

FOIP FOLIO

RIGHT TO KNOW (RTK) WEEK 2012

The week of September 24 to 28, 2012 was officially recognized as RTK Week in Saskatchewan by means of proclamations issued by the Provincial Government and by the cities of Saskatoon and Regina.

On September 26, 2012 in Saskatoon, Carleton University Professor, **Stephen Maguire**, spoke at the University of Saskatchewan, College of Law, on *Professionalism*, *Accountability and Transparency in Policing*.

The Regina Public Library organized a public film series during RTK Week to highlight the themes of transparency and accountability.

On October 3, 2012 at the University of Regina, **Wayne MacDonald**, University of Alberta's Government Studies Program Manager of the Information Access and Protection of Privacy (IAPP) Program, delivered the keynote address. Wayne's topic was *Celebrating 20 Years of FOIP* (*The Freedom of Information and Protection of Privacy Act*) Legislation in Saskatchewan.

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RTK Week 2012 (cont'd)



The 2012 Chief Justice E.M. Culliton Right to Know Award was presented to the city of Regina (the city). The award was accepted by City Manager, **Glen Davies** and **Alyssa Daku**, Manager of Corporate Information Governance.

Since 2006 this award has been presented on an annual basis to public sector bodies that have demonstrated leadership or innovation in promoting the public's right to know.

The city was selected largely on the basis of its achievement in becoming the first public sector organization in Saskatchewan to adopt an ambitious program of 'open government – open data'.

It was applauded for its actions in making data sets freely available to the public on an open licence basis with more data sets to come in the future. It is also publishing records that were previously released in response to access to information requests.

A notable feature of the city's initiative has been the close collaboration with non-government groups that create new applications for the data that the city has released or contemplates releasing.

Thanks to the sponsors and partners: Johnson Shoyama Graduate School of Public Policy, Institute of Public Administration in Canada (Saskatchewan Regional Group), Canadian Bar Association (Saskatchewan Branch), Regina Public Library, Sheldon Chumir Foundation for Ethics in Leadership, McDougall Gauley LLP, MacPherson Leslie & Tyerman LLP, McKercher LLP, University of Saskatchewan, University of Regina and Office of the Information and Privacy Commissioner (OIPC).

The Saskatchewan Right to Know Committee was again ably chaired by Mark Anderson. Committee members included: Shannon Whylie, Kaylea Dunn, Erin Kleisinger, Jeff Barber, Karen Jaster, Neil Robertson, Greg Fingas, Danielle Shabatura and Gary Dickson.

OIPC ISSUES FIRST REPORT DEALING SOLELY WITH PROCEDURAL DEFECT

Since the OIPC introduced its expedited policy for addressing procedural defects in the responses to requesters, almost all of the defects have been remedied after the matter has been escalated to the Deputy Minister or "head" of the organization.

To view the procedure see our <u>June 2007 FOIP</u> <u>FOLIO</u>, page 3, available at: <u>www.oipc.sk.ca</u> under the <u>Newsletters</u> tab. In the case of the village of Buena Vista (the village), there was no compliance with <u>The Local</u> <u>Authority Freedom of Information and</u> <u>Protection of Privacy Act</u> (LA FOIP) by the village that refused to acknowledge the role of the mayor as "head". In this unusual case, the applicant was the mayor.

The <u>Review Report LA-2012-003</u> is available at: <u>www.oipc.sk.ca</u> under the <u>Reports</u> tab.



NEW OIPC REPORTS DEALING WITH SASKATCHEWAN WORKERS' COMPENSATION BOARD (WCB)

Saskatchewan Information and Privacy Commissioner, **Gary Dickson**, has issued three different Reports involving WCB.

Two of the Reports (<u>Investigation Reports F-2012</u> -002 and <u>F-2012-003</u>) reflected privacy breaches and inappropriate disclosure of personal information of WCB claimants to third parties.

The third Report (<u>Review Report F-2012-005</u>) dealt with three different applicants who were each denied access to their personal information in the possession of WCB on the assumption that the access and privacy law for all provincial government institutions does not apply in the case of WCB.

Commissioner Dickson has renewed his call for the Saskatchewan Government to clarify the access and privacy obligations of WCB.

He also made recommendations for ways that WCB can strengthen its privacy protection for individuals who deal with WCB.

All three reports are available at: <u>www.oipc.sk.ca</u> under the <u>*Reports*</u> tab.

OIPC INVESTIGATION REPORT CONSIDERS PRACTICES OF SASKATCHEWAN TELECOMMUNICATIONS (SASKTEL)

The OIPC received a complaint regarding an apparent over-collection of a customer's personal information by SaskTel as part of its identity verification process.

Though SaskTel satisfactorily addressed the complainant's specific concerns, the investigation continued as Commissioner Dickson had concerns with SaskTel's broader collection practices. The Commissioner found that SaskTel did not have authority to require the Saskatchewan Health Services Number.

Secondly, SaskTel did not provide a satisfactory explanation as to why it needed to collect other unique identifiers over the phone since it could not verify the accuracy of same.

Thirdly, Commissioner Dickson found that SaskTel was apparently collecting third party personal information without authority. It was also found that SaskTel did not meet the notice requirements of section 26(2) of FOIP. Commissioner Dickson recommended that SaskTel conduct a privacy impact assessment, revise its privacy policy and prepare a script to ensure that its customers understand what is optional when providing proof of identity. He further recommended SaskTel purge from its systems all personal information and personal health information of its customers and third parties collected without the requisite authority within 60 days.

This <u>Investigation Report F-2012-001</u> is available at: <u>www.oipc.sk.ca</u> under the <u>*Reports*</u> tab.



SASKATCHEWAN RESIDENTS MAKE USE OF FEDERAL PRIVACY ACT

Saskatchewan residents generated 30 complaints in 2011-2012 to the federal Privacy Commissioner under the <u>Privacy Act</u>. The provinces and territories that filed more complaints than our province were Ontario, Quebec, British Columbia (B.C.) and Alberta. If you have a privacy complaint with respect to a federal government institution, please contact the Privacy Commissioner of Canada at 1-800-282-1376 or visit: <u>www.priv.gc.ca</u>.

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) BREACHES RESULT IN EYE-POPPING PENALTIES

Consider the kinds of penalties that the Office for Civil Rights of the United States of America (U.S.A.) Department of Health and Human Services is meting out to those who violate HIPAA. These include:

- U.S.A. company, Uplift Medical, P.C. (Uplift) has been assessed a penalty of \$4.3 million for failing to provide 41 patients with timely access to their medical records and then refusing to cooperate with a subsequent HIPAA investigation.
- A \$1.5 million settlement from Blue Cross Blue Shield of Tennessee after the theft of computer hard drives containing the personal health information of more than 1 million individuals. For more information, please visit: <u>www.hhs.gov/</u><u>ocr/privacy/hipaa/enforcement/examples/</u><u>resolution agreement and cap.pdf</u>.
- A \$100,000 payment imposed on Phoenix Cardiac Surgery, P.C., after it published patient appointments on an Internet calendar and thereby made this information publicly available. For more information, please visit: <u>www.hhs.gov/</u> <u>ocr/privacy/hipaa/enforcement/examples/</u> <u>pcsurgery_agreement.pdf</u>.

The Alaska Department Of Health and Social Services had to pay a fine of \$1.7



million after a portable USB hard drive was stolen from a government employee. For more information, please visit: <u>www.hhs.gov/ocr/privacy/hipaa/</u> <u>enforcement/examples/alaska-</u> <u>agreement.pdf</u>.

- A \$4.3 million penalty was ordered to be paid by Cignet Health Centre by a U.S.A. District Court. For more information, please visit: <u>http://op.bna.com/hl.nsf/r?</u> <u>Open=mapi-8y8p9n</u>.
- Harvard Medical School teaching hospital paid a \$1.5 million penalty for the theft of an unencrypted laptop with the personal health information of some 3,500 patients. For more information please visit: <u>www.hhs.gov/ocr/privacy/hipaa/ enforcement/examples/alaskaagreement.pdf</u>.



CROSS CANADA HEALTH INFORMATION SNOOPING SURVEY

On October 16, 2012, 34 charges under Alberta's *Health Information Act* were announced against an Alberta resident along with six charges under the Criminal Code.

The charges were laid after a recommendation from the Alberta Information and Privacy Commissioner, **Jill Clayton**. The charges were for improperly accessing personal health information, inappropriate use of that personal health information, improper disclosure and falsifying a health record.

The Vancouver Sun reported on September 6, 2012 that seven employees of the B.C. Ministry of Health were suspended over allegations of inappropriate access to medical information. This relates to alleged inappropriate conduct by employees and drug researchers. The story by **Jonathan Fowlie** is available at: w w w.vancouversunce. com/health/ Four+fired+three+suspended+over+privacy+brea ches+health+minister/7202244/story.html.

A <u>September 10, 2012 story</u> from the Canadian Press indicates that the largest health board in Newfoundland and Labrador, Eastern Health, is investigating its third privacy breach in 2012. As many as 46 people are involved with inappropriate access by two clerks in a rural clinic over the last two years. One employee was fired and the other resigned. For more

"NOT ALL MY FRIENDS NEED TO KNOW"

<u>"Not all my friends need to know": a qualitative</u> <u>study teenage patients privacy and social media</u> is the title of a fascinating study by **Kaled El Emam** and **Maja van der Velden**.

Teenage patients' online privacy behaviour is an expression of their need for self-definition and

information, please visit: www.winnipegfreepress.com/arts-and-life/life/ health/dozens-of-patient-records-breached-saysnewfoundland-health-board-169178316.html.

Canadian Press reported in September that **Mel Holley**, Acting Ombudsman for Manitoba, urges stronger penalties for health care workers snooping in patient files. This follows his office's investigation of CancerCare Manitoba. One health worker had entered the medical file of a neighbour's child who was undergoing treatment.

His <u>investigation report</u> on CancerCare Manitoba is available at: <u>www.ombudsman.mb.ca/pdf/</u> <u>cases2011-0513-0514.pdf</u>.

Mr. Holley's recommendations for tougher penalties for snooping have been accepted by the Manitoba Government.



self-protection. This discusses the privacy paradox and the control paradox and highlights how privacy needs change over time. You can view this at: <u>http://jamia.bmj.com/content/</u><u>early/2012/07/06/amiajn1-2012-000949.short?</u> rss=1.



FACEBOOK IS NOT APPROPRIATE FOR COMMUNICATING WITH INDIVIDUALS

In Newfoundland and Labrador, Commissioner Ed Ring found that it was improper for a town to send personal information to a complainant via private message on Facebook using the town employee's personal Facebook account.

Commissioner Ring found that, outside of general announcements and notices, social media

websites should not be used by public bodies to collect, use or disclose personal information. You can view <u>Report P-2012-001</u> at: <u>www.oipc.nl.ca/privacyreports.htm</u>.

You may also wish to refer to an excellent resource at: <u>www.priv.gc.ca</u> entitled, <u>Privacy and</u> <u>Social Networking in the Workplace</u>.

CANADIAN WEBSITES DISCLOSING PERSONAL INFORMATION



Privacy Commissioner of Canada, **Jennifer Stoddart**, announced that a number of websites in Canada appear to be disclosing personal information

to third parties without consent. The concerns existed with one in four of the 25 sites tested.

Commissioner Stoddart did not name the specific tested organizations. She stated however that "Our research serves as a wake-up call to all

'OPEN COURT' PRINCIPLE HAS LIMITS

The Supreme Court of Canada determined in a recent decision that, as important as the 'open court' principle may be, there are interests sufficiently compelling to justify restricting media access. In this case those interests were privacy and cyberbullying.

This September 27, 2012 decision is <u>A.B. v.</u> Bragg Communications Inc, 2012 SCC 46.

CANADIAN BAR ASSOCIATION (CBA) RESOURCE

Saskatchewan lawyers are encouraged to check out the latest newsletter produced by the CBA National Privacy and Access Law Section.

This is edited by **Erin Kleisinger** from McDougall Gauley's Regina office and includes

five timely articles on access and privacy developments.

CBA members can view this at: <u>www.cba.org/</u> <u>CBA/pubs/newsletters/default.aspx</u>.

Canadian law – and respecting the privacy rights of people who use their sites".

online services to ensure they are complying with

The Report <u>Backgrounder: OPC "web leakage"</u> <u>research project</u> can be viewed at: <u>www.priv.gc.ca/media/nr-c/2012/</u> bg_wl_120925_e.asp.



SASKATOON AND REGINA OUTPERFORM SASKATCHEWAN GOVERNMENT

In the National Freedom of Information Audit 2012, undertaken on behalf of Newspapers Canada, top marks went to Nova Scotia, Newfoundland and Saskatchewan.

The city of Saskatoon received an 'A' grade for timeliness and an 'A' grade for comprehensiveness. The city of Regina received an 'A' grade for timeliness and a 'C' grade for comprehensiveness. Our provincial Government fared not quite as well with a 'B' for timeliness and a 'B' for comprehensiveness.

Between April and August 2012 the same requests were sent to federal government agencies, five departments in each province and 20 municipalities (including Saskatoon and Regina). The authors of the study caution readers about drawing conclusions about any institution's overall record solely from the results of this audit. "No claim is made that the audit requests filed to any one institution are necessarily

PRIVACY AND PATIENTS

In provinces like Saskatchewan we have standalone health information laws such as <u>The Health</u> <u>Information Protection Act</u> (HIPA) to facilitate the development of electronic health records. Perhaps surprisingly there hasn't been more research done on privacy and patient expectations.

In that context, there should be interest in a study done the Beryl Institute entitled <u>The Role and</u> <u>Perception of Privacy and its Influence on the</u> <u>Patient Experience</u>. You can view the study at: <u>https://theberylinstitute.site-ym.com/store/</u> view_product.asp?id=1289871. representative of the overall performance of the institution in answering all requests it receives and it would be an error to interpret them this way."

Our office's overall experience with Saskatchewan public bodies is a little less optimistic but all of us can certainly celebrate a lot of achievement by local authorities, government institutions and health trustees over the last six or seven years.

When this survey was first published seven years ago Saskatchewan placed dead last and was awarded an 'F' grade. For more information, you can view our <u>May 2005 FOIP FOLIO</u>, page 2 at: <u>www.oipc.sk.ca</u> under the <u>Newsletters</u> tab.

The latest Audit can be viewed at: www.newspaperscanada.ca/public-affairs/ FOI2012.

One caution is that this study deals not just with informational privacy but also physical privacy which is not covered by laws like HIPA.





WHEN CAN A BID DOCUMENT BE WITHHELD UNDER FOIP?

A recent Ontario Information and Privacy Commissioner (IPC) Order considered the decision of a city to release a bid submitted to the city in response to a Request for Proposal (RFP) under the <u>Municipal Freedom of Information and</u> <u>Protection of Privacy Act</u> (MFIPPA). The Order required that some of the information the city of Sarnia proposed to disclose be withheld pursuant to an exemption similar to section 19 of FOIP in Saskatchewan.

The Senior Adjudicator found the fact that the RFP cautions that all responses are subject to MFIPPA doesn't displace a reasonable expectation of confidentiality if the bid hasn't already been shared more widely and if the bid is marked "confidential to the City". There will be no expectation of confidentiality in respect of

information that is available on the bidder's website and that is disclosed in a public meeting. If harm can be inferred from other circumstances, "[t]he failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances." Also, public policy may permit losing bids greater scope for protection than successful bids. The issue of accountability in spending public funds is not as engaged with an unsuccessful bid as a winning bid.

Although the bidder failed to offer detailed evidence with respect to potential harm, the particular circumstances may permit an inference of harm. The Ontario IPC <u>Order MO-2786</u> is available at: <u>www.ipc.on.ca</u>.

PRIVACY AND CRIMINAL RECORD CHECKS

In September, the Canadian Civil Liberties Association released its report on criminal records checks. The Report entitled, <u>Presumption of Guilt? The Disclosure of Non-Conviction Records in Police Background</u> <u>Checks</u> is available at: <u>www.ccla.org</u>. This includes seven recommended best practices including:

- Regular review and destruction of nonconviction disposition records;
- Retention only in exceptional

circumstances;

- Notification of decision to retain and opportunity to make submissions;
- Independent appeal process;
- Background checks required only where clear criteria met;
- Adequate record-keeping and reporting on the scope, frequency and impact of police background checks; and
- Protecting the innocence against unwarranted discrimination.

GRACE-PÉPIN AWARD GOES TO FOUNDER OF FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION (FIPA)

Darrell Evans, who founded B.C.'s FIPA, was honoured with the *Grace-Pépin Access to Information Award*. Mr. Evans has been a tireless advocate for strong access to information and privacy protection. He has been involved in legislative developments in B.C., Alberta and at the federal level. Information Commissioner of Canada, **Suzanne Legault**'s news release on the award is available at: <u>www.oic-ci.gc.ca/eng/media-room-salle-media_news-releases-communiques-de-presse_2012_5.aspx</u>.



BRING YOUR OWN DEVICE (BYOD)

The office of the federal Privacy Commissioner has produced a useful slide deck entitled *Bring Your Own Device*. This discusses the reported risks and advantages of allowing employees to bring their own information technology (IT) products to work. It also offers sample solutions and a list of relevant considerations including:

- Clear well defined policy that outlines roles and responsibilities;
- Recognize the types of information that will be on the device;
- Define what restrictions there should be on the device;
- Strong IT security controls;
- Password protected enabled devices and encryption;
- Being able to audit devices and personal information flow;
- Employee awareness and training;
- Data breach action plan; and
- Remote wipe.

Employers should also carefully consider the following caution from **Timothy Banks** of Fraser Milner Casgrain LLP, writing for Mondaq:

"It should be obvious therefore, that in a BYOD environment, the privacy interest may be even greater. If an individual may have a reasonable expectation of privacy in the information



stored on a workplace-issued device, it is likely a shorter step to concluding that an individual has a reasonable expectation of privacy in the context of a BYOD program. Furthermore, employers should consider whether their administrative policies and practices are appropriately tailored to the operational reality that employees are using workplace-issued devices and BYODs for personal use and how that may affect their ability to monitor employees, particularly where that monitoring is surreptitious. An overreaching policy will not provide comfort to an employer if it is out of step with the practical reality of the workplace."

ALBERTA ARBITRATION AWARD FOR PRIVACY BREACH

An interesting example of the overlap of privacy and labour law is provided by an April 5, 2012 arbitration award. The arbitrator, **Andrew Sims**, considered the claim by 26 government employees for damages due to an admitted breach of their right to privacy through an unjustified credit check on their personal affairs.

These were employees of the Maintenance Enforcement Program (MEP). An investigation into some fraudulent MEP cheques ensued. An overzealous peace officer decided to conduct credit checks on employees to see if any of them were in financial difficulty. Apparently this was done assuming that this might indicate a motive to defraud the government. In a complaint investigation undertaken by the Alberta IPC, the Alberta Government conceded that the searches were improper and contravened Alberta's *Freedom of Information and Protection of Privacy Act*.

Given the apology from the Government to the affected employees, the fact that there was no disclosure of the personal information to third parties by the employer and that the records had already been destroyed, Mr. Sims assessed the damages at \$1,250 each.



EMAIL COMMUNICATION

Our colleagues in the Alberta IPC have produced a useful set of *Email Communication FAQs*. You can access these at <u>www.oipc.ab.ca</u>. These include such questions as:

- Instead of limiting the amount of information or encrypting, can I mitigate risk by having patients sign a consent form or disclaimer where patients accept the risks associated with email use?
- Can email be integrated into an existing EMR (Electronic Medical Record)?
- Is our privacy risk different if we text our patients instead of using email?
- Do mobile devices such as smart phones and tablets pose different risks with respect to emailing patients?

Our office would agree with the answers provided by the Alberta IPC to each of those questions. There are a couple of references that may be confusing for Saskatchewan readers. *Custodians* in Alberta are roughly equivalent to *trustees* in Saskatchewan. Privacy Impact Assessments (PIAs) a r e h i g h l y recommended in Saskatchewan but in Alberta they are required for all c u s t o d i a n s.



Physician Office System Program is a specific Alberta Health Services-Alberta Medical Association program that is similar but not identical to the Saskatchewan EMR program.

We also encourage our readers to consider a second Alberta IPC publication entitled, *HIA Practice* <u>Note #5 - Communicating with patients</u> <u>via email: Know the risks</u> and our resource entitled <u>Best Practices: Mobile Device Security</u> available at: <u>www.oipc.sk.ca</u> under the <u>Resources</u> tab.

HAVE YOU CONSIDERED YOUR "MEDICAL SHADOW"?



Lisa Di Valentino has written an interesting article entitled <u>"Medical</u> Shadow": On the Privacy Protection of ling in Canada

<u>Personal Health Information Online in Canada</u>. In her essay, the author discusses the "trend toward online health research, how data are collected by web sites and especially third-party advertisers, and the reasons that the privacy of such data should be protected." The 'medical shadow' in the title refers to the digital shadow that is left by individuals when they visit various Internet sites to get information on disease and health issues. It allows others the opportunity to see what phrases and words a viewer searched for and to monitor the website visits made by the individual. She proposes legislative reform to better protect consumers.

You can view this paper at: <u>http://ssrn.com/</u> abstract=2091855.



Office of the Saskatchewan Information and Privacy Commissioner September/October 2012

OUEBEC DATA PORTAL

Quebec has launched an 'open data' portal at: www.donnees.gouv.qc.ca.

Although the publication of some 70 data sets is a positive sign, some local software developers have complained that there is an indemnification clause in the licence agreement that will discourage many prospective users. The

province of B.C. is the other province that has embraced an 'open government - open data' This was a major theme in the regime. Saskatchewan Commissioner's Annual Report for 2011-2012.

The Annual Report is available at: www.oipc.sk.ca, under the Annual Reports tab.

SASKATOON CITY COUNCIL FUNDS CREATION OF 'OPEN DATA' REGIME

In August, the city of Saskatoon decided that it that would allow easy access to civic databases would move to create an 'open data' catalogue by individuals and organizations.

B.C. INTEGRATED CASE MANAGEMENT SYSTEM IDENTIFIED AS MAJOR PRIVACY CONCERN

A number of civil society organizations in the province of B.C. have joined in an open letter to Premier Christy Clark urging a public inquiry into the Integrated Case Management system. Implementation began in April 2012.

This was conceived as a comprehensive personal data sharing environment for the provincial It also however includes many government.

community organizations contracted to provide Amendments were made to the service. province of B.C.'s Freedom of Information and Protection of Privacy Act in 2011 to enable this system.

For more information, please visit: www.fipa.bc.ca.

PROTECTING YOUR CHILD'S PERSONAL INFORMATION AT SCHOOL

The U.S.A. Federal Trade Commission has produced a useful brochure entitled Protecting your Child's Personal Information at School. To limit the risks of identity theft, parents are encouraged to do the following:

- Find out who has access to your child's personal information.
- Pay attention to materials sent home.
- Read the annual notice schools • must distribute that explains your rights under U.S.A. legislation.

- Ask the school about its director information policy.
- Ask for a copy of your school's policy on surveys.
- Consider programs that take place at the school but aren't sponsored by the school.
 - Take action if your child's • school experiences a data breach.

For more information, please visit: www.ftc.gov/idtheft.



FUTURE EVENTS

November 8, 2012: Medical Records Law in Saskatchewan - Delta Bessborough Hotel, Saskatoon, Saskatchewan. For more information, please visit: <u>www.lorman.com/ID381466</u>.



February 6 - 8, 2013: The 14th Annual Privacy and Security Conference - The Victoria Conference Centre, Victoria, British Columbia. For more information, please visit: www.rebootcommunications.com/events/privsec2013/.

May 15 - 16, 2013: Western Canada Health Information Privacy Symposium (WCHIPS) - Winnipeg, Manitoba. For more information, please visit: <u>www.verney.ca/wch2013/registration/</u> index.php.

June 2013: University of Alberta Access and Privacy Conference - Edmonton, Alberta. More information to follow.

