Guidelines for Arbitrators in Saskatchewan

Balancing Openness and Transparency with the Protection of Personal Information and Personal Health Information

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Office of the
Saskatchewan Information
and Privacy Commissioner

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The Role of Arbitration

Arbitration is a form of dispute resolution. It is used to resolve legal disputes where a neutral party, an arbitrator or arbitration tribunal is engaged to come to a decision on a dispute between parties. Arbitration is often preferred over litigation because the parties can pick the arbitrator and get a decision faster and possibly cheaper. Arbitration can be voluntary (agreed to by the parties), or required by statute or contract.

There is a balance that should be maintained between openness and transparency and the protection of personal information and personal health information in the arbitration process. The Information and Privacy Commissioner has jurisdiction over many public bodies who may be involved in arbitration; therefore there are considerations to make regarding the protection of personal information and personal health information.

In the Arbitration decision for Sunrise Poultry Processors Ltd v United Food & Commercial Workers, Local 1518 (28 October 2013) (online: CanLII 70673 (BC LA)), Arbitrator Stan Lanyon, Q.C. provided the following:

> …
>
> [106] My third conclusion relates to the issue of privacy and *PIPA*. As the Supreme Court stated in *Edmonton Journal, supra* the constitutional doctrine of open court principle must be balanced with the constitutional doctrine of privacy. Although I agree with Arbitrator Sanderson that the past practice of the last five decades is important, it is no longer, in itself, determinative. Privacy has gained substantial constitutional weight over the last five decades. Certainly the sensitivity of personal information combined with the potential of harm though increased accessibility and information sharing due to technological developments (internet, smartphones, social media, etc.) must be weighed with the public interest in disclosure.
>
> …
>
> [119] However, I do agree with the Union that the past custom of general publication is no longer sufficient given the importance of privacy and the difficulties that may arise as a result of the publication of awards on the internet. Whatever legislative scheme may ultimately apply, or whether or not the open court principle applies, an arbitral approach must be developed in respect to the issue of privacy, and its application to the disclosure and publication of personal information in arbitration awards. As the Union states, labour arbitrators can benefit from the practice of other tribunals as well as the policies and protocols enumerated by the courts. The constitutional values of privacy established by the *Charter,* and captured in provincial and federal privacy legislation, must be incorporated into the practices and customs of labour arbitrators in the publication of their awards.

The internet has raised the bar in terms of privacy protection. Before the internet, an individual would need to physically search for publicly available arbitration decisions. Today, search engines have made it very easy to discover sensitive information about anyone and by anyone. Smartphones allow information to be shared on social media with limitless amounts of people in a few seconds. With that in mind, efforts must be made to protect personal information and personal health information.

WHAT SHOULD WE PROTECT?

Although arbitrators may not fall under a particular access and privacy statute, many public bodies do. Further, although an arbitration process may require the release of certain personal information or personal health information at certain stages, we live in an age where we must consider what is allowed against what is fundamentally right.

Personal information and personal health information are sensitive types of information, so the following will provide definitions of each.

Personal Information

The definition of personal information is the same in both *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Subsection 24(1) of FOIP and subsection 23(1) of LA FOIP define "personal information" as, "*…personal information about an identifiable individual that is recorded in any form*."

In order for information to qualify as personal information there are two elements you can look for in the information itself. First, the information must be about an *identifiable individual* that could enable someone to be identified if the information is disclosed. The information would either directly identify an individual or, the particular details of the information would enable the individual to be identified through other sources of information (data linking). Secondly, the information must be *personal in nature* meaning it would reveal something about the individual. If both of these elements exist, there is personal information.

Personal Health Information

The Health Information Protection Act (HIPA) defines personal health information in subsection 2(m) of HIPA:

> 2(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 individual 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;

Determining What to Release and What to Protect

Prior to commencing arbitration, the parties should be aware of the specific statutes and regulations that govern the arbitration process. In circumstances where a public body may need to provide personal information or personal health information to the arbitrator, the public body needs to consider its obligations under access and privacy legislation. For instance, the public body should attempt to determine what will happen to that information once disclosed to the arbitrator and opposing party. The public body should consider the following questions:

- What personal information and personal health information is really required in order to go through each stage of the arbitration process (need-to-know vs nice-to-know)?
- Is there any immaterial personal information and personal health information that should not be included for the arbitration process such as unique identifiers (social insurance numbers, health services numbers, bank account numbers, etc.)?
- Is it appropriate for the public body to mask or de-identify the information before providing it to the arbitrator or opposing party?
- What will happen to the personal information and personal health information provided to the arbitrator once the process is concluded? Will it be retained by the arbitrator or returned to the public body?
- What are the expectations or requirements of confidentiality and are these requirements adequately addressed in the agreement engaging the arbitrator?
- Is there authority and/or is it necessary to make the decision publicly available?

It is appropriate to have a written agreement in place to address the privacy concerns before entering into the process.

Pre-hearing

Parties should consider sharing the particulars of their case with the other party, as well as a list of witnesses. Then, they should cooperate to decide what personal information or personal health information is necessary and what is not. Removing or de-identifying the unnecessary personal information or personal health information will minimize the amount of personal information or personal health information that would be shared at the hearing.

Arbitration Decisions

Where arbitration decisions are made publicly available, consider how those decisions can be open and transparent while still respecting the privacy of individuals. This can include:

- Writing decisions in a de-identified manner to the greatest extent possible;
- Using pseudonyms or initials to identify individuals; and
- Drafting decisions in a way to eliminate the use of unnecessary, sensitive and personal information.

Other Resources

The ADR Institute of Saskatchewan's website has the ADRIC Arbitration Rules. These rules specifically speak to confidentiality and privacy during the arbitration process.

My Office has published two additional resources that may be useful for arbitrators and parties engaged in an arbitration process:

- Decision of Administrative Tribunals – How Much is Too Much? and
- Guidelines for Professional Regulatory Bodies – Transparency of discipline of members

The Privacy Commissioner of Canada developed a resource entitled *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*. Although this has been developed for administrative tribunals, this resource offers some guidance that is useful to arbitrators and public bodies entering into the arbitration process.

Contact Information

If you have any questions or concerns, please contact the IPC at 1.877.748.2298 or 306.787.8350 or by writing to:

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Check out our website at www.oipc.sk.ca