

Privacy Law and Businesses in the Tourism Sector

Tourism Industry Association of Prince Edward Island

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McInnes Cooper

and

National Privacy Services Inc.



About Us

- **McInnes Cooper**
 - Atlantic Canada's largest single law partnership.
 - Very active Privacy Law Group composed of lawyers in each Atlantic province with experience providing strategic advice on privacy law compliance for many of Atlantic Canada's largest businesses, institutions and international companies operating in Canada.
- **National Privacy Services Inc.**
 - Partnership between McInnes Cooper and Thor Solutions Inc.
 - Designed to provide guidance and support to small and medium sized organizations as they adopt mandatory privacy best practices.
 - Work closely with industry groups to design privacy programs that can be easily and efficiently adopted without interfering with the operations of the organizations required. In addition, we provide full support to our clients, with toll-free, on-call expertise.

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What is Privacy?

- Has been characterised as the right to be left alone, to be secure in one's home and free from unwanted interference
- In the context of the new law, privacy means having control over one's personal information
 - Choice of whether to disclose information at all
 - Control over with whom it is shared
 - Control over how it is used
 - Don't lose control once you've released your information "into the wild"

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PIPEDA

- *Personal Information Protection and Electronic Documents Act* ("PIPEDA")
- Federal statute, passed in 2000 (was known as Bill C-6 or Bill C-56)
- First attempt to impose privacy obligations on businesses across Canada
- **Phased in:**
 - **January 1, 2001** – Federally-regulated sector (telcos, cablecos, banks, etc.)
 - **January 1, 2004** – Provincially-regulated private sector, unless the province in question has passed substantially similar legislation and the Governor-in-Council has exempted the province, activity, etc.
 - No Atlantic Canadian governments have expressed any intention to pass private sector privacy legislation.

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PIPEDA – Purpose

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to ***govern the collection, use and disclosure of personal information*** in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

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Privacy - PIPEDA

- Addresses “personal information” – information about an identifiable individual:
 - **NOT** name, title, business address or telephone number of an employee or organization
 - Would include name, address, income, health information, demographics, preferences, birth date, SIN, customer numbers, unique identifiers
 - Also includes analysis or opinions about an individual
- Also includes information that may be traced back to an individual

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What about employees?

- PIPEDA only applies generally to employee information in the federally-regulated private sector
- Employee information is only covered in the provincially-regulated private sector if it is used in a commercial way

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Privacy Principles

- Based on the principles of the Canadian Standards Association Model Code for the Protection of Personal Information:
 1. Accountability
 2. Identifying purposes
 3. Consent
 4. Limiting collection
 5. Limiting use, disclosure and retention
 6. Accuracy
 7. Safeguards
 8. Openness
 9. Individual access
 10. Challenging compliance

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Principles

1. **Accountability** - an organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the principles contained in the Canadian Standards Association model code for the protection of personal information.
2. **Identifying Purposes** - the purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.
3. **Consent** - the knowledge and consent of the individual are required for the collection, use or disclosure of personal information, except where inappropriate. Form of consent is dependent upon the sensitivity of the information. Can't require consent that is not necessary.

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Principles

4. **Limiting Collection** - the collection of personal information shall be limited by that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.
5. **Limiting Use, Disclosure, and Retention** - Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

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6. **Accuracy** - Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.
7. **Safeguards** - Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.
8. **Openness** - An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

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Principles

9. **Individual Access** - Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
10. **Challenging Compliance** - An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

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Consequences

- Individual (not just customer!) can make a written complaint to the Privacy Commissioner (s. 11).
 - Commissioner may initiate a complaint of his own accord.
 - Commissioner investigates the complaint
 - Powers in s. 12(1): Compel evidence, administer oaths, accept any evidence whether ordinarily admissible (or not), **enter any premises** other than a dwelling, review documents, etc.
- Commissioner's Report
 - To contain findings and recommendations, whether there was a settlement
 - Commissioner can decline to issue a report if the complainant has other recourse available

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Consequences

- Court hearing
 - A complainant (**not the organization**), after receiving the Commissioner's report, may apply to the Federal Court – Trial Division for a hearing.
- Court's remedies include:
 - Order the organization to correct its practices in order to comply with ss. 5-10 of the Act;
 - Order the organization to publish a notice of actions taken to correct its practices; and
 - Award damages, including damages for humiliation the complainant may have suffered.

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Power of Publicity

- Commissioner has the power to “make public any information relating to the personal information management practices of an organization if the Commissioner considers that it is in the public interest to do so.” s. 20(2).
- Commissioner can publicize information handling practices, even before the Court has been given the opportunity to consider the matter.
- Commissioner’s pronouncements are privileged for the purposes of any law related to libel or slander, so long as it is said in good faith.

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Managers need to know

- PIPEDA creates a number of **offences** about which employers must be aware. It is unlawful to
 - discipline or retaliate against an employee or independent contractor who
 - “Whistleblows” to the Commissioner about the employer’s privacy practices;
 - Refuses to do something contrary to Part I of the Act;
 - Acts to prevent a contravention of Part I of the Act;
 - Interferes with an investigation of the Commissioner
 - destroy personal information before a complainant has exhausted his/her recourse against the organization

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What it means

- Significant impact on all businesses – disproportionate impact on small businesses.
- **No grandfathering** – any information collected before the Act comes into force for an organization can only be used if its collection and use are in compliance with PIPEDA. (e.g. consent, identified purpose, limited collection, etc.)
- Cannot “re-purpose” previously collected information without new consent.

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Impact of PIPEDA on Tourism Operators

- Tourism sector is almost entirely customer-focused.
- Some customers have particular preferences that you must focus on.
- Recognize that a growing number of your customers are concerned about their privacy and want reassurance from their service providers.
- PIPEDA is about being transparent to your customers and letting them make informed choices.

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Applying the privacy principles

- Act as though information about your customer is your customer's information
 - The key is informing them of how you will use and give them the choice
 - Provide access to their information
 - Tell them how you will protect it
 - Tell them how you manage it
 - Safeguard it

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What to do

- If you are an affected organization (and most are), you need to:
 1. Appoint a privacy officer;
 2. Develop a consent strategy;
 3. Develop written privacy policies and make them available to everyone (*don't just cut and paste*);
 4. Train staff;
 5. Enact policies and procedures in your organizations to comply with PIPEDA;
 6. Be able to respond to access requests in a timely manner; and
 7. Respond to queries and complaints effectively.

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Privacy Officer

- This is a *critical* decision if you have a choice: important customer relation issue.
- Public face of your organization's privacy law compliance
 - Not just a *pro forma* legal requirement
 - Key to showing respect to your customers/stakeholders
- Auditor – periodically reviews the organization's compliance with its own policies
- Resource
 - keeps up to date on privacy law as it relates to the organization
 - acts as a resource to management and other employees

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Build Trust With Your Customers

- Assume your customers are paranoid and suspicious (you may be right!)
- Assume your customers want you to earn their trust
 - Anticipate concerns
 - Anticipate queries
 - Anticipate complaints
- Solve them before a customer has to deal with it and show them how you can be trusted

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Building Your Consent Strategy

- Should inform your customers of *all* purposes and get their permission to use information.
- May be able to assume/imply consent in many cases, but should be more robust consent for secondary purposes.
- Hotel operators have a great opportunity at the check-in desk – probably already have forms signed.

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Privacy Policies

- Critical document.
- Many (perhaps most) will not care, but for those who do it is very important.
- Most organizations should have at least two:
 1. One to provide to your customers/contacts so that they are fully aware of how the organization collects, uses and discloses personal information and how to seek answers/recourse; and
 2. A second to be used by your employees for specific guidance on how to deal with personal information.
- Be aware that customers and the public will have access to **both** documents. Draft the documents accordingly.

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Privacy Policies

- Beware!
 - don't fall into the trap of poaching policies blindly from other companies
- Copyright issues (low risk, but ...)
- Most are American and do not address PIPEDA requirements
- If you just follow someone else's, you may miss important aspects of your business
- Start with a blank sheet and then refer to others
- If you are a car dealer, the policies of a polling company are not appropriate precedents.

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Dealing with Inquiries

- Provide prompt, honest answers
- Say what you know (don't guess!) and escalate the matter very quickly to a superior if necessary
 - Sends the message that the organization takes privacy seriously
 - Reduces the likelihood that a misunderstanding will arise
- "Customer is always right" – cliché that should serve you well
 - Unless it is a matter of principle (or huge cost!) try to accommodate the customer

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Providing Access to Information

- Any individual has the right to know about whether the organization has personal information related to the individual
- If there is any personal information under control of the organization, individual has right of access to his/her personal information – within 30 days!
- Organization needs to be able to have mechanism to accomplish this

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Providing Access to Information

- Be prepared!
 - Know where you have information – from your information inventory
 - Know where to look, who to query
 - Make sure Privacy Officer has enough pull to require necessary assistance
- Get the right information from the individual to assist in the search
 - Name, address, any personal identifiers, dates of interaction with the organization, etc.
 - This information can only be used to assist in the search – cannot be used for any secondary purpose

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Providing Access to Information

- Carefully vet materials before release
 - Are they easily understandable? Full of jargon, abbreviations?
 - Consider having “translation” resources if materials are usually not in plain English
 - Make sure that there is no **third-party personal information** included in the materials to be released
 - Can third-party info be excised?
 - Has third-party consent been obtained?
 - Make sure info is not subject to **solicitor-client privilege** or litigation privilege
 - Make sure info does not reveal **confidential business information** (reasonable definition)
- If difficulty with the above, consult counsel. You don’t want to accidentally waive privilege

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Providing Access to Information

- There are various ways of providing access to information
 - View originals on the organization’s premises (needs space and supervision)
 - Provide photocopies or print-outs (costs of copying)
- Cost-recovery
 - Statute allows you to charge a reasonable fee for access
 - Suggest that you provide access for free
 - Communicates to customers that you want to assist them in exercising their important rights
 - If you charge, may build perception that the charge is there to discourage
 - Small charge may discourage frivolous or persistent inquirers
 - E.g. free copy of customer file every twelve months – discourages someone who asks every month
 - You will probably never recover your total costs of privacy-law compliance

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Dealing with Complaints

- At the time of complaint, your job is to keep the customer's trust and to prevent a complaint
- Be the customer's advocate and let the customer know you're on his/her side
- Give prompt attention
 - Investigate quickly and thoroughly
 - If it will take some time to respond, let the customer know
 - Updates provide reassurance
- Do not appear to be merely defending the organization
- If it does not appear to be going well, consult with counsel as soon as possible

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Dealing with Complaints

- If the organization is “at fault”, provide a reasonable remedy
- Reasonable remedy will depend upon the particular circumstances
 - In many cases, sorry is all they want to hear
 - Will probably want to know what is being done to prevent a recurrence
 - If appropriate, offer reasonable compensation without accepting liability
- Place “without prejudice” on correspondence
 - In most cases, settlement discussions cannot be brought as evidence

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Settling Complaints

- If trust-building is an issue, consider bringing in an impartial third-party to mediate
 - May cost \$\$\$, but probably cheaper than a complaint to the Commissioner
 - Privacy Officer should not represent the organization in this mediation as the appearance of impartiality should be preserved
- If it is a significant complaint, get a settlement in writing
 - But may not prevent a complaint to the Commissioner or to the Court

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NPSi and the Tourism Sector

- NPSi builds full solutions for groups of small and medium businesses.
- Rather than paying \$\$\$ for a customized privacy plan and service, we reduce this cost by sharing it among similarly situated businesses.
- NPSi provides:
 - Training
 - Policies, procedures
 - On call support
 - As needed privacy officer
- If you have any questions, please visit our booth.

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