

CED: An Overview of the Law

Privacy and Freedom of Information

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I.1-II.3

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I.1: Introduction – Purpose

See Canadian Abridgment: PRI.I.3.d Privacy and freedom of information — Federal privacy legislation — Collection of personal information — Purpose and use; PRI.II.3.c Privacy and freedom of information — Provincial privacy legislation — Collection of personal information — Purpose and use; PRI.III.3.c Privacy and freedom of information — Provincial health records legislation — Collection of personal information — Purpose and use

Federal and provincial legislation provides individuals with a right of access to information in records under the control of government institutions, provides protection of the privacy of individuals about whom personal information is held by government institutions, and provides those individuals with access to that information. Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Manitoba, and the Yukon's legislation state the additional purposes of providing control over the manner in which the government may collect information from individuals, the use that the government may make of that information, and the right to request corrections. Prince Edward Island, Quebec, and Saskatchewan's legislation omit the purpose but conform to the federal and other provincial legislation in most respects. Ontario, Saskatchewan and Nova Scotia have municipal legislation which conforms to the same purpose as federal and provincial legislation, but deals exclusively with information held by local authorities.

The Access to Information Act and the Privacy Act are a seamless code with complementary provisions that can, and should be, interpreted harmoniously. Both Acts must be read jointly and neither takes precedence over the other.

Federal and provincial legislation also provides rules for the collection, use, and disclosure of personal information in a manner that respects the privacy of individuals and recognizes the needs of private and non-governmental organizations to collect, use, and disclose personal information for purposes that a reasonable person would consider

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appropriate.

This legislative scheme closely mirrors the procedures provided in the existing federal public sector legislation. In addition, the legislation provides for the use of electronic alternatives where federal laws contemplate the use of paper to record or communicate information or transactions.

Provincial legislatures in British Columbia, Manitoba, Saskatchewan and Newfoundland and Labrador have enacted statutes which expressly create a right of privacy.

I.2: Introduction – Definitions

See Canadian Abridgment: PRI.I.3.a.i Privacy and freedom of information — Federal privacy legislation — Collection of personal information — Definitions — Personal information; PRI.I.3.a.ii Privacy and freedom of information — Federal privacy legislation — Collection of personal information — Definitions — Exempt bank; PRI.I.3.a.iii Privacy and freedom of information — Federal privacy legislation — Collection of personal information — Definitions — Miscellaneous; PRI.II.3.a Privacy and freedom of information — Provincial privacy legislation — Collection of personal information — Definitions; PRI.III.3.a.i Privacy and freedom of information — Provincial health records legislation — Collection of personal information — Definitions — Health record; PRI.III.3.a.ii Privacy and freedom of information — Provincial health records legislation — Collection of personal information — Definitions — Health care professional; PRI.III.3.a.iii Privacy and freedom of information — Provincial health records legislation — Collection of personal information — Definitions — Miscellaneous

A "head" of an institution, in the case of a federal department or ministry of state, or Ontario ministry, is the member of the Queen's Privy Council for Canada, or minister of the Crown in the right of Ontario who presides over the ministry, in the case of the Ontario Assembly, is the Speaker, and, in the case of any other institution, is the person designated as the head of the institution by order in council, statute, regulation, or appointment. In an Ontario municipality the "head" is a single member of the council or committee of members designated by the members of the council.

In Alberta, British Columbia and the Northwest Territories, a "head" of a public body is the member of the Executive Council who presides over a ministry, department, branch, or office of the government, or the appointee who presides over an agency, board, commission, or corporation designated as a public body, or anybody designated as the head of a local public body, or the chief executive officer in all other circumstances.

In Manitoba, Newfoundland and Labrador, and Nova Scotia, the "head" is the minister who presides over a department, the chief executive officer of an incorporated government agency, the minister charged with the administration of an unincorporated government agency,

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or any other person designated by a local public body or by regulation, and in Newfoundland and Labrador, the "head" is the speaker in the House of Assembly.

In New Brunswick, the "head" of a public body, in the case of a department, secretariat or office of the Province of New Brunswick specified in the Public Service Labour Relations Act, is the minister of the Crown who presides over it; for other public bodies the "head" is designated in the Act. In Quebec, the "person in charge" is the person exercising the highest authority in a public body.

In Prince Edward Island and Saskatchewan, the "head" is the member of the Executive Council responsible for the administration of the department, secretariat, or other similar agency of the provincial government, or the prescribed person in the case of a board, commission, Crown corporation, or other body. In a Saskatchewan municipality, a "head" is the mayor, reeve or chairman of the local advisory committee, or in the case of any other local authority, the chairperson of the governing body of the local authority or the individual designated as the head by the governing body or the local authority.

A federal "government institution" means any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of the Financial Administration Act. In Ontario, an "institution", or in Manitoba, a "government agency", is a ministry of a provincial government, and any agency, board, commission, corporation, or other body designated as an institution by statute, regulation, or otherwise. The Legislative Assembly of Ontario is also an "institution", but the Freedom of Information and Protection of Privacy Act only applies to it in respect of records of reviewable expenses of the opposition leaders and the persons employed in their offices, and in respect of the personal information contained in those records. In Quebec, a government agency includes agencies to which the government or a minister appoints the majority of the members, to which, by law, the personnel are appointed in accordance with the Public Service Act, or whose capital stock forms part of the domain of the State. A municipal "institution" means a municipality, a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management, and any agency, board, commission, corporation or other body designates as an institution in the regulations.

In certain provinces, a government institution is referred to as a "public body" or "local government body". A "public body" is a ministry, department, branch, or office of the government; an agency, board, commission, corporation, office, or other body designated as a public body by the regulators; and, in Alberta, the Executive Council Office; the office of a member of the Executive Council; the Legislative Assembly Office; the office of the Auditor

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General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner, or the Information and Privacy Commissioner. A "public body" does not include the office of the Speaker of the Legislative Assembly and the office of a Member of the Legislative Assembly, or the courts of the province.

However, while the legislation has codified the individual's right to access to information held by the government, it has neither replaced nor eliminated traditional rights that individuals had in acquiring information from the government under the common law. The federal legislation specifically provides that the Act is intended to complement and not replace existing procedures for access to government information. Therefore, whatever judicial records may have been available under the common law prior to the enactment of access legislation remain available. It must be noted that courts are usually excluded from the definition of government institutions.

II.1: Administration – Minister

See Canadian Abridgment: PRI.I.6 Privacy and freedom of information — Federal privacy legislation — Miscellaneous; PRI.II.4 Privacy and freedom of information — Provincial privacy legislation — Miscellaneous; PRI.III.4 Privacy and freedom of information — Provincial health records legislation — Miscellaneous; PRI.IV.1.e Privacy and freedom of information — Freedom of information — Federal legislation — Miscellaneous; PRI.IV.2.e Privacy and freedom of information — Freedom of information — Provincial legislation — Miscellaneous

The federal minister must review the manner in which government records are maintained and managed to insure compliance with the Access to Information Act, prescribe required forms, prepare and distribute to government institutions directives and guidelines concerning the operation of the Act, cause statistics to be collected on an annual basis for the purpose of assessing compliance with the Act, and prescribe the form and content of reports to be delivered to Parliament, except as any of these duties may relate to the Bank of Canada.

The federal minister must review the manner in which personal information banks are managed and maintained to insure compliance with the Privacy Act, assign a registration number to each personal information bank, prescribe required forms, prepare and distribute to government institutions directives and guidelines concerning the operation of the Act, and prescribe the form and content of reports to be delivered to Parliament, except as any of these duties may relate to the Bank of Canada. The minister will continue to review existing personal information banks and proposals for new personal information banks, and will make recommendations regarding the use or termination of underused banks. The minister must approve any change to or the creation of any personal information banks.

Ontario's Lieutenant Governor in Council may designate a minister of the Crown as the minister responsible for matters regarding public access to information and protection of

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privacy.

In Alberta, British Columbia, Manitoba and Saskatchewan, the designated minister must prepare an annual report about the operation of the Act and submit it to the Legislative Assembly.

The federal and Ontario ministers must insure that a list of all institutions is published each year, or on a periodic basis not to exceed one year, respectively, and that the list will include where an applicant may make a request for access to a record, the name and office of the head of the institution, where all public information about the institution is available, and whether the institution has a library or reading room available for public use, and, if so, its address. The minister must cause to be published an index describing each organization and the responsibilities of each institution in detail; a list of the general classes and types of records prepared by or in the custody of each institution; and the title, business telephone number, and business address of the head of each institution. These materials must be made available to the public for inspection and copying. The federal minister must update the information contained in the publications by means of a bulletin published twice a year.

In Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Saskatchewan and the Yukon, the minister responsible for the administration of the Act must prepare a directory to assist in identifying and locating records in the custody or under the control of the provincial government. In Saskatchewan, the minister must also ensure that the directory is kept reasonably up to date and that copies of it are made available to the public through libraries, electronic information networks and government offices.

In Quebec, the minister must receive an annual report on how the Act is being observed and on request, a copy of the final notices it sends to a department or a government body, and a copy of the rules, reports, prescriptions and orders arising from its oversight functions. The report of activities must be tabled in the National Assembly of Québec within 30 days of its receipt, if the assembly is in session, or, if it is not sitting, within 30 days of the opening of the next session, or of resumption. The designated minister shall also publish in the *Gazette Officielle du Québec* the text of every draft regulation, with a notice indicating that after a period of not less than 45 days following the publication, the text will be submitted to the government for adoption.

II.2: Administration – Information and Privacy Commissioner

See Canadian Abridgment: PRI.IV.1.e Privacy and freedom of information — Freedom of information — Federal legislation — Miscellaneous; PRI.IV.2.e Privacy and freedom of information — Freedom of information — Provincial legislation — Miscellaneous

While a corporation incorporated under the *Canada Business Corporations Act* is

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prohibited from engaging in the business of a company to which the federal *Trust and Loan Companies Act* applies, a corporation under Ontario's *Business Corporations Act* may be incorporated with its powers restricted by its articles to lending and investing money on mortgages and real estate, or otherwise with its powers restricted by its articles to accepting and executing the office of liquidator, receiver, assignee, trustee in bankruptcy or trustee for the benefit of creditors and to accepting the duty of and acting generally in the winding-up of corporations, partnerships and estates, other than estates of deceased persons. The corporation is not deemed to be a corporation within the meaning of the provincial *Loan and Trust Corporations Act* by reason of conducting that business. The number of its shareholders, exclusive of employees of the corporation, is limited to five. Nor may the corporation issue debt obligations except to its shareholders, or borrow money on the security of its property except from its shareholders, or receive money on deposit, or offer its securities to the public. In general terms, this allows a private corporation to engage in some functions reserved to companies under the *Loan and Trust Corporations Act*, provided that it does not raise funds by public subscription.

In Alberta, British Columbia, Newfoundland and Labrador, the Northwest Territories, Ontario, Prince Edward Island, Quebec, and Saskatchewan, the Lieutenant Governor in Council must, on the recommendation of the Legislative Assembly, appoint an Information and Privacy Commissioner as an officer of the legislature, who is to hold that office for a prescribed period.

The federal Information Commissioner and the federal Privacy Commissioner are appointed for periods of seven years by the Governor in Council after approval by resolution of the Senate and House of Commons. The federal Information Commissioner may be appointed as the federal Privacy Commissioner, thus combining both functions.

In Manitoba and the Yukon, the ombudsman fulfils much the same role as the Information and Privacy Commissioner in the other provinces. The ombudsman is appointed pursuant to the Ombudsman Act.

In Quebec, the commission is a panel consisting of at least five members, including a chair and a vice chair. There is an oversight division and an adjudicative division; the term for a member in either division is five years. The members are appointed, on a motion of the Prime Minister, by a resolution of the National Assembly of Québec approved by not less than two-thirds of its members. The chair of the commission is responsible for the management and administration of the affairs of the commission. The functions of the chair include fostering the participation of the members in the formulation of guiding principles for the commission so as to maintain a high level of quality and coherence in its decisions; coordinating and assigning the work of the members, seeing that standards of ethical conduct are observed; and promoting the professional development of the members.

In Alberta, British Columbia, Newfoundland and Labrador, Ontario, Prince Edward

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Island, and Saskatchewan, the commissioner, and in Manitoba and the Yukon, the ombudsman, has broad powers defined by statute to conduct investigations or audits to ensure compliance with the Act and may make orders whether or not a review is requested or the order results from an investigation, audit or inquiry; inform the public about the Act; receive comments from the public about the administration of the Act; research anything affecting the achievement of the Act's purposes; comment on the implications for freedom of information or for protection of privacy of proposed legislative schemes or government programs; comment on the implication for the protection of privacy of using or disclosing personal information for record linkage; authorize the collection of personal information from sources other than the individual the information is about; notify the head of a government institution of the institution's failure to assist applicants for access to information; and advise the heads of government institutions on how to fulfil the purposes of the Act. The federal Information Commissioner and the federal Privacy Commissioner have more limited powers. However, with regard to the conduct of an investigation they have broad powers and, once the investigation is finished, they can only issue recommendations and not orders to disclose the requested records.

In the Northwest Territories, the commissioner may engage in research into matters affecting the carrying out of the purposes of the Act, receive representations about the operation of the Act, and comment on the implications for privacy protection of proposed legislative schemes or government programs.

In Quebec, the commission must inquire into the degree to which the Act is observed, approve agreements entered into between public bodies, give its opinion on the draft regulations, agreements and orders submitted under the Act, establish rules for the keeping of the register, see to it that the confidentiality of personal information contained in files held by public bodies respecting the adoption of a person is respected, and see to it that the confidentiality of personal information contained in files held by the Public Curator on persons whom he or she represents or whose property he or she administers is respected.¹³

The commissioner in Alberta, British Columbia and Prince Edward Island has the power to investigate and try to resolve complaints regarding duties of the heads of government institutions; extensions of time for responding to access requests; fees; corrections of personal information; and violations of the manner in which personal information was collected, used, or disclosed by a government institution or its employee, officer, director or service provider's employee or associate. The commissioner also has the power to authorize the head of a government institution to disregard an access request or an application for personal information because it is repetitious, would unreasonably interfere with the operation of the government institution, would amount to an abuse of the right to make a request, or is frivolous or vexatious.

In Ontario, the commissioner may conduct an inquiry to review the decision of a head of

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a government institution, or may authorize a mediator to do the same; and may examine any record in the custody or control of an institution pursuant to that investigation.

In Saskatchewan, the commissioner has the power to research any matter affecting the achievement of the purposes of the Act; conduct public education programs and provide information about the Act; and receive recommendations concerning the operation of the Act.

The Privacy Act does not grant the commissioner the capacity to sue. The commissioner cannot extend his or her authority beyond what was granted by Parliament.

II.3: Administration – Administrative Duties

See Canadian Abridgment: PRI.IV.1.e Privacy and freedom of information — Freedom of information — Federal legislation — Miscellaneous; PRI.IV.2.e Privacy and freedom of information — Freedom of information — Provincial legislation — Miscellaneous

In Alberta, British Columbia, Ontario and Saskatchewan, a head of an institution must make available all manuals, directives, or guidelines prepared by the institution, issued to its officers, and containing interpretations of the provisions of any enactment or scheme administered by the institution where the interpretations are to be applied by any officer who determines an application by a person for a right, privilege, or benefit conferred by the enactment or scheme; whether to suspend, revoke, or impose conditions on a right, privilege, or benefit already granted to a person under the enactment or scheme; or whether to impose an obligation or liability on a person under the enactment or scheme.

The federal and Ontario Acts further provide that a head must make available all instructions, guidelines, procedures and methods used by officers of the institution to carry out the administration or enforcement or the provisions of any enactment or scheme administered by the institution that affects the public. He or she may delete from the document any part that he or she would have been entitled to refuse to disclose under a request for the record, but must include a statement that a deletion has been made, a brief description of the part deleted, and a reference to the provisions under which the part was deleted. These materials will be made available to the public for inspection and copying.

In Quebec, some public bodies must comply with the regulation respecting the distribution of information and the protection of personal information. In accordance with this regulation, the public bodies subjected to this regulation must be proactive in the distribution of the information and must distribute specific documents and information through a website, insofar as the information has been made accessible by law. In accordance with that regulation, public bodies must also take specific measures to protect personal information.

A head of an institution must submit an annual report to the commissioner stating the

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number of requests the institution has received for access to records, the number of times the head refused access to records and on what grounds, the number of times that personal information was disclosed for a purpose other than involving disclosure on a regular basis and the amount of fees the institution collected. The annual report must be made available to the public for inspection and copying.

In Ontario, every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.