



September 2003

DOES THE NEW PRIVACY LAW APPLY TO UNIVERSITIES AND COLLEGES?

A BRIEF GUIDE TO DECIPHERING THE APPLICATION OF PIPEDA

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Canada's new privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), will begin to apply to provincially regulated organizations as of January 1, 2004. This new law governs the collection, use and disclosure of personal information in the course of "commercial activity". Many in the non-profit educational sector assume – incorrectly – that they do not engage in commercial activities and, therefore, the law does not apply to their institution. Many administrators are unpleasantly surprised when they look at PIPEDA more closely and consider it in light of their institution's activities.

Commercial Activities

Section 4 of PIPEDA states that the statute will apply to "every organization in respect of personal information that ... the organization collects, uses or discloses in the course of commercial activities..." Whether PIPEDA applies to your institution thus depends on whether your organization is engaged in "commercial activities". This term is interestingly defined within the legislation:

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

Whether the Act applies does not depend upon the "business" you are in. Instead, each individual transaction involving personal information must be scrutinized. In addition, exchanges of donor information among non-profit organizations are explicitly caught in the Act's purview. This may come as a surprise to universities and colleges that think of themselves as entirely non-commercial.

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Organizations in the educational sector need to take PIPEDA very seriously, beginning with an examination of all facets of their operations. Most universities have embedded "for profit" enterprises that have most of the traditional characteristics of commercial activity. Some examples would be:

- Bookstores,
- Cafeterias using debit or stored-value cards,
- Health clubs,
- Residences that are used as "hotels" during the summer,
- Conference facilities,
- Catering services,
- Computer stores,
- Performing arts centres,
- Art galleries,
- Student health services, and
- Customized training divisions.

The law also specifically deems transfers of donor lists to be commercial activity, demanding PIPEDA compliance every step of the way. In addition, alumni offices will no longer be able to provide their membership lists to affinity organizations without very careful legal review.

Conclusion

PIPEDA is being phased in gradually, but on January 1, 2004, it will apply to provincially-regulated organizations, such as universities and colleges. If a "transaction, act or conduct or regular course of conduct" is of a commercial character, associated personal information will be subject to the new law. Embedded commercial activities within otherwise non-commercial organizations may pose hidden risks. For an otherwise non-profit entity, any personal information that may be the subject of a commercial transaction must be handled in compliance with the law, which involves complicated administrative obligations, such as the designation of a privacy officer and making compliance policies publicly available.

Post-secondary institutions may also find themselves to be subject to two privacy law regimes. Some Atlantic Canadian universities and colleges are already governed by provincial public-sector freedom of information and privacy laws, such as Nova Scotia's *Freedom of Information and Protection of Privacy Act*. As of January 1, 2004, such institutions will also be subject to PIPEDA in the circumstances outlined above.

All universities and colleges should carefully examine all of their operations in light of PIPEDA to determine the extent of their privacy obligations.

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The McInnes Cooper PIPEDA Team

McInnes Cooper has assembled a Privacy Working Group, comprised of lawyers with expertise in advising universities and colleges on PIPEDA, including whether and to what extent individual organizations are subject to the new law. We have also developed expertise in training employees of affected organizations on privacy law compliance matters. If you have any questions, please contact any of the following:

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