



**5109/00/EN
WP 39**

**Opinion 2/2001 on
the adequacy of the Canadian
Personal Information and Electronic Documents Act**

Adopted on 26th January 2001

The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent EU Advisory Body on Data Protection and Privacy. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 14 of Directive 97/66/EC. The Secretariat is provided by:

The European Commission, Internal Market DG, Unit Free flow of information and data protection.
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THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995¹

having regard to Articles 29 and 30 paragraphs 1 (a) and 3 of that Directive,
having regard to its Rules of Procedure and in particular to articles 12 and 14 thereof

has adopted the following OPINION:

Introduction

Canada has had federal legislation to protect personal information in the public sector since the 1983 Privacy Act. The Act establishes rules applying to information collected and used by government and introduces a fair information code to regulate government handling of personal records. It also gives the Federal Privacy Commissioner broad powers to investigate individuals' complaints, to launch complaints and to audit federal agencies' compliance. Most provinces (with the exception of Prince Edward island) have similar provisions. The Privacy Act is currently being reviewed.

As for the private sector, the Personal Information and Electronic Documents Act received Royal Assent on 13 April 2000. The Act will apply to private sector organisations that collect, use or disclose personal information in the course of commercial activities. It enter into force in three stages:

Stage 1 : On 1st January 2001, the Act will apply to every organisation which operates as a federal work, undertaking or business. It will apply to personal information of clients and employees in the federally regulated private sector, such as airlines, banking, broadcasting, inter-provincial transportation and telecommunications. The law will also apply to all organisations that disclose personal information for consideration outside a province or outside Canada.

Stage 2 : On 1st January 2002, the law will apply to personal health information for the organisations and activities already covered in the first stage (i.e. federally regulated private sector or out of province/country exchanges).

Stage 3: As from 1st January 2004, the law will extend to every organisation that collects, uses or discloses personal information in the course of a commercial activity within a province, whether or not the organisation is a federally-regulated business or not. Where and whenever a province adopts legislation that is substantially similar, the organisations, classes of organisations or activities covered will be exempted from the application of the federal law for intra-provincial transactions.

¹ Official Journal no. L 281 of 23/11/1995, p. 31, available at:
http://europa.eu.int/comm/internal_market/en/media/dataprot/index.htm

The Personal Information and Electronic Documents Act

The privacy provisions in Schedule 1 of the Act are those of the CSA Model Code for the Protection of Personal Information, recognised as the Canadian national standard in 1996.

These provisions have been compared with the main provisions of the directive taking into account the Working Party's opinion on "Transfers of personal data to third countries : Applying Articles 25 and 26 of the EU data protection directive »².

Below are some specific issues to which the Working Party draws the Commission's attention:

Scope of the Act

Organisations covered: The Act applies to every organisation and in its first stage to organisations that operate as a federal work, undertaking or business. An organisation includes an association, a partnership, a person and a trade union. The Act contains a non-exhaustive list of federal works subject to the Act. Although most federally regulated organisations are captured under this definition, not all types of organisations are federal works. For instance, insurance companies and credit unions are not federal works for the purposes of the Act.³

Commercial activity: The Act applies to information that is collected, used or disclosed in the course of commercial activities. These include any transaction or any regular course of conduct that is of a commercial character including the selling, buying or leasing of donor, membership of other fund-raising lists.

Non-profit organisations and charities are therefore not subject to the Act unless they engage in a commercial activity.

Furthermore, the Act does not apply when an organisation uses personal information solely for journalistic, artistic or literary purposes, nor does it apply to personal information used solely for personal or domestic purposes. Organisations to which the federal Privacy Act applies are also not covered.

Sensitive Data:

The Working Party notes that sensitive data is not identified as such. Data is regarded as sensitive depending on the context in which it is used. There is no prohibition on the collection of sensitive data. However, clause 4.3.4 of Schedule 1 requires organizations to take into account the sensitivity of the information in determining the form of the consent sought for its collection. Clause 4.3.6 recommends that an organisation "should" generally seek express consent when the information is likely to be considered sensitive. Furthermore, clause 4.7.2 of Schedule 1 states that more sensitive information should be safeguarded by a higher level of protection.

² WP12 – adopted by the Working Party on 24 July 1998, available at: http://www.europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/index.htm

³ See « Your privacy responsibilities – A guide for businesses and organisations » issued by the Federal privacy Commissioner, page 3 available at <http://www.privcom.gc.ca>

The Working Party would welcome the systematic use of highest level of protection when sensitive data is processed and encourages the Canadian authorities and in particular the Privacy Commissioner to work towards this goal.

The Act also lists several specific situations (sections 7(1), (2) and (3)) where personal information (including data that can be considered sensitive in Europe) may be collected, used or disclosed without the knowledge or consent of the individual. Having examined them, the Working Party considers that the specific circumstances warrant these exceptions.

In particular, the Working Party draws attention to the Section 7(1)(d), (2)(c.1) or (3)(h.1) which allows the use and disclosure of personal information, without the knowledge or consent of the individual, if the information is publicly available and is specified by the Regulations. The Regulations issued by Industry Canada limit the secondary uses of the data and provide sufficient and adequate safeguards for this type of data⁴.

Health data : The legislation exempts "personal health information" from its ambit for one year after the legislation comes into force(2.1), that is in January 1, 2002. Personal health information, with respect to an individual, whether living or deceased, is defined as follows:

- information concerning the physical or mental health of the individual;
- information concerning any health service provided to the individual;
- information concerning the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
- information that is collected in the course of providing health services to the individual; or
- information that is collected incidentally to the provision of health services to the individual.

The Working Party draws the attention to the fact that the Privacy Act applies to all public sector health institutions. Moreover, most of the health information in private organisations will not be covered by the Personal Information and Electronic Documents Act until 2004, when the Act applies to provincial organizations in the commercial sector where most such information is found.

Health Canada is coordinating the efforts of a federal/provincial/territorial working group, the Protection of Personal Health Information Working Group, which is currently developing a Harmonization Resolution for the treatment of personal health information in Canada. This resolution is not legally binding but outlines a set of voluntary principles for the protection of personal health information across Canada. It applies to the health system whether in the public or private sector. As part of this process, provinces and territories are being asked to conduct a review of personal health information protection in their respective jurisdiction, and where necessary, to work towards developing legislation and/or other measures consistent with the Resolution.

⁴ See « The regulations specifying publicly available information and investigative bodies », published in [Part 1 of the Canada Gazette](#) and available at <http://www.canada.gc.ca/gazette/part1/>

Attached for information purposes is a paper released by Industry Canada on the status of the provisions currently in force or being debated throughout Canada (annex 1).

The Working Party encourages all efforts aiming for a comprehensive and coherent rules for health throughout Canada.

Employment data

Initially the Act applies will only apply to personal information about an employee of organisations which collects, uses or discloses personal information in connection with the operation of a federal work undertaking or businesses. As from 1st January 2004, the application of the Act will extend to all organisations whether or not they are federally regulated.

Personal information is defined as information about an identifiable individual but it does not include the name, title, business address or telephone number of an employee of an organisation⁵. This type of information is therefore excluded from the application of the Act. But should this information be combined with personal information, the Act will apply.

Also as from 1 January 2001, the Act will apply to disclosures of personal data across outside a province for consideration (where the personal information itself is the subject of the trade).

Considering the specific case of employee data exported from the EU to Canada, the Working Party notes that this will fall under the Act as from 1st January 2001, if the data is about an employee of a Canadian federally related work or if the exchange of information is carried out for a commercial purpose. In all other cases, the Act will apply as of 1st January 2004.

Interaction with Provincial legislation and Onward transfers

Given the progressive entry into force of the Act and its interaction with other provisions, the Working Party draws the attention of the Commission to flows of personal data within Canada (eg from an organisation subject to the Act company to one beyond its scope) or outside Canada.

Clause 4.1.3 of Schedule 1 states that an organisation is responsible for information that has been transferred to a third party for processing. An organization needs consent to collect personal information from another organization if the personal information is collected during the course of commercial activity. The organization also needs consent to use this personal information and to disclose it to another organization. In the example above, an insurance company would need consent before they were allowed to disclose personal information to another organization, regardless of whether the receiving organization was outside or inside the scope of the *Act*. Clause 4.1.3 also indicates that an organisation shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party.

⁵ See Chapter 5, Part I, 2 (1)

The Working Party is of the opinion that the transfer of data outside Canada would require the use of contractual or other binding provisions able to provide a comparable level of protection and encourages the Canadian authorities to issue guidance to this effect.

Substantially similar process: If a province passes a law that is deemed substantially similar to the federal Act, the organisations or activities covered by the provincial law will no longer be subject to the federal law for intra provincial transactions. The federal Act will continue to apply to all interprovincial and international collections, uses and disclosures of personal information.

Before establishing the formal procedure for substantially similar determination, Industry Canada has indicated that it will consult with stakeholders and provincial governments on the procedures that would be most appropriate in implementing the substantially similar provision of the Act. Key issues include the matter of who could initiate such a process, the criteria for meeting the substantially similar test, and the nature of public involvement in the process. In January, 2001 Industry Canada will likely release a position paper outlining options on these key questions.

Conclusions

In light of the issues raised, the Working Party draws the attention of the Commission and the Art. 31 Committee to the fact that the Act only applies to private sector organisations that collect, use or discloses personal information in the course of commercial activities. Moreover the Act will enter into force in three stages, full implementation being scheduled only for 2004.

It recommends therefore that any adequacy finding for the Personal Information and Electronic Documents Act should reflect the limitations in scope and the implementation timetable.

Moreover, the Working Party invites the Commission and the Art. 31 Committee to look into the process leading to the definition of “substantially similar” and to ascertain whether it is appropriate to individually recognise provincial laws as providing an adequate level of protection or if the same objective can be attained at the Federal level through an Order in Council. This issue is of particular importance in the case of Quebec where the “*Loi sur la protection des renseignements personnels dans le secteur Privé*” is currently in force.

The Working Party also invites the Commission to follow the process with regard to health data and encourages any initiatives that will foster coherence of rules throughout Canada.

Finally the Working Party welcomes any initiative on the part of the Canadian authorities with a view to provide the highest possible protection for sensitive data and ensure that a comparable level of protection is provided for when data is transferred from Canada to the another country.

Done at Brussels, 26th January 2001

For the Working Party

The Chairman

Stefano RODOTA

Annex 1
Provincial and Territorial Information Protection Legislation

BRITISH COLUMBIA

Public Sector Legislation

The *Freedom of Information and Protection of Privacy Act* applies to most provincial government, local government, and self-governing professional bodies in British Columbia. These public bodies are ministries, agencies, boards, and crown corporations; hospitals, municipalities, regional districts, municipal police, school districts, universities, and colleges; and numerous professional bodies, such as the British Columbia College of Teachers, the College of Physicians and Surgeons, and the Law Society of British Columbia.

The Act provides individuals with specific information and privacy rights with regards to information that is collected or controlled by public bodies in British Columbia. Individuals have two major rights under the Act: the right of access to records in the custody or under the control of a public body, including one's own personal information, and the right of protection of the privacy of one's personal information in the custody or under the control of a public body. The Act contains rules that a public body must follow when it wants to collect, use, or disclose an individual's personal information. Individuals also have the right to request correction of their personal information if they think it is inaccurate, and the right to ask the Information and Privacy Commissioner to investigate if they think their rights are not being upheld.

URL: <http://www.oipcbc.org/BCLAW.html>

Other Privacy Legislation

In late 1999, the province released a discussion paper titled *Protecting Personal Privacy in the Private Sector*. A Special Committee on Information Privacy in the Private Sector input has conducted consultations and hearings on this paper. A report from the Committee has yet to be released.

The province's public sector privacy legislation is the *Freedom of Information and Protection of Privacy Act*. Its coverage includes health information by all publicly funded health organizations and health care providers, including clinics, universities, hospitals. Only practitioners in private practice and private clinics fall outside the scope of this Act. It is expected that private sector legislation, which would also be broad and non-specific would apply to the private health care sector.

ALBERTA

Public Sector Legislation

Alberta's *Freedom of Information and Protection of Privacy Act* applies to departments, branches or offices of the Government of Alberta, including agencies, boards, commissions, and corporations. It applies to local public bodies (educational, health care or municipal government) as well as health care bodies (hospitals, nursing homes, health boards, community health councils, etc) and educational bodies (universities, colleges, technical institutes, charter schools, etc).

With respect to privacy, the Act controls the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information. It allows individuals, subject to limited and specific exception, the right to access their personal information when it is held by a public body, and it allows individuals a right to request corrections to this information. It provides for independent reviews of decisions made by public bodies under the Act and the resolution of complaints.

URL: http://www.gov.ab.ca/foip/legislation/foip_act/index.cfm

Other Privacy Legislation

The province's *Bill 40, Health Information Act* was assented to in December 1999, but has not yet come into force. The Act applies primarily to the publicly funded health sector, but it also covers pharmacists and physicians, regardless of how they're paid. Currently, physicians and pharmacists are not subject to any law.

The province's *Freedom of Information and Protection of Privacy Act* currently covers the province's Department of Health and the health authorities, which are subject to the Act as public bodies. When the new *Health Information Act* comes into force the health authorities and the Department of Health will be subject to its provisions, just like physicians and pharmacists.

SASKATCHEWAN

Public Sector Legislation

The *Freedom of Information and Protection of Privacy Act* covers all government institutions, including the office of Executive Council and any department, secretariat or other similar agency of the executive government of Saskatchewan. It also covers boards, commissions, Crown corporations and bodies of government. The Act The Freedom of Information and Protection of Privacy Act allows people to apply for access to information possessed or controlled by government, subject to certain exemptions. The Act also establishes privacy rules for how the government may collect and use personal information.

URL: <http://www.qp.gov.sk.ca/orphan/legislation/F22-01.htm>

The *Local Authority Freedom of Information and Protection of Privacy Act* allows people, subject to certain exemptions, to apply for access to information possessed or controlled by a local authority, such as a municipality, board of education, hospital or special-care home. The Act also establishes privacy rules for how a local authority may collect and use personal information. Local authorities are defined as rural, urban or northern municipalities, their boards, commissions.

URL: <http://www.qp.gov.sk.ca/orphan/Legislation/L27-1.htm>

Other Privacy Legislation

Saskatchewan's *The Health Information Protection Act* was assented to in May 1999, but has not yet come into force. It applies to the entire health care sector, both public and private.

MANITOBA

Public Sector Legislation

The *Freedom of Information and Protection of Privacy Act* (FIPPA) provides Manitobans and others with a right of access to records of public bodies, subject to certain specified exceptions, and with protection for personal information held by public bodies. FIPPA sets out requirements that public bodies must follow to protect the personal information that they hold. These requirements embody the principles of 'fair information practices'. These rules cover the collection, use, disclosure and management of personal information. Individuals are provided access to their information and have the opportunity to correct this information. Principles of openness and accountability also apply. The Act states that there should be an avenue of independent review for individuals concerned about the personal information policies, practices or holdings of an organization. The Act also provides for independent review by the Manitoba Ombudsman of the decisions and actions of public bodies relating to access to records and personal information protection.

FIPPA applies to Manitoba government departments and agencies and covers all local governments, school divisions, community colleges, universities, regional health authorities and hospitals.

Records specifically dealt with under the *Personal Health Information Act* are not covered by FIPPA.

URL: <http://www.gov.mb.ca/chc/fippa/actandregs/index.html>

Other Privacy Legislation

The province's *The Personal Health Information Act* came into force in 1997. It applies to the entire health care sector in Manitoba, public and private.

ONTARIO

Public Sector Legislation

Freedom of Information and Protection of Privacy Act

The *Freedom of Information and Protection of Privacy Act* applies to Ontario's provincial ministries and agencies, boards and most commissions, as well as community colleges and district health councils.

The Act requires that the government protect the privacy of an individual's personal information existing in government records. It establishes rules regarding the collection, retention, use, disclosure and disposal of personal information in its custody or control. If an individual feels his or her privacy has been compromised by a government organization governed by the Act, he or she may complain to the Information and

Privacy Commissioner who may investigate the complaint. The Act also gives individuals the right to request access to government information, including most general records and records containing their own personal information.

URL: <http://www.ipc.on.ca/english/acts/prov-act.htm>

Municipal Freedom of Information and Protection of Privacy Act

The *Municipal Freedom of Information and Protection of Privacy Act* applies to municipalities, local boards, agencies and commissions. This may include information held by a city clerk, a school board, board of health, public utility or police commission.

The Act requires that local government organizations protect the privacy of an individual's personal information existing in government records. It establishes rules regarding the collection, retention, use, disclosure and disposal of personal information in its custody or control. If an individual feels his or her privacy has been compromised by a government organization governed by the Act, he or she may complain to the Information and Privacy Commissioner who may investigate the complaint. It also gives individuals the right to request access to municipal government information, including most general records and records containing their own personal information.

URL: <http://www.ipc.on.ca/english/acts/mun-act.htm>

Other Privacy Legislation

Ontario is currently undertaking consultation on two proposed privacy laws. The first is a proposed Ontario Privacy Act and the second is a proposed Personal Health Information Privacy Legislation for the Health Sector.

The province is at this time receiving input from various stakeholders on these proposed legislation.

QUEBEC

Public Sector Legislation

Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels - details to come.

URL: <http://www.cai.gouv.qc.ca/loi.htm>

Other Privacy Legislation

Quebec's *Act respecting the Protection of Personal Information in the Private Sector* is not sector specific. As such, it covers personal health information in the private sector. The *Act respecting Access to documents held by public bodies and the protection of personal information* applies to the remainder of the health care sector.

NEW BRUNSWICK

Details on possible public sector still to come.

A *Protection of Personal Information Act* was assented to in 1998. It will come into force on January 1, 2001. The Act is specific to the public sector, and will cover private information including personal health information. It applies to organizations like the Ministry of Health, hospitals, universities, and labs (which are all publicly funded in New-Brunswick). However, health care providers, even those offering publicly funded health care, are not covered.

NOVA SCOTIA

Public Sector Legislation

The Freedom of Information and Protection of Privacy Act provides access to most records under the control of the provincial government while protecting the privacy of individuals who do not want their personal information made public. Privacy protection rules cover the collection, use and release of personal information. The Act also gives individuals the right to correct personal information about themselves. They also have the right to appeal decisions if the requested changes were not made.

The Act does not apply to records of the Legislature, municipalities and educational institutions.

URL: <http://www.gov.ns.ca/govt/foi/act.htm>

Other Privacy Legislation

Province has no legislation specific to health information in the private sector. Its *Freedom of Information and Protection of Privacy Act* covers personal information in the hands of public sector bodies, including hospitals. However, the handling of patient records is covered by the provinces *Hospitals Act, section 71*.

PRINCE EDWARD ISLAND

The province has no privacy legislation, covering neither the public or private sector. A *Freedom of Information and Protection of Privacy Act*, which would have covered the public sector, died on the Order Paper and is not in force.

NEWFOUNDLAND AND LABRADOR

The province has no privacy legislation, neither for the public or private sector.

NORTHWEST TERRITORIES (NWT)

Northwest Territories has an *Access to Information and Protection of Privacy Act* which covers personal information held in the public sector, including personal health information. The Act applies to government bodies and Health Boards, which are public sector bodies responsible for administering the delivery health care in NWT through nursing stations and public health care clinics. The hospital in Yellowknife is also run by

a Health Board. All organizations under the responsibility of the health boards fall under the Act including their employees. Private health clinics currently fall beyond the scope of the Act, even though practitioners bill the government for services rendered. These clinics are likely to be purchased by the government in the near future. However, it is yet uncertain how the Act will apply to them.

The government is presently at the initial stages of preparing for the development of a Health Information Act.

YUKON

Yukon's *Access to Information and Protection of Personal Information Act* covers all public sector organizations and their employees. Its coverage includes personal health information. The government of Yukon's Ministry of Health and Social Services serves a dual function. It not only funds health care in the Yukon, it also acts as a Regional Health Authority which delivers health services directly to residents of the Territory. As such, health care providers which deliver services for the Ministry are covered by the Act.

NUNAVUT

Nunavut has an *Access to Information and Protection of Privacy Act* which covers personal information (including personal health information) in the public sector. Nunavut's *Medical Care Act* covers personal health information held by health care providers and all employees engaged in the administration of the Act.

The Act applies to government bodies and Regional Offices, which are public sector bodies responsible for administering the delivery health care in Nunavut through nursing stations and public health care clinics. All organizations under the responsibility of the Regional Offices (including hospitals) fall under the Act, including their employees. Private health clinics currently fall beyond the scope of the Act.