



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

CHECK AGAINST DELIVERY

News and Views from BC's Information and Privacy Commissioner

Presentation to the FOI & Privacy Law Subsection Vancouver, BC – June 10, 2014

Elizabeth Denham
Information and Privacy Commissioner for B.C.

It's great to be here once again — I can't believe a year has passed! Some of you are probably still winding down from the Law Society AGM earlier today, so I'll try to keep things light.

It has been a crazy busy time for our office -- from data breaches at retail giants to revelations about the breadth of intelligence gathering in the US, Canada and beyond — to the federal government's cyberbullying legislation — there has been no shortage of privacy issues to sink our teeth into.

We've also been busy with internal matters – we've recently hired a new IT analyst, David Nicholson, who works on our policy and technology team. We've established a new audit program under Tanya Allen, and we're gearing up to host the next Asia Pacific Privacy Authorities meeting in December in Vancouver. The first time APPA has met in Canada.

Tonight I'd like to focus on three big files that are on my desk. But before we get to those specific BC files, there is much to do, and that includes weighing in on some very important national issues.

Last week, I joined my colleagues Jill Clayton in Alberta and Ann Cavoukian in Ontario to raise our concerns about Bill C-13, the federal government's cyberbullying legislation. Bill C-13 contains important provisions and sanctions for the non consensual distribution of intimate images—important to protect the public. But, Bill C-13 proposes amendments to the *Criminal Code* that would increase the powers of law enforcement, often on low suspicion-based thresholds.

Bill C-13 will also entrench and possibly encourage the expansion of warrantless disclosure of private sector data to law enforcement by providing broad immunity for such practices. Similar provisions were proposed in Bill C-30, the so-called lawful access legislation. Bill C-30 was vigorously opposed by many Canadians and civil society groups, and was also a cause of concern to Privacy Commissioners across Canada. In the face of that opposition, government ultimately withdrew the Bill.

Along comes Bill C-13 — as the immortal philosopher Yogi Berra once remarked, “It's déjà vu all over again”. Bill C-13 is currently being studied by the Justice and Human Rights Committee. Ann, Jill and I called on the Committee to suspend its deliberations until such a time as the federal Commissioner could come forward to give expert testimony on behalf of privacy regulators. They heard our concerns and as a result, our new colleague Daniel Therrien appeared before the Committee earlier today representing the privacy regulators. I also note that the Commissioner and the CBA share the view that the Bill should be split into its constituent parts — one dealing with proposal concerning the distribution of intimate images, and the other with changes to law enforcement powers. Parliament and Canadians need to have the benefit of an open and transparent debate about these extraordinary provisions.

Now, onto the main event: what is keeping me up at night.

If I had to distill my office's top three issues of late—here they are: police information checks, health information law reform, and government's review of the Personal Information Protection Act.

Police Information Checks

In April, we released our investigation of police information checks, one of the most significant reports issued since I was appointed. I say this because of the far-reaching and real life impact these checks are having on British Columbians. Even if you are just stocking shelves at Canadian Tire, an increasing number of businesses are asking for record checks from prospective employees.

In the past few years police forces have shifted away from providing criminal record checks to police information checks. Some of you might know that a criminal records check is a search of a national police database for a summary of prior criminal convictions. This may be a legitimate employment screening tool, depending on the type of position, with relevance being a key factor.

A police information check is a broader search of police databases and includes non-conviction records. These checks can disclose sensitive personal information including mental health apprehensions, suicide attempts, and allegations or investigations that didn't result in charges or convictions. And it is the only available employment check from municipal police forces and the RCMP in B.C. This information is collected in a police database for legitimate law enforcement purposes. If a police officer is responding to an incident at a private residence – it makes sense for them to know what they're getting into – if there is prior adverse police contact, for example.

The issue is when this information is turned over in the employment realm in the form of a background check—a re-purposing of the information. In looking at this practice, we didn't focus on a specific agency. Instead we took a broader look at the use of these checks in the employment context. We consulted law enforcement, employer groups, civil society, and we invited public submissions. We heard from some members of the Bar who were shocked to learn that this information was being disclosed. We heard from other counsel who had attempted to intervene on their client's behalf in the past. And we heard from dozens of individuals whose dignity, self-esteem and work prospects have been impaired by police information checks. Some of these cases are documented in our report.

Police information checks are having a real-world impact on British Columbians. They affect an individual's ability to get a job or a volunteer position – and can have lasting negative effects on their dignity and self-esteem.

My key recommendations to government are as follows:

First and foremost, mental health information should be completely off the table for employment background checks. There is no reason why this information should be disclosed to employers, who would have no right to ask about someone's mental health status in the conduct of an interview.

Second, there should be a prohibition on the use of any non-conviction information for record checks outside of those working with vulnerable adults and children. Background checks for people employed in the vulnerable sector are mandated by the *Criminal Records Review Act* – these checks were not the focus of our investigation. But for the average job out there — non-conviction information should be off the table.

I've recommended a legislative solution to this issue, but in the short-term, I called on the Solicitor General to direct police agencies to cease and desist disclosing non conviction information in the context of any employment background check.

Government is studying my recommendations and they have committed to respond in the coming weeks.

Health Information law reform

Moving on to the topic of health information privacy law and the need for reform. The health sector, as many of you know, is undergoing significant change in terms of integration, service delivery models and technology. When a patient seeks care today, a digital medical history is likely at her physician's fingertips via a computer or mobile device. The results of her lab tests may be accessible through a patient portal. She can track her own health and fitness with a wearable device that beams results to her smart phone. And, for about \$1,000, her genome can be sequenced in a lab, identifying potential health risks and tailoring treatments to her unique genetic make-up.

All of this integration and innovation creates potential for better patient care, but also creates new privacy and data security risks. BC's current legal framework is strained by this new reality. We are one of the few provinces without comprehensive health privacy laws. And even existing stand-alone health information laws are showing their age. Much reform is underway across the country.

In BC, health information governance is fragmented between more than a dozen separate laws. Some of the rules are difficult to understand, even by privacy and legal experts, because they are complex, inconsistent and incomplete. [Some privacy advocates think this is a good thing!] But for the public, this patchwork means a lack of transparency – anyone with questions or concerns about their personal health information has to figure out which one of B.C.'s laws or regulations applies to the data in question.

Doctors treat the whole patient and not a specific condition; similarly, government needs to take a holistic approach to the collection, use, disclosure and protection of personal health information by introducing a new policy framework, with clear and consistent rules for the public and the private sector.

This is one of 21 recommendations I made in a special report called *A Prescription for Legislative Reform*. It is a special report that outlines how BC can take advantage of health innovations, while also addressing the very real challenges involving notice, consent, and the use of personal health information those innovations create in areas such as big data, genomics, and precision medicine to name a few. The paper is supposed to encourage discussion in the health community and among health researchers. I am hopeful that the paper will move the conversation forward. I am also hoping that it promotes a continued dialogue about privacy-positive health research – another important area of focus for my office.

In recent years we have hosted two health research roundtables – the second roundtable in partnership with the Ministry of Health – where stakeholders came together for some frank discussions about the challenges inherent in the current system.

A Prescription for Reform builds on these roundtables with recommendations to address some of the key issues facing health research. Some of the proposals include a streamlined ethics approval process, centralized data stewardship oversight model, and a one-stop research platform that would create a secure and controlled environment for public interest health research. Bottom line: We have the opportunity to embrace innovation and protect privacy at the same time.

PIPA Review

My final topic this evening is the government's review of the *Personal Information Protection Act*. This is the second mandatory review of PIPA – the previous review concluded in 2008. As we all know, the privacy landscape has changed dramatically over that time, necessitating some important updates to the law.

The Special Legislative Committee is chaired by MLA Mike Bernier and the OIPC was invited to make an initial appearance two weeks ago. I told the Committee that the law does a pretty good job of balancing the rights of individuals with business needs, but that some key reforms were necessary or we risk falling behind other jurisdictions. British Columbians are expressing more concerns about privacy – our privacy complaints are up 38% this year over last.

Our next submission will include much more detail, but I wanted to alert the Committee to a few significant areas of concern.

First, mandatory breach notification. My office advised the Committee that mandatory breach reporting is an important reform. There are numerous benefits to a legal requirement to notify. Reporting significant breaches to the Commissioner's Office and affected individuals, would strengthen the oversight of my Office, and drive compliance by focussing and investing in privacy and data security.

It would also level the playing field for organizations—the good guys voluntarily report to customers and to regulators now, and yet those that don't report may escape with no negative effects on their reputation or bottom line. And of course there is a good reason for harmonization among private sector privacy laws in Canada. Given that businesses operate nationally and even internationally, it is confusing and difficult for businesses to have to comply with different requirements depending on whether they are federally regulated or in what province their services are provided.

As most of you know, this requirement already exists in the Alberta law. It is also a proposed amendment in Bill S-4, the *Digital Privacy Act*, which would amend PIPEDA. The Digital Privacy Act is expected to be passed quickly through parliament – without mandatory breach notification, BC's substantial similarity status could be impacted.

The other issue I highlighted for the Committee is warrantless disclosures of personal information by BC companies. This sampling of recent headlines I think makes very clear that this is a live issue we need to address head-on. Section 18(1)(j) of PIPA gives broad authority for organizations to disclose personal information to a law enforcement or government agency without the knowledge or consent of an individual and without a warrant.

At present, companies have the discretion to comply with a request, or they can refuse to release personal information without a court authorized order. Many companies have told me that they refuse such warrantless requests; others may be less resistant to the request because of the broad language in this section. We have no way of knowing the number, scale, frequency or reasons for the disclosures. There are no provisions in the law requiring organizations to report on these disclosures, and British Columbians seeking access to their personal information would likely find it difficult to even know if a company had disclosed their data.

Canadians and British Columbians have expressed significant concerns about warrantless access by law enforcement agencies. At a minimum, PIPA should be amended to mandate transparency requirements for disclosures made by organizations to law enforcement in the absence of a judicial warrant or court order. I've also flagged the issue of the breadth of organization to organization disclosures (s. 18(1)(c)) in a subsequent letter to the Committee. (I believe Monica circulated this follow up letter).

The PIPA Review Committee is continuing its deliberations – I believe they will be seeking comment from stakeholders and other parties. I look forward to your sub-section's work in this review. It takes a village to amend the law!

I am happy to answer any questions you have.