



# Proposing Privacy

Ontario may be saving itself from the confines of some restrictive legislation

By Elliott Goldstein

### Q Is Ontario proposing a privacy act?

**A** Yes. Ontario's Ministry of Consumer and Business Services (MCBS), formerly the Ministry of Consumer and Commercial Relations, has proposed a draft privacy act entitled Privacy of Personal Information Act, 2002 (POPIA).<sup>1</sup>

According to the MCBS, the legislation is "designed to strike a balance between safeguarding the protection of personal information and helping Ontario's businesses seize competitive opportunities offered in today's global marketplace."<sup>2</sup> The draft bill seeks to establish clear rules that govern how personal information is handled by the private sector.

When passed, Ontario's legislation will replace its federal counterpart, the Personal Information Protection and Electronic Documents Act (PIPEDA),<sup>3</sup> which now applies to businesses that are federally regulated and to cross-border (that is, provincial and national) trade in personal information. This means that PIPEDA will not automatically apply to commercial activities in Ontario in January 2004 because Ontario has established its own privacy law. The same applies to other provinces that adopt "substantially similar" legislation.

Ontario's proposed Privacy of Personal Information Act, 2002 is based on the Canadian Standards Association (CSA) Model Code for the Protection of Personal Information, the same code used as the basis for the federal privacy law, PIPEDA, which came into effect on January 1, 2001. The CSA Model Code is just a schedule to the federal legislation. However, the proposed Ontario legislation "would incorporate these privacy principles directly into the provisions of the law, setting out specific rights and obligations."

Ontario's proposed legislation includes all activities and organizations not federally regulated and not covered by provincial public sector privacy legislation (that is,

the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act).

Ontario's Information and Privacy Commissioner is given powers by the draft bill to deal with privacy complaints and review the information practices of businesses and organizations if there is reason to believe that there has been a violation of the Act. Under the proposed legislation, there are a limited number of exemptions that

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apply to support "public safety and health, public security, and balance the protection of personal information with other legitimate activities performed by government and others." These exemptions, of particular interest to those who conduct surveillance and are responsible for security within institutions, organizations and businesses, are discussed below.

POPIA, as drafted, governs the collection, use and disclosure of "personal information" on an individual (even if the organization collected the information before the day the Act came into force). The Act requires every person and organization in Ontario to obtain consent from that individual, unless an exemption applies. If personal information is collected in contravention of the Act, the organization shall not use or disclose it. Personal information collected inside Ontario cannot be used outside Ontario unless permitted by the Act.

"Personal information" is broadly defined to mean "information in any form or manner about an individual, whether or not the information is recorded, that

(a) identifies the individual,

(b) can be manipulated by a reasonably foreseeable method to identify the individual, or

(c) can be linked or matched by a reasonably foreseeable method to other information that identifies the individual or that can be manipulated by a reasonably foreseeable method to identify the individual, and includes ... information that relates or may relate to the work performance of the individual or professional wrongdoing, misconduct or disciplinary matters involving the individual...."

As the federal privacy commissioner has ruled that surveillance videotapes collect personal information, it is a certainty that both visual surveillance and surveillance videotape recordings will come with-

in the definition of "personal information." They may also fall within the Act's definition of a "record," which is defined to mean "a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record." The Act also contains specific definitions for the words "collect," "use" and "disclose."

The aforementioned requirement to obtain the consent of the individual to the "collection, use, or disclosure" of his or her personal information may be express or implied. Express consent may be verbal or in writing but must be informed, voluntary, not obtained through deception or coercion, and must not have been withdrawn. Consent may be implied only if the purpose of the collection, use or disclosure is "reasonably obvious" to the individ-

ual and it is reasonable to expect the individual would consent, and the organization uses or discloses the information for no purpose other than that for which it was collected.

To make the aforementioned "purpose" obvious to the individual, the organization may post or provide a notice describing the purpose where it is likely to come to the individual's attention. This means that existing signage or notices that inform the public that an area is under video surveillance may have to be changed to include an explanation of the purpose of that surveillance.<sup>4</sup> The Act also permits an individual to withdraw his or her consent. However, there are restrictions on such withdrawal (for example, consent cannot be withdrawn if doing so would frustrate a legal obligation).

The aforementioned exemptions to the requirement that consent first be obtained (for collection, use or disclosure) only apply if certain conditions are met. For example, an organization may collect personal information about an individual without the consent of that individual if the following conditions apply:

- "The purpose of the collection reasonably relates to determining whether to investigate or investigating whether there has been a breach of an agreement or a contravention of an Act, a regulation or a law of a province or territory of Canada, including the common law and a rule or other instrument that such a law authorizes to be made."
- "It is reasonable to expect that obtaining the consent of the individual would compromise the availability of the information or its accuracy or would frustrate the investigation."

This above exemption would apply in cases of employee theft, embezzlement, mischief, misconduct and so on.

Other consent exemptions for collection include situations where the information is relevant to litigation and, at the time of collecting the information, or within a reasonable time thereafter, the organization gives written notice to the individual stating the purpose for which it is collecting the information and stating that it is collecting information under the authority of this clause.

There are also consent exemptions for the use and disclosure of personal information. For example, an organization may disclose its personal information about an individual to that organization's

lawyer. The organization may also disclose information, without consent, for the purpose of having an investigative body enforce any law of Canada or its provinces or territories or a foreign jurisdiction or a municipal bylaw; carry out an investigation relating to the enforcement of that law or bylaw; or gather information or intelligence for the purpose of enforcing that law or bylaw.

Note that "investigative body" is specifically defined to mean "a prescribed person or body that is legally authorized in Canada to carry out an investigation relating to the enforcement of a law of Canada, a province, municipality or territory of Canada or a foreign jurisdiction, etc." This would probably include law enforcement officers but not private investigators or corporate security personnel.

The proposed Act contains penalties for its breach. For example, the Act provides that "an individual may bring action in the Superior Court of Ontario for damages for actual harm suffered as a result of the breach of this Act or its regulations." Furthermore, "the Attorney General may prosecute a person or organization that contravenes the Act. If convicted, persons or organizations face fines of up to \$50,000 (for individuals) or \$100,000 (for an organization), respectively.

The proposed Privacy of Personal Information Act, 2002 is subject to amendment and is not yet law. However, the MCBS has been instructed to have this bill ready for introduction in the Legislative Assembly by late spring of 2002. When it comes into effect, it will be the subject of further comment in this column. ♣

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### Author's Notes

- 1 The draft copy of the Act is found at [www.cbs.gov.on.ca/mcbs/english](http://www.cbs.gov.on.ca/mcbs/english). Simply click on "privacy protection new update" under HOT ITEMS.
- 2 All quotes are taken from news releases found on the Web site listed above.
- 3 PIPEDA presently applies only to the territories: Yukon, North West Territories, and Nunavut.
- 4 Such wording will be the topic of a future article.

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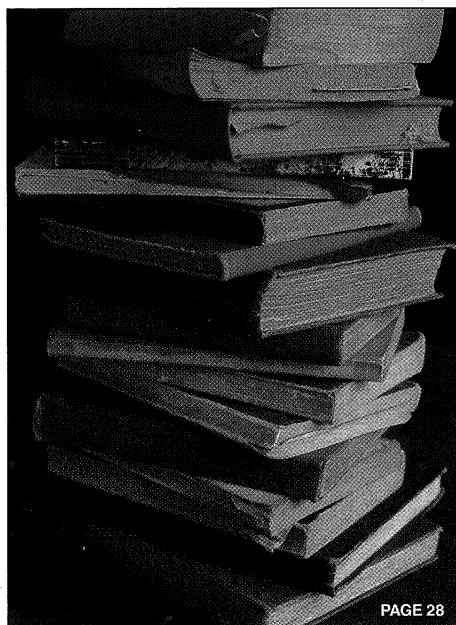
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# Contents



PAGE 28

## 18 Risky Business

Proactive risk assessment and management, and its impact on security

*By David Murray Hyde*

## 22 Dealing in Detection

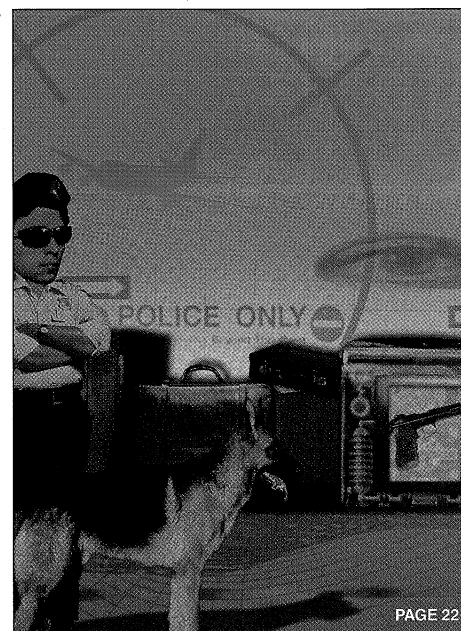
Improving national security by using the latest and greatest in detection technology

*By Duff McCutcheon*

## 28 Getting Educated

The benefits of higher learning as seen through the eyes of security professionals who have risen to the challenge

*By Stacey Hunt*



PAGE 22

## In Each Issue

### Editor's Notebook

Defining Personal Space

4

### Letters to the Editor

Thoughts on a first issue

6

### Industry Updates

National Gallery chooses Securitas; weapon does double duty; new emergency call system; and more

9

### Alarm Industry News

Dominion unveils new personal alarm; remotely monitoring multiple complexes; updates from CANASA; and more

14

### CCTV and the Law

Proposing Privacy  
*By Elliott Goldstein*

16

### CSIS Information

Of Nuclear Threat  
*By Gerry Kileeg*

32

### People on the Move

35

### Calendar of Events

36

### Product Marketplace

37

### Literature Request Directory

37

### Advertisers' Index

37

### From the Trenches

On the Run  
*By Glen Kitteringham*

38