Squeeze play

by Robert C. Worthington

Competing privacy protection legislation complicates the outsourced management of personal information

AS MORE GOVERNMENTS outsource their information management services to private sector companies, concerns are rising regarding the privacy of personal information of Canadians, especially when the out-sourced company is located outside of Canada. Recently the BCGEU, British Columbia's prime government employees' union, sought an injunction to prevent the province from hiring a US-linked contractor to run BC's public health insurance program. They argued that the US *Patriot Act* provisions could force the proposed information management company to disclose personal health information on Canadians to foreign governments.

The lawsuit prompted BC's Information and Privacy Commissioner to launch a public consultation, culminating in October 2004 with a 150-page report. Just days prior to the report's release, the province passed Bill 73 amending BC's *Freedom of Information and Protection of Privacy Act* (*FIPPA*), purporting to restrict the disclosure of personal information outside of BC and to expand the scope of personal liability and penalties if the rules are broken.

The US Congress passed the *Patriot Act* in the aftermath of September 11, 2001. The *Act* greatly expanded the powers of US law enforcement agencies to gather information. It allows US authorities to obtain records and other tangible things from any US company or its subsidiaries for "any significant purpose" to protect against international terrorism. It also allows the FBI to issue "national security letters" compelling any US company to secretly disclose information about their customers. These companies cannot (ever, apparently) reveal to their customers that they have done so. There is no oversight body, independent of the law enforcement authority, to control this information gathering, and there is no control upon what is done with the information once it is collected. And, US courts frequently uphold subpoenas ordering US-linked corporations to disclose records under the company's control – even records located outside the US.

It's easy to see why people in BC got a bit excited. Their health records could be revealed to US law enforcement (and the US government), secretly and contrary to Canada's protection of privacy and personal information laws.

Seeking to resolve these concerns, BC's Bill 73 amendments to *FIPPA* include:

- expanding coverage of the *FIPPA* to include personal information in the control of private organizations that provide services to public bodies;
- creating personal liability for employees, officers and directors of public bodies and service providers for contraventions of the *Act*;
- requiring both public bodies and their service providers to report foreign "or suspected foreign" demands for disclosure of personal information to the minister responsible for the *Act*;
- storage of personal information is required to remain in Canada – unless the person whose data it concerns has consented to it being stored or accessed from another jurisdiction;
- creating "whistle blower protection" for an employee who, acting in good faith and with reasonable belief, reports contraventions of *FIPPA*;
- giving the BC Information and Privacy Commissioner the power to issue apparently binding orders against service providers, although no method of enforcement is described in the *Act*.

However well-intentioned, the amendments to *FIPPA* do not appear to solve the fundamental problem of maintaining confidentiality of Canadian personal information when a government is outsourcing information management services to American companies.

An American information management services provider to a Canadian government or private company served with a US government demand for disclosure would be faced with a stark and difficult choice – comply with the demand and breach BC's law, or refuse and risk prosecution under the US *Patriot Act*.

Canadian law enforcement and domestic security forces are still entitled to disclose any information directly and without restriction or independent oversight, to any foreign law enforcement agency. The amended *FIPPA* still retains a wide range of permissible disclosures of personal information through the inappropriately vague "any arrangement, written agreement, treaty or provincial or Canadian legislative authority."

Further, the *FIPPA* amendments are not retroactive on existing contracts, creating two classes of rules – pre October 2004 and post October 2004. There are still different rules for public entities and private companies where data collection, storage

→ pg 6

← pg 2

and use are concerned. And, due to the international aspect of the issue (a purely federal matter), it may even be that the federal *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) will also apply to the outsourced company and to the government involved.

Finally, the "consent disclosure" provision of *FIPPA* may cause most information collectors to simply add a standard consent to all their information collection and thereby largely avoid the *Act* altogether.

The real difficulty is that the United States is not going to pay much attention to what any single Canadian province does. Given their current views on the *Patriot Act*, they might not even pay much attention to the Government of Canada raising the issue of protection of personal information, but at least we would have two equal levels of government talking. As it stands, while the BC legislation is one of Canada's first attempts at resolving the conflict between American and Canadian approaches to protection of personal information privacy, unfortunately, it falls short. Doubtless, we will be hearing more on this controversy.

An award-winning lecturer in law, Robert C. Worthington has taught purchasers and contract managers throughout Canada for the past 22 years, specializing in the laws of contract, competitive bidding and purchasing. He wrote the only Canadian book on purchasing law, entitled The Purchasing Law Handbook, *now in its 2nd edition, and his newest book,* The Public Purchasing Law Handbook, *is designed especially for government contracting and purchasing professionals.*