructure its compliance programs, perhaps even needing to obtain new consent forms.
2. *Additional Unnecessary Costs of Compliance*  
Without being able to obtain a level of comfort from your Office, an organization might expend resources to establish a privacy compliance program which it believes in good faith to conform with requirements of PIPEDA, only to learn that its interpretation differed from that of your Office. In addition to having to incur further costs in restructuring the program, the organization could face serious and unnecessary damage to its goodwill.
3. *Overemphasis on your Office's Commitment of Resources to Investigation*  
As the date for full application of PIPEDA (January 1, 2004) approaches, your Office will be subject to increasing demands on its resources. By proactively assisting organizations to comply with the legislation, your Office reduces the likelihood that these organizations will later be subject to complaints that your Office will be required to investigate. In turn, this allows your Office to focus its investigative efforts on those organizations that are not seeking to comply. Scarce resources would be used more efficiently.

In addition, a more proactive approach by your Office would add a measure of certainty to the process of implementing privacy compliance programs. Your Office would send a signal to organizations that it is in their interest to adopt a proactive approach in designing and implementing their privacy compliance programs.

### **Recommendation: Proactive Mechanisms to Assist Organizations to Comply with PIPEDA**

The CBA Working Group recommends that your Office adopt more a proactive approach in assisting organizations to comply with PIPEDA. This could involve:

- *responding to name/no-name inquiries* from organizations on PIPEDA compliance issues;
- *issuing of non-binding comfort letters*, with qualifications your Office considers appropriate;
- *responding to inquiries from sector/industry organizations* on specific issues in their sector/industry; and
- depending on available resources, providing a *qualified seal of approval* from your Office where an organization requests it. This could be based on privacy compliance documentation provided by an organization and thus qualified by the assumption that the organization complies with such documentation.

The Canada Customs and Revenue Agency (the CCRA) and the Commissioner of Competition have adopted a similar proactive approach with interpretation of the *Income Tax Act* and the *Competition Act* respectively. Both respond to name/no-name inquiries. In addition, the CCRA issues binding advance tax rulings and the Commissioner of Competition issues binding advisory opinions. Also, our understanding is that the privacy commissioner in British Columbia intends to adopt a similar proactive approach to assisting in the interpretation of the provincial privacy legislation, once enacted.

In closing, the CBA Working Group believes that if your Office adopts a more proactive approach in responding to queries about the suitability of proposed privacy compliance programs, the result would be a greater degree of PIPEDA compliance by organizations. Ultimately, the overall objective of the PIPEDA would be further advanced, in that there would be better protection of personal information.

We would be most pleased to discuss this recommendation at greater length.

Yours truly,

*“original signed per Wendy Parkes”*

Roger McConchie  
C-Chair

*“original signed per Wendy Parkes”*

David Young  
Co-Chair

cc: Richard Simpson  
Director General  
Electronic Commerce Branch  
Industry Canada