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CALL MONITORING AND PERSONAL INFORMATION: RECENT DECISIONS BY THE PRIVACY COMMISSIONER PROVIDE SOME GUIDANCE ON CALL MONITORING

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The Office of the Privacy Commissioner has released a series of recent decisions under the *Personal Information Protection and Electronic Documents Act* (PIPEDA) that should be considered by businesses operating in the customer care sector, or any company that wishes to monitor customer service calls.

Notwithstanding the recent change of Privacy Commissioners, the office remains open for business and compliance efforts should continue.

PIPEDA is Canada's new private sector privacy legislation. It came into force on January 1, 2001 for the federally regulated private sector, and will be binding upon the provincially-regulated private sector on January 1, 2004.¹ It places strict limits on how organizations can collect, use, disclose and retain personal information. The essential principle of PIPEDA is that informed consent must be obtained before collecting, using and disclosing personal information.

In PIPEDA Case Summary #160, the Office of the Privacy Commissioner investigated a complaint made by a former employee of a telecommunications company.² The complainant alleged that the company was in violation of PIPEDA because supervisors listened in on calls received by operators in training. The company admitted that:

[s]ome calls are, however, monitored live when the operator is engaged in side-by-side coaching with a supervisor for the purpose of improving the operator's skills at handling calls. The supervisor does not collect any personal information provided by the customer.

¹ A quick test of whether a company is federally or provincially regulated is to ask whether the company is subject to the *Canada Human Rights Act* and the *Canada Labour Code*. If the answer is yes, the company is most-likely federally regulated for the purposes of PIPEDA .

² Available online at http://www.privcom.gc.ca/cf-dc/2003/cf-dc_030416_5_e.asp.

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The company did not inform callers that supervisors might be listening to such calls. The complainant alleged that allowing a supervisor to listen to calls without the knowledge or consent of the callers was unacceptable collection and use of personal information and contrary to the principles of PIPEDA.

Personal information is defined expansively in the legislation:

"personal information" means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.

The Commissioner concluded that the calls would likely contain personal information, as defined in the legislation.

Informed consent is required for the collection, use and disclosure of personal information. Principle 3, listed in Schedule I to PIPEDA, reads:

4.3 Principle 3 -- Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

The exceptions to the consent rule are narrowly drawn. For example, consent may be waived if the information is being collected in the course of investigating a crime or an alleged breach of an agreement. None of the exceptions applied to this circumstance.

In addition to the exceptions, consent may be inferred or presumed from particular circumstances. Commentary 4.3.6 expands on Principle 3:

4.3.6 – The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive. ...

In the context of a directory information call or a call to an operator to complete a toll call, any personal information being collected would be at the less sensitive end of the spectrum. The placing of the call itself can be interpreted as granting the telephone company consent to collect and use the personal information for the reasonably anticipated purpose of complying with the service request. Any collateral use of the information would require more explicit knowledge and consent.

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To justify not obtaining the informed consent of its customers for the monitoring of calls by supervisors, the telecommunications company argued that the calls are brief, are limited to information that is probably publicly available in any event and the callers would not be concerned with whether an anonymous supervisor is listening in for the purpose of coaching the operators. From the Commissioner's summary:

In the company's opinion, informing customers calling for directory assistance or toll calls of call monitoring would not make any difference to what personal information the customer might choose to disclose during the call, nor would it make any difference to the customer's expectations as to how the company would treat any information being provided.

Despite his conclusion that personal information was being provided by customers in the course of the call, the Commissioner concluded that knowledge and consent were not required in this particular circumstance.

In deliberating over whether consent is required, the Commissioner noted that when supervisors are listening to calls, their attention is focused on the operators and their ability to handle the call. Although they can hear what is being said, this is strictly incidental to the coaching process. Any notes taken by supervisors are only about the operators.

Any personal information that may be provided by a customer in the course of the call was only being used for the purposes that the caller would reasonably anticipate, namely to complete the toll call or to provide directory information. While the customer's information may arguably have been "collected" by the supervisor, it was merely incidental to the primary task of training the company's operators and the Commissioner concluded it was never "used".

In this circumstance, the Commissioner concluded the complaint was not well founded.

For the company's customer service lines, where billing and other more sensitive information may be collected, it was now the company's practice to announce that monitoring of the calls might take place:

The company recognizes that significantly more personal information may be collected during calls to its customer service centres, and as a result, is introducing recorded announcements informing customers calling these centres that calls may be monitored for quality assurance purposes.

In most circumstances, calls related to the provision of customer service are a collection and use of personal information of sufficient magnitude to engage the knowledge and consent provisions

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of PIPEDA. In circumstances where the information conveyed is not particularly sensitive and its use obvious, consent may be presumed. In other circumstances, sensitive information and unobvious uses will require explicit knowledge and consent. Also, *Criminal Code* provisions dealing with intercepting calls do not provide the entire answer.

Such was the case in PIPEDA Case Summary #86,³ in which the Privacy Commissioner investigated a complaint by an individual who had called a bank's toll-free line to provide sensitive financial information in support of his child's application for a loan. At the end of the call, the complainant was informed that the telephone call was recorded. Unlike in the previous case, the purpose of the recording was not training or quality control. The bank routinely recorded such calls to have a record of the transaction:

The bank argued that taping calls is necessary to ensure that the customer has consented to the application and the terms and conditions of the product or service. It maintained that this practice is the equivalent of having a customer sign an application form and is required for record-keeping purposes.

The bank apparently relied upon the provisions of the *Criminal Code* that allow the recording of calls as long as one party consents. However, the recording of this call was the collection of "personal information" and, under PIPEDA, the consent of the individual concerned is required.

As the bank had not made the complainant aware of what it was doing and did not give him the opportunity to consent or to choose alternative means of providing the information, the Commissioner therefore found that the bank had contravened Principle 4.3.

In the result, the Commissioner determined that the complaint was well-founded.

In a published fact sheet,⁴ the Office of the Privacy Commissioner has offered further guidance related to the recording of telephone calls. While fact sheets do not have the force of law, they do provide useful insight into the perspective and likely position of the Office of the Privacy Commissioner on this subject. From the fact sheet:

- Organizations should only record calls for specified purposes;
- Those purposes must meet the reasonable person test;
- Organizations must make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used;
- The individual must consent;

³ Available online at http://www.privcom.gc.ca/cf-dc/cf-dc_021022_2_e.asp.

⁴ Office of the Privacy Commissioner, *Fact Sheet - Best Practices for Recording of Customer Telephone Calls*, Available online at http://www.privcom.gc.ca/fs-fi/02_05_d_14_e.asp.

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- The information collected should only be used for the specified purposes; and
- The tapes should be subject to the other provisions of the Act with respect to matters such as safeguards, access, retention and disposal.

Based on Principle 3, the organization must obtain the individual's informed consent. The company has an obligation to inform the individual of the purpose for the collection and this information may only be used for such purposes. The practical result is that call centres, when proposing to record or monitor customer service calls, must inform the individual callers that the calls may be monitored and also inform them of the purpose of the monitoring. From the fact sheet:

The organization must be clear about the purposes; an organization should not state that it is recording the conversation for quality assurance purposes if, in fact, the recording might be used for other purposes. ... If the individual proceeds knowing the conversation is being recorded and the purpose of the recording, consent is implied.

Companies offering customer care over the telephone have implemented a number of mechanisms to evaluate and maintain the quality of the caller's experience with customer service representatives. Other companies have found it necessary to record certain calls in order to have a record of the particular interaction between the caller and the company. Under the old common law and the provisions of the *Criminal Code*, the consent of the customer service representative was all that was necessary to monitor or record the calls. The advent of PIPEDA brings into effect new rules that change the legal foundation for such practices. Any company considering the monitoring or recording of customer calls will need to carefully craft their practices in light of PIPEDA and the Privacy Commissioner's decisions.

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