SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT 2005 – 001

AUTOMOBILE INJURY APPEAL COMMISSION

Summary: The Complainant asked the Commissioner to investigate the practice of the Automobile Injury Appeal Commission of publishing on its website the full text of its decisions. Those decisions include a good deal of personal information and personal health information of those persons applying for compensation. The Commissioner found that there was no legislative requirement that the Commission publish decisions on its website and that such publication falls short of privacy 'best practices'. The Commissioner found that the Commission had failed to adequately protect the privacy of the applicant as it is required to do by *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act*. The Commissioner made 11 recommendations to the Commission.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, C. F-22.01 as amended; *The Freedom of Information and Protection of Privacy Regulations,* C. F-22.01 Reg 1 as amended; *The Health Information Protection Act,* S.S. 1999, C. H-0.021, as amended; *The Auto Accident Insurance Act*, R.S.S. 1978 C. A-35, as amended; *The Personal Injury Benefits Regulation*, C.A-35 Reg 3; *Interpretation Act* 1995, S.S. 1995, C. 1-11.2; *The Archives Act*, S.S. 2004, c. A-26.1

Authorities Cited: R. v. Dyment [1988] 2 S.C.R. 417; R.v. Edward [1996] 1 S.C.R. 128; R.v. O'Connor [1995] 4 S.C.R. 411; R.v. Duarte [1990] 1 S.C.R. 30; R.v. Serendip Physiotherapy Clinic [2003] O.J. No. 2407 (Ont. S.C.); R.v. Mills [1999] 3 S.C.R. 668; Canadian AIDS Society v. Ontario (1995) 25 O.R. (3d) 388; General Motors Acceptance Corporation v. Prozni 51 D.L. R. (2nd) 724; Alberta (Attorney-General) v. Krushell [2000] A.J. No. 358; Paisley Parks Enters, Inc. v. Uptown Products, 54 F. Supp 2nd 347

Authorities Cited: Cont'd

Open Courts, Electronic Access to Court Records and Privacy, Prepared on behalf of the Judges Technology Advisory Committee for the Canadian Judicial Council, May, 2003; *The Law of Privacy in Canada, Vol. 1*, Barbara McIsaac, Rick Shields, Kris Klein, Thompson-Carswell, Toronto, 2000, 2-13; *Privacy Law in the Private Sector*; *An Annotation of the Legislation in Canada*, Priscilla Platt and Jeffrey Kaufman, Canada Law Book Inc. Aurora, Ontario, N-2; *Public Records on the Internet: The Privacy Dilemma*; Beth Givens, 2002, available online at http://www.privacyrights.org/ar/onlinepubrecs.htm;

I BACKGROUND

[1] Our office received a complaint from a Saskatchewan resident on August 10, 2004. The complaint related to the practice of the Automobile Injury Appeal Commission ("the Commission") of publishing its reports on its website, www.autoinjuryappeal.sk.ca.

[2] The Commission is a "government institution" and subject to *The Freedom of Information and Protection of Privacy Act* ("FOIP Act") by virtue of *The Freedom of Information and Privacy Regulation* ("FOIP Regulation"). The Commission is also a "trustee" under *The Health Information Protection Act* (HIPA).

[3] Our authority to investigate this complaint arises under section 33(d) of the FOIP Act. That provides as follows:

> ***33*** *The Commissioner may: . . .*
>
> *(d) from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part.*

[4] In Report 2004-003[1] this office determined that the purposes of the FOIP Act are as follows:

> To make public bodies more accountable to the public and to protect personal privacy by:
>
> (a) giving the public a right of access to records;
>
> (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves;
>
> (c) specifying limited exemptions to the rights of access;
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
>
> (e) providing for an independent review of decisions made under this Act.
>
> [Emphasis added]

[5] In addition, section 52 of *The Health Information Protection Act* authorizes the Commissioner to do the following:

> *52 The Commissioner may:*
>
> *(b) after hearing a trustee, recommend that a trustee:*
>
> *(i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act . . .*
>
> *(d) from time to time, carry out investigations with respect to personal health information in the custody or control of trustees to ensure compliance with this Act;*
>
> *(e) comment on the implications for protection of personal health information of any aspect of the collection, storage, use or transfer of personal health information.*

[6] We wrote the Commission on August 19, 2004 to advise of the complaint and stated as follows:

> *Please be advised that our office has received a complaint with respect to personal data disclosed on your website autoinjuryappeal.sk.ca. As we understand the complaint, the concern is that individually identifying information of a claimant is available on the website without any masking of identity.*

[1] Report 2004-003, available online at http://www.oipc.sk.ca/Reviews_files/Report%20No.%202004--003%20--%20File%20014--2004.pdf , [10], [11]

> *Please advise as to your specific authority for the publication and disclosure of individually identifying information on your website. We would be particularly interested in your views as to why the principle of transparency cannot be adequately addressed if individually identifying information was masked on your website.*

[7] On December 22, 2004 this office received a letter from the Commission dated December 20, 2004. The letter discusses its authority for the publication and concludes as follows:

> *The Commission has concluded that it is authorized under its own legislation (AAIA and PIBR) and under the exemptions in HIPA and FOIPP to publish its decisions on its website, and on that of CANLII.*
>
> *We believe that in doing so, we serve our public better by providing information of assistance in presenting their claims. We are conscious that we are dealing with real people, with real complaints and concerns about a government agency. By following the court model, we hope to assure claimants that they are receiving a genuinely independent inquiry.*

[8] What is the business of the Commission? The Commission advises that:

> *The Commission was established in January, 2003 pursuant to section 196.1 of The Automobile Accident Insurance Act (the "AAIA"). The purpose of the Commission is to hear and determine appeals of decisions made by Saskatchewan Government Insurance ("SGI") under Part VIII of the AAIA. A claimant can choose to appeal a decision made by SGI to either the Court of Queen's Bench or the Commission: section 191(1). An appeal hearing ultimately involves the presentation to the Commission of a claimant's personal information within the meaning of FOIPP and personal health information within the meaning of HIPA.*
>
> *Subject to The Personal Injury Benefits Regulations (the "PIBR"), the Commission may make rules governing its proceedings: section 196.4 of the AAIA. By virtue of section 92 of the PIBR, hearings of the Commission are to be open to the public, unless the Commission orders otherwise. The AAIA directs that reasons for decisions of the Commission are to be in writing and provided to the claimant and SGI [section 193(8)]. The AAIA is silent in relation to the authority of the Commission to publish the decision, or make it otherwise generally available to the public.*

The Commission Website

[9] If one visits the website of the Commission, one will find a page headed "Decisions" that lists the following links:

- Income Replacement Benefits
- Rehabilitation
- Medical, Travel and Personal Expenses
- Living Assistance
- Permanent Impairment Benefit
- Death Benefits
- Other

[10] If one clicked on those links on January 22, 2005 there is access to the following:

- Income Replacement Benefits- 26 decisions
- Rehabilitation – 19 decisions
- Medical, Travel and Personal Expenses –17 decisions
- Living Assistance- 8 decisions
- Permanent Impairment Benefit-5 decisions
- Death Benefits – 1 decision
- Other – 9 decisions

[11] Each decision refers to the applicant by first and last name. In some cases a middle name is included. If one clicks on any of the case names, there is immediate access to the full report of the Commission. I have reviewed a number of the decisions on the website. Each decision typically includes information about the diagnosis, treatment and care of the individual. It typically reflects things said by the applicant and things said about the applicant by others including medical experts. It may include gross income, income tax, CPP, EI and total deductions. It may discuss living arrangements, children and relationships. The information about the physical and mental health of the applicant is detailed and extensive. We expect that if an applicant had a mental illness, HIV/AIDS, a miscarriage, an abortion, and that was viewed as somehow relevant in the Commission's deliberations, that would be described in the decision as it appears on the website.

[12] We note that on the Decisions page on the website it states that "*once the 30 day appeal period has expired, the decision is posted on the Commission's website"*. Such a notice does not appear on the prescribed application form that must be completed to trigger the review by the Commission. This notice does not clearly disclose that the published decision will reveal the identity and a good deal of personal and personal health information of the applicant. Apparently there is no such notification to applicants. The website does not refer the visitor to a Commission privacy policy nor does it identify a privacy officer or indeed any person to contact to get more information about privacy policy or concerns.

[13] In our experience, SGI often will collect at least three years post-accident medical information to look for prior injuries. SGI will have considerable information about medical diagnosis, treatment and care, the names of health care providers, details of treatment and discussions involving claims officials and health care providers over a number of years. SGI will also have information on the prognosis of an injury. All of this information is accessible by the Commission and may be described in the decision posted to the Commission website.

II ISSUES

[14] **1. Does the publication of the Commission's decisions on its website violate *The Freedom of Information and Protection of Privacy Act?***

[15] **2. Does the publication of the Commission's decisions on its website comply with *The Health Information Protection Act?***

[16] **3. Does the Commission's practice of publication of decisions correspond to best practices in terms of disclosure of personal information?**

III DISCUSSION OF THE ISSUES

[17] The Commission has acknowledged that the AAIA is silent as to the authority of the Commission to publish its decisions or make it otherwise generally available to the public.

[18] It is important to note that in the appeals to the Commission, the applicants are required to provide a great deal of personal information and personal health information to SGI and subsequently the Commission. Those applicants have no choice if they wish to seek the compensation permitted by law.

[19] I have found the 2002 article, *Public Records on the Internet: The Privacy Dilemma*[2] by Beth Givens very helpful in trying to identify and frame the issues for this investigation. Ms. Givens enumerates nine negative consequences of the availability of public records online. She also offers eleven recommendations for safeguarding personal privacy while upholding the public policy reason for providing access, that being to promote public accountability.

[20] Part IV of the FOIP Act sets out a complete code for the collection, use and disclosure of personal information by government institutions. HIPA sets out a complete code for the collection, use, disclosure and protection of personal health information by trustees. The language in both FOIP and HIPA however is general and not particularly prescriptive. This affords the necessary flexibility to our office to apply the protection of privacy rules in many different contexts. Before addressing those specific provisions in the FOIP Act cited by the Commission to justify its practice of website publication, or the relevant HIPA provisions it may be useful to consider the larger privacy picture.

[2] Available online at http://www.privacyrights.org/ar/onlinepubrecs.htm

1. Does the publication of the Commission's decisions on its website violate *The Freedom of Information and Protection of Privacy Act?*

Privacy as a Charter Right

[21] Saskatchewan legislation must conform to the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada has considered the concept of privacy in several different contexts and determined that the Charter guarantees all Canadians a right of privacy. The Supreme Court has stated that privacy is a feature "at the heart of liberty in a modern state"[3]. Justice Cory had characterized privacy as "the right to be free from intrusion or interference".[4]

[22] Privacy is regarded as a fundamental right that is essential to safeguard the autonomy and dignity of an individual.

[23] The right of privacy is founded on sections 7 and 8 of the Charter.[5] Those sections provide as follows:

> *7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> *8. Everyone has the right to be secure against unreasonable search or seizure.*

[24] The Supreme Court has signalled that the right of privacy is contingent on a reasonable expectation of privacy.[6]

---

3 R. v. Dyment [1988] 2 S.C.R. 417,

4 R. v. Edward [1996] 1 S.C.R. 128

5 R. v. O'Connor [1995] 4 S.C.R. 411 (S.C.C.); R. v. Serendip Physiotherapy Clinic (2003), [2003] O.J. No. 2407 (Ont. S. C.); Canadian AIDS Society v. Ontario (1995), 25 O.R. (3d) 388 (Gen. Div.); affirmed (1996), 31 O.R. (3d) 798 (C.A.), leave to appeal refused (1997), 216 N.R. 150 (note) (S.C.C.); R. v. Mills [1999], 3 S.C.R. 668

6 The Law of Privacy in Canada, Vol. 1, Barbara McIsaac, Rick Shields, Kris Klein, Thompson-Carswell, Toronto, 2000, 2-13

[25] The Supreme Court has recognized a number of kinds of privacy namely, physical or bodily privacy, territorial privacy, privacy of communications and information privacy. For purposes of this investigation, the focus will be on what is described as information privacy. The Supreme Court of Canada has quoted with approval the following statement:

> *This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.*[7]

In the words of La Forest, J:

> *…privacy may be defined as the right of an individual to determine for himself when, how and to what extent he will release personal information about himself…* [8]

Publication of Court Decisions

[26] Although it is common ground that the Commission is not a court and not therefore excluded from the FOIP Act, the Commission has argued that there are similar obligations on the part of both courts and the Commission to assure applicants that they are receiving a genuinely independent inquiry. The Commission has stated that in publishing its decisions on its website it is following "the court model".

[27] We also note however that there are significant differences between the Commission and a court. Every court has supervisory power over its own records and is guided by an extensive body of jurisprudence. The Commission is an administrative tribunal created by legislation with a mandate and powers defined by legislation.

[7] R.v. Dyment [1988] 2 S.C.R. 417
[8] R.v. Duarte [1990] 1 S.C.R. 30

[28] In any event, the traditional approach of the courts in Canada on this question of public access in an electronic environment is currently under review. Some of the factors at play in such a review are noted in Privacy Law in the Private Sector, An Annotation of the Legislation in Canada:

> *Equally contentious is the access given to the decisions of courts and tribunals. Often these decisions are published in legal journals, but with the advent of the internet such decisions are also widely available without cost, or need to subscribe, 24 hours a day, seven days a week. Most superior courts, including the Supreme Court of Canada, have their own web sites that post decisions. Moreover, other sites such as www.canlii.org contain many decisions of courts and tribunals from across Canada in one place. Such widespread access to sensitive personal information contained in judgments, together with powerful search engines, eliminates the practical obscurity that exists when publication is in paper form or through subscription to legal journals. Ought Social Insurance Numbers, bank account numbers and other sensitive identifying information to be in judgments? What of the names of children and the detailed financial information of their parents? …employment history and medical information are frequently outlined in employment decisions. Ought judgments to be written differently based on their widespread availability on the internet? In light of the impact on reputations, will those who are knowledgeable and able to afford alternatives resort to private courts or arbitration, leaving the public courts to the poor and uninformed? With the proliferation of identity theft, will electronic access to judgments provide fertile ground for this burgeoning crime?*[9]

[29] We note the Alberta Court of Queen's Bench decision in Alberta (Attorney-General) v. Krushell.[10] That case involved a judicial review of an Order by the Alberta Information and Privacy Commissioner. This related to an access request for the list of names of accused persons and the charges they face which were produced for each criminal docket court each business day. The applicant intended to offer it for sale to the public via the Internet. Although the issue before the court was different than the issue in this investigation, a number of the observations of Madam Justice Bielby are useful in this discussion.

---

[9] Privacy Law in the Private Sector- An Annotation of the Legislation in Canada; Priscilla Platt, Lise Hendlisz, Daphne Intrator, Jeffrey Kaufman, Canada Law Book, December 2004, N-2

[10] [2000] A.J. No. 358

[30] This includes the following dicta:

> *The mischief which could be created by allowing ready public access to the names of unconvicted accused is not difficult to imagine. Statutorily prescribed punishments for the convicted would pale in many cases in comparison to the de facto punishment created by posting information on the criminally charged for the benefit of the gossip and the busybody. Similarity of names might create defamatory impressions. Same-day internet postings would create concern about courthouse security and judge-shopping which could affect the administration of justice and thus judicial independence in ways the Legislature clearly attempted to avoid by so carefully exempting all matters relating to the judiciary in other subsections of s. 4.*
>
> *While there is currently limited public access to this information via the physical daily posting of the criminal dockets on site, that does not justify posting world-wide for all time to all of those with access to the internet. Currently privacy is protected by the practical obscurity created by the physical inconvenience of attending at each courthouse to examine the criminal dockets by others than those who have personal involvement in the matters then before the courts: United States Department of Justice et al v. Reporters Committee for Freedom of the Press et al, 489 U.S. 749, 109 S.Ct. 1468 (1989) (U.S.S.C.). Similarly, the transitory purpose of these documents described by the Privacy Commissioner in his reasons, in that they are created and used for one day in each courthouse, does not translate into the permanent record that would be created by providing them to* [the applicant] *for posting on the world-wide web.*

[31] Although the records in question are clearly permanent records and questions of court house security, judge shopping and the administration of justice are not engaged in this investigation; Justice Bielby recognizes differential harm resulting from Internet publication as opposed to a physical record available for examination in one location.

[32] In May, 2003 the Canadian Judicial Council published a paper, *Open Courts, Electronic Access to Court Records and Privacy* ("Open Courts paper"). This paper was prepared on behalf of the Judges Technology Advisory Committee. The authors conclude that it would be inappropriate to recommend a model policy. Instead the discussion paper was designed to provide a framework within which electronic access policies might be established.

[33] I have found that the Open Courts paper provides an up-to-date survey of relevant case law and other important considerations in assessing public access to court records. The Report discusses the importance of open courts but also states:

> *However, the open court presumption is rebuttable and the Court maintains discretion over the issue of access to its records:*
>
> > *Undoubtedly every court has supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of that right.*[11]

[34] The Open Courts paper also quotes Mr. Justice Binnie of the Supreme Court of Canada as follows:

> *It is an important constitutional rule that the courts be open to the public and that their proceedings be accessible to all those who may have an interest. To this principle there are a number of important exceptions where the public interest in confidentiality outweighs the public interest in openness. This balance is dealt with explicitly in the relevant provisions of the Young Offenders Act, which must be interpreted in light of the Declaration of Principle set out in s. 3* [12]

The Report also notes that some provinces including Saskatchewan "generally restrict access to court records for family law proceedings to the parties and their lawyers"[13]

[35] One of the conclusions of the Report is that there is disagreement about the nature of the exemption to the general rule that the public has a right to open courts.[14]

[11] Open Courts, [12]
[12] Open Courts, [28]
[13] Open Courts, [35]
[14] Open Courts, [39]

[36] The Report offers the following observations about the global context:

> *Up to this point, the issue of accessibility and the rationalization of the fundamental values of openness and privacy have arisen in a world dominated by paper. That will change dramatically. As an example:*
>
> *The world produces between 1 and 2 exabytes of unique information per year, which is roughly 250 megabytes for every man, woman, and child earth. An exabyte is a billion gigabytes, or 10[su'18'] bytes. Printed documents of all kinds comprise only .003% of the total. Magnetic storage is by far the largest medium for storing information and is the most rapidly growing with shipped hard drive capacity doubling every year. Magnetic storage is rapidly becoming the universal medium for information storage.*
>
> *Furthermore:*
>
> *While many government site users focus on their personal needs in dealing with government agencies, there is abundant evidence that a new "e-citizenship" is taking hold: 42 million Americans have used government Web sites to research public policy issues [;] 23 million Americans have used the Internet to send comments to public officials about policy choices[;] 14 million have used government Web sites to gather information to help them decide how to cast their votes[; and] 13 million have participated in online lobbying campaigns.*
>
> *In the Canadian context, in 2001, half of Canada's small businesses were doing business online (compared to 77% of American small businesses). Canada leads North America in connectivity with 60% of Canadians online as of 2001 (compared to 52% of Americans) although only 17% of Canadians purchased online (while 27% of Americans purchased online). In the financial sector, 85% of Canadians have a debit card and 82% of debit cardholders have used their card to make a purchase. An estimated 2.5 billion debit card transactions were made in Canada in 2002. Canadians can use their debit cards at more than 460,000 terminals across Canada, including in grocery stores, gas stations and drug stores. Over the past six years, Canada's six largest banks have spent a cumulative total of almost $17 billion on technology.*
>
> *The federal government has established an Innovation Strategy and has set a goal to make Canada one of the top five countries in the world for information and communications technology research and development performance by 2010. A commitment has been made to make high-speed broadband access available to all Canadians by 2005.*

> *It may be that jurisdictions which have attempted or contemplated "e-commerce" in various aspects of the administration of justice have been confronted with challenges. Notwithstanding such challenges, it is not a question of whether the electronic environment will dominate the administration of justice. It is a question of when."* [15]

According to the Report:

> *In the middle of 2002, as a result of privacy issues having been raised in family law reasons for decision, at the direction of the Chief Justices, the Supreme Court of British Columbia (with few exceptions related to judgments which the judicial officer considered to be of precedential value) and of the Court of Queen's Bench in Alberta stopped posting family law cases to the court web site and stopped sending electronic versions to CANLII. Electronic versions continued to be sent to commercial publishers.*[16]

We note a particularly important observation in the Report as follows:

> *Even though "every court has the supervisory and protecting power" over records, e-access policies ought not to be made without affording to "the public" in whose name access is protected, an opportunity to advance views as to what openness means in an electronic environment."* [17]

[37] We note parenthetically that there has been no such public consultation in Saskatchewan prior to the electronic publication of Commission decisions on its website.

[38] Finally, the Report suggests that courts may be more tolerant of restrictions on bulk transfers of personal information and refers to dicta in Paisley Park Enters., Inc. v. Uptown Prods., 54 F.Supp 2d 347, 249 (S.D.N.Y. 1999):

> *Virtually all have an interest in ensuring that everyone in our society have access to a fair and impartial judicial system without having to pay too high a price of admission in the form of the surrender of personal privacy…courts must be vigilant to ensure that their processes are not used improperly for purposes unrelated to their role.* [18]

[39] We understand that CANLII routinely edits court decisions before publication to ensure that there is no inappropriate disclosure of sensitive personal information.

---

[15] Open Courts, [40] to [44]
[16] Open Court, [56]
[17] Open Court [81]
[18] Open Court [38]

[40] If the courts in Canada are reconsidering limitations on the right of access to court records, surely administrative tribunals should also be reconsidering the practice of indiscriminately posting decisions to a website. For example, we understand that the Law Society of Saskatchewan does not identify complainants and witnesses when it publishes on its website decisions with respect to disciplinary matters.

Identify Theft

[41] Quite apart from failing to respect an individual's right of privacy, the publication of extensive personal information on a website facilitates a serious crime--identity theft. In a 2004 speech, the Privacy Commissioner of Canada, Jennifer Stoddart, observed that:

> *Canadians are highly sensitized to the issue of identity theft and the fact that it is one of the fastest growing crimes on the planet. You can hardly pick up a paper without reading about it. Many Canadians have been affected by identity theft, or know someone who haw been, and they are worried. There has been a significant increase in efforts by thieves to access large databases of personal information held by private companies and government agencies. Criminals have broken into government offices to stead computer hard drives, bribed or compromised employees into obtaining personal data for them, and have hacked into databases.* [19]

[42] Identity theft is defined as someone using your personal information without your knowledge or consent to commit a crime, such as fraud or theft. Criminals use stolen personal information to empty personal bank accounts and also to obtain or create fraudulent documentation to assume false identities to obtain loans or evade law enforcement.

[19] Speech delivered by Jennifer Stoddart in Ottawa, Ontario, September 28, 2004. Available online at www.privcom.gc.ca.

[43] The Consumer Measures Committee has produced a useful tip sheet to provide general information to Canadians about identity theft. The tip sheet includes the following information:

> *Identity thieves steal key pieces of personal information and use it to impersonate you and commit crimes in your name. In addition to names, addresses and phone numbers, thieves look for social insurance numbers, drivers licence numbers, credit card and banking information, bank cards, calling cards, birth certificates and passports.*
>
> *They may physically steal important documents, or they may find out your personal information in other ways, without your knowledge.*
>
> *Once they steal the information, identity thieves can manipulate it and invade your personal and financial life. They can use stolen identities to conduct spending sprees, open new bank accounts, divert mail, apply for loans, credit cards, and social benefits, rent apartments and even commit more serious crimes and, once arrested, they use their new identity.*
>
> *Identity thieves get your personal information by:*
>
> *…searching public sources, such as newspapers (obituaries), phone books, and records open to the public (professional certifications).”*

[44] The Solicitor General of Canada has published a Public Advisory: *Special Report for Consumers on IDENTITY THEFT*. It includes the following passage:

> *Theft from Company or Government Databases*
>
> *Law enforcement agencies in both Canada and the United States have noticed a significant increase in efforts by identity thefts to access large databases of personal information that private companies and government agencies maintain. Criminals have broken into offices to steal computer hard drives, bribed or compromised employees into obtaining personal data for them, and hacked into databases.*

[45] In August 2004 the Criminal Intelligence Service Canada released a report that indicated emerging technology is enabling criminals and organized crime to expand their activities, particularly in identity theft.[20] *"Criminals are increasingly using technology to steal identities, as well as illicitly obtain funds"* according to the report. *"Identity theft is one of the fastest growing crimes in North America."* According to a fraud reporting agency, losses from identity theft in 2003 totalled $21 million – almost double the figure from the previous year. The Canadian Council of Better Business Bureaus has estimated identity theft costs the Canadian economy more than $2.5 billion a year[21].

[46] Canada-wide the RCMP received complaints from 8,187 identity theft victims who lost a total of $11,786,843.44 in 2002. In 2003, those numbers jumped substantially to 13,359 victims and total losses of $21,564,103.96.[22]

[47] A 2004, Ipsos-Reid poll revealed that 75% of Canadian are concerned about identity theft.[23]

[48] Identity theft often involves a criminal act to collect the personal information of the victim. In this case, no criminal act is required since the personal information has been published by the Commission on its website.

[49] Notwithstanding this high level of concern in Canada with identity theft, the Commission has obviously taken no steps to minimize this risk to those who exercise their right to appeal to the Commission.

[20] Available online at www.cisc.gc.ca/AnnualReport2004
[21] Identity theft skyrocketing, Fastest-growing consumer crime hard to protect against, Bruce Constantineu, Edmonton Journal (Alberta), July 2, 2004
[22] CanadaOne Magazine (Ontario), July 2, 2004
[23] Note 21 supra

Other Negative Consequences of Electronic Records

[50] Reputations can easily be damaged. Saskatchewan residents who avail themselves of the right to appeal to the Commission may experience shame and embarrassment and in some cases even discrimination when details of their personal lives are broadcast on the Internet. Their neighbours, co-workers and, in the words of Justice Bielby, the gossip and the busybody now have ready access to all kinds of personal and personal health information that the applicant would not otherwise wish to share with them.

[51] The personal safety of victims of domestic violence and stalking may be compromised by publication of Commission decisions.

[52] Private businesses looking for new marketing opportunities for their products and services are able to discover extensive information about applicants. Such information can be merged with other commercial sector data to develop more comprehensive data profiles of Saskatchewan residents.

[53] Information about something as prejudicial as mental health information or HIV/AIDS could lead to discrimination against the applicant in a host of circumstances including employment and accommodation.

Statutory Provisions

[54] As noted above, the type of information disclosed on the Commission website includes a good deal of both personal health information and personal information.

[55] In support of its disclosure practice, the Commission relies on four different provisions of the FOIP Act:

- section 3, (matter of public record),
- section 4, (information already available to the public),
- section 29(2)(a) (disclosure is for original or consistent purpose of collection),
- section 29(2)(t) (another statute authorizes disclosure).

2. Does the publication of the Commission's decisions on its website comply with *The Health Information Protection Act?*

[56] Before considering those four provisions in the FOIP Act in detail, I will deal with the applicability of *The Health Information Protection Act* (HIPA). As noted above, much of the information that appears in the Commission decisions posted to the website is personal health information.

[57] HIPA defines personal health information as follows:

> *2 In this Act: . . .*
>
> *(m) **"personal health information"** means, with respect to an individual, whether living or deceased:*
>
> (i) *information with respect to the physical or mental health of the individual;*
>
> (ii) *information with respect to any health service provided to the individual;*
>
> (iii) *information with respect to the donation by the indivdual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;*
>
> (iv) *information that is collected:*
>
> (A) *in the course of providing health services to the individual; or*
>
> (B) *incidentally to the provision of health services to the individual; or*
>
> (v) *registration information;*

[58] The obligations and powers under HIPA are exercised by "trustees". The definition of trustee includes the following:

> *2 In this Act: . . .*
>
> (t) ***"trustee"** means any of the following that have custody or control of personal health information:*
>
> (i) *a government institution; . . .*

As a 'government institution' by virtue of the FOIP Regulation [24] the Commission is also a health information trustee for purposes of HIPA.

[24] FOIP Regulation, Appendix, Part I

[59] Section 4(4) and (5) of HIPA provide as follows:

> ***4****(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of: . . .*
>
> *(b) Part VIII of The Automobile Accident Insurance Act;*
>
> ***4****(6) The Freedom of Information and Protection of Privacy Act … apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.*

[60] The FOIP Act and regulations do not exempt Part VIII of *The Automobile Accident Insurance Act.*

[61] Those parts of HIPA that do not therefore apply to the information on the website consist of parts described as follows:

Part II	Rights of the Individual
Part IV	Limits on Collection, Use and Disclosure of Personal Health Information by Trustees
Part V	Access of Individuals to Personal Health Information

[62] Those parts of HIPA that continue to apply to the Commission and to the personal health information in question are as follows:

Part I	Preliminary Matters
Part III	Duty of Trustees to Protect Personal Health Information
Part VI	Review and Appeal
Part VII	Commissioner
Part VIII	General
Part IX	Transitional, Consequential Amendments and Coming into Force

[63] Regrettably, there is no explicit purpose or object clause in HIPA but there is a list of principles in the preamble to the statute:

> *Whereas the Legislative Assembly recognizes the following principles with respect to personal health information:*
>
> > *That personal health information is private and shall be dealt with in a manner that respects the continuing interests of the individuals to whom it relates;*
> >
> > *That individuals provide personal health information with the expectation of confidentiality and personal privacy;*
> >
> > *That trustees of personal health information shall protect the confidentiality of the information and the privacy of the individuals to whom it relates;*
> >
> > *That the primary purpose of the collection, use and disclosure of personal health information is to benefit the individuals to whom it relates;*
> >
> > *That, wherever possible, the collection, use and disclosure of personal health information shall occur with the consent of the individuals to whom it relates;*
> >
> > *That personal health information is essential to the provision of health services;*
> >
> > *That, wherever possible, personal health information shall be collected directly from the individual to whom it relates;*
> >
> > *That personal health information shall be collected on a need-to-know basis;*
> >
> > *That individuals shall be able to obtain access to records of their personal health information;*
> > *That the security, accuracy and integrity of personal health information shall be protected;*
> >
> > *That trustees shall be accountable to individuals with respect to the collection, use, disclosure and exercise of custody and control of personal health information;*
> >
> > *That trustees shall be open about policies and practices with respect to the collection, use and disclosure of personal health information*
> > [Emphasis added]

[64] Wherever possible, my intention is to interpret HIPA in a fashion that reflects those statements provided by the Legislative Assembly of Saskatchewan.

[65] I recognize that there are, as yet, no regulations for HIPA. Nonetheless HIPA has now been in force more than 17 months. In addition, the Act has had an unusually long gestation period since it was first passed by the Legislative Assembly in 1999. There has been a great deal of time for the Commission to consider what changes might be required in its practices and procedures to be compliant.

[66] Turning to the specific complaint in question, it relates to a disclosure by a trustee, namely the Commission.

[67] Part III of HIPA describes the duty of trustees to protect personal information. Within Part III, Section 16 of HIPA requires that a trustee take steps to protect the personal health information in its custody or control. It provides as follows:

> ***16*** *Subject to the regulations, a trustee that has custody or control of personal health information must establish policies and procedures to maintain administrative, technical and physical safeguards that will:*
>
> *(a) protect the integrity, accuracy and confidentiality of the information*
>
> *(b) protect against any reasonably anticipated:*
>
> *(i) threat or hazard to the security or integrity of the information*
>
> *(ii) loss of the information; or*
>
> *(iii) unauthorized access to or use, disclosure or modification of the information; and*
>
> *(c) otherwise ensure compliance with this Act by its employees.*

[68] The Commission has not produced any written policies or procedures that I find are required by section 16. If the Commission had developed such policies and procedures I expect that it would have been required to address the issue of Internet publication of its decisions in that process.

The Statutory Exemptions Claimed By the Commission

[69] **Does Section 3 of the FOIP Act Apply?**

Section 3(1) of the FOIP Act provides as follows:

> *3(1) This Act does not apply to: . . .*
> *(b) material that is a matter of public record;*

The Commission asserts that it is under a legal duty to compile a record of its hearings. Section 95 of the PIBR stipulates that the mandatory record must include the written decision of the appeal commission. By reason of section 193(8) the Commission is under a legal duty to provide written reasons for its decision but only to the parties.

[70] The section provides as follows:

> *193(8) The appeal commission shall provide the claimant and the insurer with written reasons* for its decision. [Emphasis added]

We have not been referred to any statutory requirement that the decision of the appeal commission be published to any larger audience.

[71] A matter of "public record" is not defined in the FOIP Act nor in *The Interpretation Act.* Since this is an exclusion from a statute that confers rights on citizens, we are inclined to give this a narrower, not a wider interpretation. The Commission has referred us to Section 17(2)(b) of the FOIP Act which refers to *"an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function"*. As the Commission notes in its submission, the purpose of this section is to deny to a government institution the right to refuse access to such a record.

[72] The definition of "public record" in Webster's Third New International Dictionary is as:

> *a record that is required by law to be made and kept: a: a record made by a public officer in the course of his legal duty to make it; b: a record filed in a public office and open to public inspection*

[73] The Commission asserts the Commission is under a legal duty to compile a record of its hearings. Section 95 of the PIBR states:

> *95 (1) The appeal commission shall compile a record of a hearing that was held.*
> *(2) The record of a hearing mentioned in subsection (1) is to consist of:*
> *(a) the written decision of the insurer that was appealed;*
> *(b) the notice of appeal to the appeal commission;*
> *(c) any written submissions or affidavit evidence received by the appeal commission for the purpose of the hearing;*
> *(d) the written decision of the appeal commission;*
> *(e) any expert reports and opinions submitted to the appeal commission that was recorded in writing or by any electronic means.*

[74] Furthermore, the Commission asserts that it is under a legal duty to provide written reasons for its decision: section 193(8).

[75] The Commission argues that the decisions of the Commission meet both aspects of the definition of "public record" in Webster's: reasons are required to be given in writing, the decisions are part of a record required to be compiled, and they are required to be made available to any person who makes an access request under the FOIP Act.

[76] If the Legislature had intended that "official record" should mean the same thing as "public record", then surely the Legislature would not have used different language. I find that unlike land titles records, assessment rolls and motor vehicle registry, personal health information and personal information of applicants under the AAIA was not intended to be part of a "public record". The Commission has referred me to General Motors Acceptance Corp. v. Prozni, 51 D.L.R. (2nd) 724 at 736. That decision however did not deal with the kinds of personal and personal health information at issue in this investigation.

[77] I note that there is a definition of "public record" in the new *Archives Act*.[25] Section 2(j) of that statute defines public record as follows:

> *". . . means a record created in the administration of the public affairs of Saskatchewan and includes:*
>
> *(i) a ministerial record; and*
>
> *(i) a record of the Legislative Assembly Office or for an officer of the Legislative Assembly; but does not include:*
>
> *(ii) a surplus copy of a record or a copy of a record created only for convenience of reference; or*
>
> *(iii) a court record"*

My view is that the Assembly would not have contemplated that a record containing all of the personal information and personal health information of persons exercising their right under the AAIA would be treated in the same way as land registry information or motor vehicle registration information. Consequently, I find that the decision of the Commission is not a public record.

[78] The Commission also argues that:

> *It may be objected that the personal information made available to the Commission is unusually sensitive. In reply, all that needs to be said is that, in providing an alternative to the Court of Queen's Bench appeal where these sensitive matters were already being discussed in public, the decision was made that Commission hearings would also be open to the public.*

[79] The Commission further argues that "*It seems incongruous that a hearing would be open to the public for its entire evidentiary process, only then to be later subject to confidentiality in relation to the decision resulting from the public process."* I am not contemplating any means of keeping the decision of the Commission secret. I am however concerned with the routine publication to the world of its decisions on the Commission website without any masking of the identity of applicants. This concern will be discussed below.

[25] S.S. 2004, c. A-26.1

[80] If my interpretation of section 3(1)(b) is in error, I find that the act of publishing personal and personal health information to the world in the fashion followed by the Commission is qualitatively a different matter than permitting an interested member of the public access to paper records in the office of the Commission.

[81] **Does Section 4 of the FOIP Act Apply?**

Section 4 of the FOIP Act provides as follows:

> ***4*** *This Act: . . .*
>
> *(b) does not in any way limit access to the type of government information or records that is normally available to the public;*

I have not seen any evidence that this practice of posting decisions to the Commission website existed prior to the proclamation of the FOIP Act in 1992. In fact, I understand that the Commission's website was only created in 2003.

[82] I note the Commission's argument that other "*more established tribunals that conduct public hearing such as the Labour Relations Board and Saskatchewan Municipal Board are routinely made available to the public"*. I do not feel bound in any way to follow the practices of those other tribunals if the result would be to violate the privacy to which a Saskatchewan resident is entitled. I might add that neither of those two tribunals would be producing decisions that routinely disclose the identity and a host of personal information and personal health information of individuals. Unions, corporate employers and municipal corporations do not enjoy a constitutional right of privacy.

[83] *The Workers' Compensation Act*, on the other hand, contemplates appeals to the Appeals Committee that would also routinely involve a great deal of personal information and personal health information. I would expect that much of the information before the Appeals Committee under *The Workers' Compensation Act* and the Commission would be very similar. Decisions of the Appeal Committee are not posted on the Workers' Compensation website, www.wcbsask.com.

[84] The Commission argues that decisions of the Court of Queen's Bench under its concurrent AAIA jurisdiction are available to the public without restriction. I note however that there are circumstances where the publication of personal information can be suppressed by the court, the disclosure practices of Canadian courts are currently under review and, most importantly, the Commission is not a court.

[85] **Does Section 29(2)(a) of the FOIP Act Apply?**

Section 29(2)(a) provides as follows:

> ***29*** *(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:*
>
> *(a) for the purpose for which the information was obtained or compiled by the government institution or for a use that is consistent with that purpose;*

The Commission asserts that disclosing a decision publicly is both the purpose for which the information was obtained and a use consistent with the public process through which the information was obtained. I take the point but the issue I have to determine is whether the publication of the personal information to the world via the Internet is the original purpose for which it was collected. The publication of the Commission decisions on the website is a 'disclosure' and not a 'use' since the personal information is being shared outside of the Commission. Those individuals who go to the Commission are asserting a statutory right and seek to resolve a claim for compensation resulting from a motor vehicle accident. I do not believe that applicants would reasonably expect that when they prosecute a claim at the Commission, they are also exposing their personal lives and personal health information to the world via the Internet. I cannot agree that Internet publication was the purpose for the collection of the personal information and personal health information.

[86] Furthermore, it appears that applicants are not routinely advised by the Commission that by asserting this right to appeal, a good deal of their personal information will be made available to the world. Presumably, claimants would be interested in the least possible disclosure to others of their personal health history and prognosis. The Commission advises that they routinely provide those applicants who are proceeding to a review by the Commission with written notice that the decision will be published on the Commission website. The Commission has provided our office with a four page document entitled, *AIAC Hearing Guidelines.* This document has information arranged under the following headings:

- Protocol
- Hearing Process
- Interpreters
- Record of Proceedings
- Documents as Evidence
- Witness Testimony as Evidence
- Subpoena
- Costs
- Special Needs
- Decision
- Variation

[87] Under the heading *Decision*, the following text appears:

> *The Commission makes every attempt to render a decision as soon as possible after completion of the hearing.*
>
> *If a decision is delayed because additional information is required by the panel, the parties will be notified. In this case, the decision will be made after receipt of all new information or after receipt of additional submissions resulting from the new information.*
>
> *The Commission will provide the claimant and SGI with written reasons for its decision. This decision is binding on both parties. Either party may appeal the decision to the Court of Appeal on a question of law only.* ***Once the appeal period is expired, the decision is posted on the Commission's website****.*

[88] This notice is not timely. It is provided at or about the time the appeal is set down for hearing. According to the above noted Guidelines, shortly after the applicant receives their Notice of Hearing, the applicant will also receive an appeal package including all documents filed by the claimant and SGI prior to the hearing. In other words, the notice is given some time after the collection of the applicant's personal information and personal health information.

[89] I find that such written notice is inadequate. It is not clear to an applicant just what is included in the Commission's decision. It does not clearly bring home to an applicant the extent to which their personal information or personal health information will be disclosed to the world. An applicant might assume that the decision is a brief summary or that the decision is edited to remove personal information or that it is anonymized in some fashion.

[90] The publication of individually identifying personal information of applicants on the Internet cannot be justified by section 29(2)(a) of the FOIP Act.

[91] **Does Section 29(2)(t) of the FOIP Act Apply?**

Section 29(2)(t) provides as follows:

> ***29*** *(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:*
> . . .
>
> *(t) for any purpose in accordance with any Act or regulation that authorizes disclosure; or*

[92] The Commissioner further asserts that Section 29(2)(t) authorizes the disclosure. Again, the Commission makes no distinction between Internet publication and permitting public access to the record in the offices of the Commission.

[93] I find that there is statutory authority for the hearings to be open, for the written decision to be part of the record and for that decision to be made available to the applicant and to SGI. I have not been referred to any Act or regulation that authorizes disclosure of personal information and personal health information via the Internet in the fashion practiced by the Commission.

[94] The Legislative Assembly could have easily provided that the exclusion from the FOIP Act of the Court of Appeal, Her Majesty's Court of Queen's Bench for Saskatchewan or the Provincial Court of Saskatchewan[26] should be extended to administrative tribunals that share some of the characteristics of courts. The Assembly has not done so. In the result, I find that the Commission is in no different position than any other government institution in Saskatchewan.

[95] I find that the publication of individually identifying personal information of applicants on the Internet cannot be justified by section 29(2)(t) of the FOIP Act.

[96] In addition to those 4 statutory provisions cited by the Commission, we must deal with section 29(1) of the FOIP Act:

> ***29*** *(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.*

[97] As already determined above, the reports when posted to the Commission website constitute a disclosure of personal information in its possession or under its control. The prescribed manner for consent is stated in the FOIP Regulation as follows:

> ***18*** *Where the* [FOIP Act] *requires the consent of an individual to be given, the consent is to be in writing unless, in the opinion of the head, it is not reasonably practicable to obtain the written consent of the individual.*

[26] FOIP Act, section 2(2)n

[98] I find that it would be reasonably practicable to obtain or at least to seek the written consent of the relatively small number of persons who prosecute an appeal at the Commission level. The Commission has not contended otherwise. It cannot reasonably be argued that there is some kind of implied consent as a result of the Commission's written notice to applicants and the act of an applicant in continuing to prosecute the appeal. Such 'implied consent' would not meet the statutory requirement for consent. In any event, I find that the written notice is inadequate.

[99] Even if consent was obtained in written form to comply with the FOIP Regulation, there would be a question as to whether it would be a free and voluntary consent if an applicant is led to believe that they cannot prosecute their appeal at the Commission level without consenting to Internet publication.

[100] Section 29(2) enumerates twenty-two different circumstances in which disclosure can occur without consent. I have already addressed sections 29(2)(a) and 29(2)(t) that were cited by the Commission and determined that neither applies in this case. I have carefully reviewed the other twenty circumstances and find that none of them apply to authorize the Internet publication of the personal information and personal health information in question.

[101] In the result, I find that the publication of the Commission's decisions on its website violates the FOIP Act.

3. Does the Commission's practice of publication of decisions correspond to best practices in terms of disclosure of personal information?

[102] Although I believe my interpretation of the FOIP Act resolves this complaint, I have decided to also offer commentary with respect to the privacy 'best practices' that have been adopted by the Saskatchewan government.

[103] As to best practices, we note that in February 2003 Deloitte Touche issued a report for the Saskatchewan government, known as "the Privacy Assessment". This reviewed the privacy practices and procedures in 17 of the largest provincial government departments and Crown Corporations. Subsequently the provincial government adopted an instrument that purported to set the new standard for the collection, use and disclosure of personal information for government institutions in Saskatchewan.

OverArching Personal Information Privacy Framework for Executive Government

[104] In September 2003, the Saskatchewan government announced the adoption of the OverArching Personal Information Privacy Framework for Executive Government ("Privacy Framework").[27] It is significant that Saskatchewan is the only jurisdiction in Canada that has decided to set the consent-driven standard used in private sector legislation as its goal. This represents a significantly higher standard of privacy protection if it can be realized. The explicit purpose of the Framework is "*…to raise, for individual citizens, the level of protection of their personal information.*"[28]

[105] All Saskatchewan boards, commissions and other bodies that have been prescribed as "Government Institutions" under the FOIP Regulation are expected to comply with and adopt this Framework. Consequently the Commission is required to meet not just the requirements of the FOIP Act and HIPA but also the higher privacy standard contemplated by the Framework.

[27] Available online at http://www.gov.sk.ca/newsrel/releases/2003/09/11-648-attachment.pdf
[28] Privacy Framework, 3

[106] The Framework consists of eleven principles. This particular complaint engages five of them. Those five principles are as follows:

Principle Two -- Purpose

> *The purpose for which information is collected shall be identified at or before the time the information is collected.*
>
> The explanatory note in the government training material states: *"People have the right to know why you want their personal information. Wherever possible, identify the purposes up-front. The purpose must relate to an existing program or activity."*

Principle Three -- Limiting Consent

> *Obtaining consent from the individual is the expected approach for the collection, use and disclosure of personal information, but it is not always feasible, appropriate or the only legal means of authority.*
>
> The explanatory note in the government training material states: *"It is "expected" that you get consent directly from the individual. If you can't, you must be prepared to justify why not*.
>
> *Consent should be informed. Wherever possible, identify why its being collected, how it will be used, and how it may be disclosed. Wherever possible, identify why it's being collected, how it will be used, and how it may be disclosed.*

Principle Five -- Use and Disclosure

> *Personal information shall be used or disclosed only for the purposes for which it was collected or for use consistent with that purpose, except with the consent of the individual or as specifically authorized by law.*

Principle Eight -- Safeguards

> *Appropriate security safeguards shall protect personal information*

Principle Nine -- Openness

> *The privacy principles, and the policies and procedures relating to their implementation, should be readily available.*
>
> *Government privacy principles, policies and procedures (at all levels) should be made available to the public….The public generally has a right to know how their information will be handled and what steps are being taken to protect it.*

[107] The Commission has not produced policies or procedures designed to implement the Privacy Framework. I find that the Commission has failed to meet the standard articulated in the Privacy Framework as follows:

Principle Two - Purpose

> The Commission does not communicate, at the time it collects information, that any or all of the personal information of the applicant may be published on the Internet by means of the Commission website. The notice on the website described earlier in this report is inadequate for this purpose. The note on page 4 of the AIAC *Hearing Guidelines* is also inadequate.

Principle Three - Limiting Consent

> Consent for publication on the Internet is not sought nor is it typically obtained. The Commission has not claimed that consent would be impractical to obtain. On the other hand, consent could not be said to be voluntary given the current web site practices of the Commission.

Principle Five - Use and Disclosure

> This is essentially a restatement of section 29(2)(b) of the FOIP Act. As noted above, we think that publication on the Internet is not the purpose for which personal information is collected nor is it a consistent use.

Principle Eight – Safeguards

> Not only is the personal information of applicants not protected adequately, that same personal information is indiscriminately published on the Internet.

Principle Nine - Openness

> The practice of publishing a great deal of personal information on the Internet is not satisfactorily communicated to applicants. The Commission is not transparent to the extent that would be reasonable given the type of notoriety that attaches to Internet publication.

[108] In our view, the publication of individually identifying personal information on the Internet is contrary to Principles 2, 3, 5, 8 and 9 of the Privacy Framework.

[109] As indicated above, I find that the disclosure of the personal information of applicants on the Commission's website without consent is not authorized by either the FOIP Act or HIPA.

IV CONCLUSION

[110] In concluding this discussion of the issues raised in the investigation, I note that Ms. Givens in her article has offered a number of solutions to mitigate the negative consequences of making public records containing personal information available on the Internet[29]. One of her solutions is particularly appropriate in this case. She describes it as the "go slow" approach. She describes it as follows:

> *Finally, courts and government agencies must take a "go slow" approach to posting public records on the Internet. For example, as discussed earlier, the full texts of court records should not be posted online until flexible and effective redaction technology is available, and until court systems have adopted rules that support sealing the most sensitive information. Government agencies must examine the public policy objectives they are attempting to accomplish by making records available on the Internet-the prime one being government accountability. If there are ways to limit the amount of personal information provided online without undermining the public policy objectives of providing access, then such approaches should be considered.*

[29] See note 2, p.10

[111] I find that recommendation is persuasive.

[112] There are a number of strategies to accommodate the goal of public accountability while protecting the privacy of an applicant. I think perhaps the simplest and most practical would be to mask the identity of the applicant before the decision is published on the website.

[113] The history of the claim, the relevant health history and the disposition of the appeal could all be available on the website even if the applicant's identity is masked. What value is added to the goal of accountability and transparency by refusing to mask the particular identity of a claimant?

[114] The arguments of the Commission make no distinction between posting the decision on the Internet and allowing a person to attend at the Commission's office to look at the record and decision. I find that there is an important distinction. I find that there is a 'practical obscurity'[30] of paper files in the offices of the Commission that no longer exists once the report is posted to the website. Practical obscurity means the inaccessibility of paper records relative to the accessibility of information contained in electronic form.

[115] I wish to acknowledge the thoughtful and comprehensive submissions that I have received from the Commission and the complainant.

V RECOMMENDATIONS

[116] 1. I find that the Commission is not required by law to publish its decisions on its website without the consent of the applicant.

[30] United States Department of Justice et al. v. Reporters Committee for Freedom of the Press et al. (1989) 489 U.S. 749 (S. C.)

[117] 2. I further find that, by publishing the full text of its decisions on its website without masking the identity of applicants, the Commission has violated the right to privacy of claimants provided by section 29(1) of *The Freedom of Information and Protection of Privacy Act.*

[118] 3. I further find that the Commission's practice of publication of decisions on its website does not meet the 'best practices' standard developed in Saskatchewan.

[119] 4. The Commission should immediately ensure that the identity of applicants is masked before the decision that relates to them is posted on the Commission's website.

[120] 5. The Commission should, within 30 days, ensure that decisions already posted on its website are revised so that the identity of applicants is masked.

[121] 6. The Commission should immediately, and in any event within 30 days, task an individual with specific responsibility as Freedom of Information and Privacy (FOIP) Coordinator and ensure that both employees and applicants are made aware of that individual and his or her contact information.

[122] 7. The Commission should, within 90 days, develop comprehensive written policies and procedures as required by section 16 of *The Health Information Protection Act.*

[123] 8. The Commission should provide comprehensive training for its staff and Commission members of the access and privacy requirements to which the Commission is subject including *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act*. This training should occur within 90 days and plans should be developed for regular in service refresher training at appropriate future intervals.

[124] 9. The Commission should review its practice of disclosing the identity of applicants even in hard copy form and consider whether routinely masking the identity of applicants can be accommodated on a routine basis for both paper records and electronic records.

[125] 10. The Commission should ensure that all applicants are provided with clear and understandable information at the outset as to the manner in which their personal information and personal health information will be used and disclosed by the Commission, including the kinds of information published on the Internet.

[126] 11. The Commission should, within 90 days, provide this office with written confirmation that it has addressed each of the above recommendations and provide particulars as to how each recommendation has been addressed by the Commission.

Dated at Regina, in the Province of Saskatchewan, this 27th day of January, 2005.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan