

## Guiding Practitioners on their Privacy and Confidentiality Obligations during COVID-19

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Regulating the protection of client privacy / confidentiality is now a shared responsibility between professional regulators and privacy commissioners. In recent years privacy commissioners have taken the lead in this area by providing more detailed guidance to practitioners and by operating well-known and comprehensive enforcement mechanisms. This is not to say that professional regulators have no role at all. As recently noted in our blog, in *Dagenais c. Nurses (Professional Order of)*, 2020 QCTP 11, <http://canlii.ca/t/j54cs> a nurse was disciplined by her professional regulator for revealing information about a patient to a journalist.

How then should these separate agencies provide guidance about addressing privacy and confidentiality concerns during the COVID-19 crisis? In particular, are standards relaxed when providing essential services by practitioners who may be unexpectedly practising electronically from their homes using equipment and programs that have not been set up using the usual safeguards?

The Information and Privacy Commissioner of Ontario, who oversees privacy by health care practitioners, offers the following guidance:

**Should organizations tell staff who are working at home to avoid accessing and collecting personal information of patients/clients? Home computers may not**

**have the same level of security as the devices in the office, which are on a secure network.**

We understand that these are exceptional circumstances and it may not be possible for service providers to meet the same standards for security and privacy protection that they normally do. Many organizations are striving to manage service disruptions and continue to provide essential services, especially in the health and child and family services sectors.

If your organization believes that staff (or agents working on the behalf of the organization) should be allowed to handle personal information from home, in order to provide necessary services in an effective and efficient way, you should permit them to do so. You should guide any staff working from home on how to do their work within as privacy-protective an environment as they can, given the realities of our current situation.

In a public health crisis, it is also understandable that service professionals, especially in the health and child protection sectors, may need to send or receive information by phone, text, email or other messaging services. The above applies to the use of technologies not normally used for business, during this crisis.

We remain available to public organizations for consultation and discussions on access and privacy matters during this time.

The Information and Privacy Commissioner of Ontario goes on to say:

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### Tips for Working from Home

We understand that these are exceptional circumstances and it may not be possible for you to meet the same standards for security and privacy protection that you normally do. Many organizations are striving to manage service disruptions and continue to provide essential services, especially in the health and child and family services sectors.

Here are some tips for dealing with personal information when working from home:

#### Mobile devices

- password protect your device
- lock your device when not in use
- if using portable storage devices, such as USBs and portable hard drives, if possible, ensure they are encrypted and password protected
- keep your software up-to-date

#### Emails

- if possible, use work email accounts rather than personal ones for work-related emails involving personal data
- before sending an email, check that you're sending it to the correct recipient, particularly for emails involving personal data

#### Paper copies and files

- only remove personal information from the office if it is necessary to carry out your job duties

- securely store any paper files when not in use – lock files away and do not leave files in your car

Most non-health professions in Ontario fall under the jurisdiction of the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)*. The Information and Privacy Commissioner of Canada has also issued guidance relating to COVID-19. However, while helpful, this guidance is more legalistic and, perhaps, less practical than that from Ontario.

*PIPEDA* allows organizations to collect, use or disclose information only for purposes that a reasonable person would consider appropriate in the circumstances (subsection 5(3)). Organizations are required to obtain the knowledge and meaningful consent of the individual for the collection, use, or disclosure of their personal information (Principle 3). Consent is only valid if it is reasonable to expect that the individual understands the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting (section 6.1).

This said, there are some circumstances under which organizations may collect, use, or disclose personal information without the consent of the individual, including:

- If the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way (paragraph 7(1)(a)), such as if an individual is critically ill or in a particularly dangerous situation, and needs help.
- If the collection and use is for the purpose of making a disclosure required by law

(paragraphs 7(1)(e), 7(2)(d) and 7(3)(i)). For instance, this would include where a public health authority has the legislative authority to require the disclosure.

- If the disclosure is requested by a government institution under a lawful authority to obtain the information and the disclosure is for the purpose of enforcing or administering any law of Canada or a province (subparagraphs 7(3)(c.1)(ii)-(iii)). Again, this would include instances where a public health authority has the legislative authority to require the disclosure.
- If the disclosure is made on the initiative of the organization to a government institution, which has reasonable grounds to believe that the information relates to a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed (paragraph 7(3)(d)(i)). This would include if an organization believes an individual is in contravention of an invoked quarantine order.
- If the use or disclosure is for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual (paragraphs 7(2)(b) and 7(3)(e)), such as if an individual requires urgent medical attention, and they are unable to communicate directly with medical professionals.

The federal guidance does not appear to address whether the usual privacy safeguards can be relaxed at this time other than to say:

All organizations must continue to operate with lawful authority and exercise good judgment. Government institutions will need to apply the principles of necessity and

proportionality, whether in applying existing measures or in deciding on new actions to address the current crisis

Regulators will undoubtedly be asked by practitioners about their privacy and confidentiality obligations during this crisis. Since most regulators of professions define the privacy and confidentiality duties broadly, they probably have greater flexibility in issuing general guidance indicating that all of the circumstances will be taken into account if a complaint comes in. Of course, more detailed guidance is possible and will likely be welcomed. Regulators may also wish to ensure that their messaging is, where possible, consistent with that issued by the applicable Information and Privacy Commissioners.

Some Canadian regulators of professions have given some carefully worded guidance about recognizing that the exceptional circumstances might result in practitioners adopting procedures that might not generally be considered appropriate. For example, the regulator for registered nurses in Alberta has said:

CARNA supports the use of virtual care platforms that are recommended and supported by the employer. We recognize that in highly challenging circumstances an NP may need to depart from established procedures in order to care for clients and people using health-care services. It is reasonable that if the employer is supporting temporary use of unregulated communication technologies based on the principle of matching intervention to need, then CARNA would also support this use as the Practice Standards for Regulated Members state that the RN and NP follow policies relevant to their practice setting.

Similarly, the legal regulator in Ontario has provided guidance on a number of issues, including proffering an interpretation of requirements for commissioning affidavits that is clearly driven by COVID-19:

Commissioning is governed by the *Commissioners for Taking Affidavits Act* and is not regulated by the Law Society. Although the law is evolving in this area, the best practice for commissioning documents remains for the lawyer or paralegal who is acting as a commissioner to be in the *physical presence of the deponent* to commission the document(s). For more information, please review the Law Society's Virtual Commissioning resource.\*

However, as a result of COVID-19, until further notice:

- The Law Society will interpret the requirement in section 9 of the *Commissioners for Taking Affidavits Act* that “every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public” as not requiring the lawyer or paralegal to be in the physical presence of the client.
- Rather, alternative means of commissioning such as commissioning via video conference will be permitted.
- If lawyers and paralegals choose to use virtual commissioning, they should attempt to manage some of the risks associated with this practice as outlined below....

The guidance went on to provide safeguards to ensure that the client fully understands the nature of the document and the significance of commissioning it

and to ensure that the client was not experiencing undue influence.

The guidance documents referred to above can be found at:

- <https://www.ipc.on.ca/newsrelease/ipc-closure-during-covid-19-outbreak/>
- [https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/gd\\_covid\\_202003/](https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/gd_covid_202003/)
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