
AFP 2004 CONGRESS CURRENT LEGAL ISSUES IN FUNDRAISING

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New Privacy Legislation and Its Impact on Fundraising (Power Point Presentation)

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Introduction

- Overview of some of the developments that have occurred in the area of privacy law within Canada
- Specifically focusing upon the *Personal Information Protection and Electronic Documents Act (PIPEDA)*
- Review of impact of PIPEDA on charitable and not-for-profit organizations
- See Charity Law Bulletins # 28 and #42 at www.charitylaw.ca for more details

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PIPEDA

- On January 1, 2001, PIPEDA applied to organizations involved in the operation of a federal work, undertaking, or business
- On January 1, 2004, PIPEDA applied to all other organizations engaged in the collection, use and disclosure of personal information in relation to commercial activities

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- PIPEDA contains the following important definitions

“Organization”

- Includes an association, partnership, person, corporation, or a trade union

“Personal Information”

- Information about an identifiable individual but does not include the name, title or business address or telephone number of an employee of an organization

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– Only information which can be ascribed to an identifiable individual and does not include general databases which do not allow for the identification of individuals

“Commercial Activity”

- 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
- Includes any transfer of personal information for profit

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- Charities and not-for-profit organizations may be caught by the act if they engage in “commercial activities”
- Examples of “commercial activities”
 - Charitable golf tournament
 - Sale of books, hymnals, magazines
 - Sale of promotional items

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- There are no exceptions in the application of PIPEDA based upon the size of the organization
 - i.e., A small convenience store will be forced to comply with PIPEDA in relation to personal information about clients who rent its movies
- Compliance with PIPEDA will impose onerous, expensive and time consuming administrative requirements on organizations which collect, use or disclose personal information
- Failure to comply will lead to sanctions under PIPEDA

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Application of PIPEDA to Charitable and Non-Profit Organizations

- On March 31, 2004, the Office of the Privacy Commissioner of Canada (“Privacy Commission”) released a fact sheet which clarifies the application of PIPEDA to charities and non-profits
- The fact sheet states, “The bottom line is that non-profit status does not automatically exempt an organization from the application of the Act”

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- On September 8, 2004, an Ontario Court released *Rodgers v. Calvert*, the first court decision in Canada to analyze the meaning of “commercial activity” under PIPEDA
- The decision states, “there must be something more than a ‘mere exchange of consideration’ to characterize an activity as commercial.”

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- Whether a charitable or not-for-profit organization will be subject to PIPEDA depends on whether the organization engages in the kind of commercial activities as defined by PIPEDA:

“The presence of commercial activity is the most important consideration of determining whether or not an organization is subject to the Act.

Section 2 of the Act defines “commercial activity” as 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.”

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- It is the position of the Privacy Commission that collecting membership fees, organizing club activities, compiling membership lists, mailing out newsletters, and fundraising are not considered commercial activities
- Some clubs, such as many golf clubs and athletic clubs, may be engaged in commercial activities which are subject to the Act
- Each charitable or not-for-profit organization must review its activities to determine whether or not it engages in commercial activities and it is subject to PIPEDA

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Requirements of PIPEDA

- If a charity or not-for-profit organization determines that it is subject to PIPEDA, then it must comply with part 1 of PIPEDA
- Part 1 of PIPEDA incorporates the CSA “Model” code for the Protection of Personal Information (The Model Code)
- The Model Code was created to establish a voluntary national standard for the protection of personal information and did not impose sanctions upon organizations that did not comply with the Model Code

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- The Model Code incorporates 10 primary principles related to the collection, use and disclosure of personal information
- The following 10 principles have now been incorporated into PIPEDA and a breach of these principles may lead to sanctions under PIPEDA

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10 Principles

1. Accountability

- An organization is responsible for personal information under its control and shall designate an individual or individuals in the organization who will be accountable for compliance with PIPEDA
- An organization will also be responsible for information that it transfers over to third parties

2. Identifying Purposes

- An organization must identify the purposes for which personal information is collected and used at the time of, or before the collection of the personal information

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3. Consent

- The consent of the individual providing personal information is required at or before the collection of the personal information
- The form of consent (i.e., expressed or implied) will depend on the sensitivity of the information that the organization collects

4. Limited Collection

- The collection of personal information shall be limited to that personal information which is necessary for the purposes identified by the organization and shall be collected by fair and lawful means only

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5. Limited Use, Disclosure and Retention

- Personal information shall not be used or disclosed for purposes other than those purposes for which it was collected except with the consent of the individual or as required by law

6. Accuracy

- Personal information collected shall be accurate, complete and up-to-date as is necessary for the purposes for which it is to be used

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7. Safeguards

- Personal information shall be protected by security measures appropriate to the sensitivity of the information
- An organization should ensure that they have both physical security measures, e.g., locked filing cabinets, and technical security measures in place, e.g., fire walls and encryption

8. Openness

- An organization shall make readily available to individuals specific information about its policies and practices related to the management of personal information, including but not limited to:

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- The name or title, and the address of the person who is accountable for the organization's policies and practices
- The means of gaining access to personal information held by the organization
- A description of the type of physical information held by the organization, including a general account of its use

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9. Individual Access

- Upon request, an individual shall be informed of the existence, use and disclosure of his or her personal information; shall be given access to that information; shall be given the opportunity to challenge the accuracy of that information and have it amended if necessary

10. Challenging Compliance

- An individual shall be entitled to address a challenge concerning compliance with PIPEDA to an individual or individuals designated under Principle No. 1

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What Happens If There Is Non-compliance?

- An individual who has concerns that an organization is not complying with PIPEDA may do the following:
 - Complain to the Privacy Commissioner
 - The Privacy Commissioner may attempt to mediate the complaint
 - The Privacy Commissioner may also make recommendations; however, the recommendations are not binding
 - If the matter remains unresolved, the complainant or Privacy Commissioner can make an application to the Federal Court

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- Federal Court may:
 - Order the organization to correct its practices
 - Order the organization to publish a notice of any action taken or proposed to be taken to correct the problem
 - Award damages against the organization

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How Can an Organization Comply with PIPEDA?

- The following are some basic recommendations to assist in complying with PIPEDA:
 - Appoint a compliance officer or officers who will be responsible for compliance by an organization
 - Carry out a privacy audit; review the impact of the privacy principles on a specific organization

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- **Develop a privacy policy, ensure that individuals are aware of the policies and practices relating to an organization's management of personal information**
- **Revise your contracts; ensure that personal information that is transferred to thirds parties is protected by contractual means**
- **Ensure consent; the type of consent that an organization obtains will depend on the sensitivity of the information**
- **Develop appropriate security measures; both physical and technical security measures**
- **Maintain ongoing compliance; compliance with PIPEDA is not a one time occurrence**

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Concluding Comments

- **Once personal information is obtained, it is a valuable commodity**
- **PIPEDA is designed to ensure that no inappropriate use of such personal information is made**
- **Compliance with PIPEDA is mandatory**
- **Failure to comply will lead to possible sanctions and a loss of credibility**

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- **Although a charity or not-for-profit organization may not be subject to PIPEDA, it is still important to adhere to the underlying privacy principles, as donors and members expect charities and not-for-profit organizations to recognize their right to privacy**
- **For these reasons, it is recommended that charities and not-for-profit organizations implement a privacy policy to provide all the safeguards as standardized in PIPEDA**

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