



## **December 11, 2020 – Advisory from the Office of the Information and Privacy Commissioner of Saskatchewan on questions regarding vaccines for organizations, employers and health trustees**

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Announcements regarding the development of vaccines for COVID-19 has been greeted with excitement. There are still steps to go before the roll out of a vaccine, such as approval, delivery and administering the vaccine. As citizens receive the vaccine, questions arise as to how organizations, health trustees and employers will handle this new reality. In my [Advisory from the Office of the Information and Privacy Commissioner of Saskatchewan on questions, screening or testing by employers regarding COVID-19](#), I attempted to answer many of the questions surrounding the issue of employers asking questions about screening or testing for COVID-19. This Advisory attempts to answer similar questions in regard to getting the vaccination for COVID-19.

### **1. Can organizations ask whether a customer or employee has received a vaccination for COVID-19?**

Private sector businesses and other organizations engaged in commercial activities in Saskatchewan are not covered by *The Freedom of Information and Protection of Privacy Act (FOIP)* and *The Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP)*, but are subject to orders made under *The Public Health Act, 1994*. Many organizations are covered by the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. I note that PIPEDA only protects personal information of employees of federally regulated businesses, works and undertakings (FWUBs). Those organizations, if they have questions, may have to contact the [Federal Privacy Commissioner](#). It should be noted that the federal government has introduced [Bill C-11](#), which introduces significant changes to PIPEDA. In some cases, PIPEDA provides rules and protection for employee personal information and in others, it does not. Whether an employer in Saskatchewan fits any of the following definitions, the advice below can be considered best practice and an employer can choose to follow it.

### **2. What organizations are covered by PIPEDA?**

PIPEDA defines an “organization” in Part 1, section 2(1) as follows:

2. “organization” includes an association, a partnership, a person and a trade union.”

PIPEDA indicates that the “protection of personal information” applies as:

4. (1) This Part applies to every organization in respect of personal information that
  - (a) the organization collects, uses or discloses in the course of commercial activities; or

PIPEDA defines “commercial activity” as follows:

2. “commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

As one can see, an “organization” is broad and includes a business, community based organization and charity, if that organization carries on commercial activity. In the rest of this Advisory I will refer to them as “organizations”.

### **3. Can an employer ask an employee whether they have received the vaccination for COVID-19?**

Some employers may be considering whether they will require their employees to receive the vaccine or provide a vaccination certificate for COVID-19. Employers have an obligation to make a workplace safe to work in within reasonable limits. [The Saskatchewan Employment Act](#) provides:

### General duties of employer

3-8 Every employer shall:

(a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;

...

(h) ensure, insofar as is reasonably practicable, that the activities of the employer's workers at a place of employment do not negatively affect the health, safety or welfare at work of the employer, other workers or any self-employed person at the place of employment; and

...

Each employer will have to make a fundamental decision as to whether they need all employees to receive the vaccine or provide a vaccination certificate to make the workplace safer.

Prior to considering what privacy legislation might apply, employers need to seriously consider whether they want to require employees to receive the vaccine or provide a vaccination certificate. Because these vaccines are new, there will be many questions about their use and effectiveness. There may be workplaces where social distancing, wearing masks and washing hands may be determined to be sufficient protection. These are considerations for the employer. Requiring employees to receive the vaccine is a fundamental issue and can be controversial. Requiring proof an employee has received the vaccine is less controversial, but does have privacy implications. It gets us into the issue of whether employers can or should require medical tests in the workplace. There has been considerable debate and court challenges over testing for drugs in the workplace. This particularly is a challenging issue for hospitals, medical clinics, long-term care and group homes. Employers need to know that requiring employees to receive the vaccine or provide a vaccination certificate, might result in a court challenge.

The OPC in "[A Matter of Trust: Integrating Privacy and Public Safety in the 21<sup>st</sup> Century](#)" stated:

Following the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, the Supreme Court of Canada formulated a methodological test to determine whether the violation of a *Charter* right is nonetheless justifiable in a free and democratic society. Stemming from the case *R. v. Oakes*, this became known widely as the Oakes test. It requires:

- **Necessity:** there must be a clearly defined necessity for the use of the measure, in relation to a pressing societal concern (in other words, some substantial, imminent problem that the security measure seeks to treat),
- **Proportionality:** that the measure (or specific execution of an invasive power) be carefully targeted and suitably tailored, so as to be viewed as reasonably proportionate to the privacy (or any other rights) of the individual being curtailed,
- **Effectiveness:** that the measure be shown to be empirically effective at treating the issue, and so clearly connected to solving the problem, and finally,
- **Minimal intrusiveness:** that the measure be the least invasive alternative available (in other words, ensure that all other less intrusive avenues of investigation have been exhausted).

The balance of this Advisory presumes an employer has made the decision to require vaccinations and understands the legal risks of a challenge, but intends to proceed.

#### 4. What questions might an employer ask?

If an employer decides to require vaccinations, what questions might the employer be asking? Possible questions include:

- Are you planning to get vaccinated?
- When will you receive your first injection?
- Have you received your first injection?
- When will you receive your second injection?
- Have you received your second injection?
- Will you provide me a vaccination certificate?

#### 5. What privacy legislation might apply?

If an employer decides to require its employees to get vaccinated or provide a vaccination certificate, the employer needs to know what privacy legislation applies. FOIP applies to government institutions which include Crown corporations, boards, agencies and other prescribed organizations. Part IV of FOIP deals with the collection, use, disclosure, storage and protection of personal information.

LA FOIP applies to local authorities which include cities, towns, villages, municipalities, universities and the Saskatchewan Health Authority. Part IV of LA FOIP deals with the collection, use, disclosure, storage and protection of personal information.

*The Health Information Protection Act* ([HIPA](#)) applies to health trustees which include government institutions, the Saskatchewan Health Authority, a licenced personal care home, a health professional licenced under an Act, a pharmacy, and licenced medical laboratories with custody or control of personal health information. Parts III and IV of HIPA deal with collection, use, disclosure, storage and protection of personal health information.

If an employer falls into one of the above categories, then that particular statute will apply to the collection, use, disclosure, storage and protection of personal information/personal health information. To be sure, an employer should check each of the Acts to see if it has any application. If in doubt, the employer should obtain legal advice.

Regulations under each of the Acts can also prescribe the organizations that are government institutions, local authorities or health trustees.

[The Privacy Act](#) may allow a lawsuit where a business, community based organization, employer or health trustee has breached someone's privacy.

A further issue is that after the employee has received the vaccine, is the employee required to show a proof of vaccination? Will the employer accept the employee's word that the vaccination was taken? If the employee is required to provide proof, will the employer visually examine it or make a copy of it? If so, by whom and for what purpose? If a copy is made, the record may be accessible under HIPA, FOIP or LA FOIP.

If an employer is in doubt regarding requiring employees to get vaccinated or requiring a copy of the vaccination certificate, the employer should obtain legal advice.

**6. What is the purpose of the employer asking whether an employee has gotten a vaccine or requiring a vaccination certificate?**

Before embarking upon requiring vaccinations, the employer must determine the purpose for which it is requiring vaccinations and the purpose for requiring a copy of the vaccination certificate. Is it to keep the workplace safe? More specifically, is it to prevent transmission of COVID-19 being spread from employee to employee, customer or patient? It is important that the employer not expand the purpose after the fact.

**7. How should employers notify its employees of the purpose?**

Employers should be open and transparent. They should advise staff that they will be asking whether the employee has received the vaccine, has a vaccination certificate and inform them of the purpose. Later, at the time of collection of the vaccination certificate, tell employees the purpose of the collection, what will be collected, who it will be shared with and how long the information will be stored. Employees will particularly want to know if the employer is sharing the information with other third parties, why and under what legal authority.

The employer can provide other staff with statistical information, such as how many have been vaccinated. The employer should not give out names or identify the ones who were or were not vaccinated as this may be considered a privacy breach.

**8. What information will the employer collect?**

Asking an employee whether they have had the vaccination and requesting a vaccination certificate is a collection of personal information/personal health information. Employers should collect the least amount of information necessary to achieve the purpose. If the employer is comfortable, they could choose to accept the employee's verbal statement that they have had the vaccination. Alternatively, the employer could ask the employee to show a vaccination certificate, but choose not to make a copy of the vaccination certificate. This is referred to as the data minimization principle, that is, only collect what is needed to achieve the purpose.

**9. What if an employee refuses to be vaccinated?**

If an employee refuses to get the vaccination, refuses to confirm that they had the vaccination or refuses to provide a vaccination certificate, employers will need to decide if it will require the employee to wear a mask at work, stay home and self-isolate, send the employee home without pay or end the employment relationship.

**10. Can the employer use the information for any other purpose?**

The employer must determine its authority to collect for a defined purpose, and only collect personal information/personal health information for that purpose. This may include the employee providing the information for that purpose (indicating they had a vaccination and provided a vaccination certificate).

The employer should check the relevant legislation before using that information for any other purpose without getting the consent of the employee.

### **11. Who can the employer share the information with?**

Since the employer has collected the information that the employee has received the vaccination or refused to get it, the employer needs to determine who in the organization needs to know. If the employee gets the vaccination, very few people need to know, but the employer can provide statistical information as to how many employees have received the vaccination. If the employee refuses to get the vaccination and is sent home, very few people need to know. Just like other sensitive health information, it is confidential, the employer should prohibit supervisors and HR employees from sharing the information with other staff. This does not prevent an individual employee from alerting others around them that they have been vaccinated (sticker, badge, lanyard, headband). An employer could promote this, but should not make it mandatory.

### **12. Where does an employer store this information?**

The choices are storing on the employees HR personnel file or storing in a separate folder for all employees, containing all information regarding vaccination of employees or refusal to vaccinate. There is probably no need to store it anywhere else.

The information the employer has collected must be stored in a secure place. Once the employer collects personal information/personal health information about an employee, it is the employer's obligation to ensure it is protected and only those with a need-to-know should be able to access it.

### **13. Is an employer obliged to secure the information?**

Under privacy legislation, there is an obligation for an employer to protect and secure the information collected and stored. If an employer is not subject to privacy legislation, best practice would suggest the information be protected. Other resources have made suggestions on securing information and a few tips are given by the [British Columbia Information and Privacy Commissioner](#).

Your organization must make reasonable security arrangements to protect personal information in its custody or under its control. For example, if the collected information is in paper form, it should not be left in a publicly accessible area. Rather, it should be stored in a locked file cabinet. If you are storing the list on a computer, make sure the computer is password protected, encrypted, and on a secure network. Position computer monitors so that personal information displayed on them cannot be seen by visitors.

### **14. When should the employer destroy the information?**

How long is an employer going to keep this information? Will it get destroyed in accordance with the destruction of documents policy? Should it have a special destruction period, shorter than the normal? Could it or should it be destroyed within six months? Employers need to decide whether they will develop a policy including destruction guidelines. Maybe the information collected can be destroyed earlier than an employer's standard procedure.

### **15. Do employers need to develop a policy on COVID-19 vaccinations?**

Once an employer has made a decision, the employer should consider developing a policy. In normal times, my office would recommend a [privacy impact assessment \(PIA\)](#). In these unique times, an employer might move very quickly and my office would still recommend either a shortened version of a PIA or a policy statement regarding COVID-19 vaccinations. Whatever the form of the document, it should contain:

- authority for the collection;
- a statement of the purpose;
- a statement as to whether employees will be asked to show a vaccination certificate;
- a statement on possible actions taken based on whether the employee has the vaccination or not;
- a statement on where information will be stored;
- a statement as to who it will be shared with (with public authorities or not); and
- a statement on when the information will be destroyed.

### **16. Can a public body ask visitors whether they have had a vaccination for COVID-19?**

Public bodies (government institutions and local authorities) have carried on their activities during the pandemic. As much as possible, communications have shifted to emails and telephone calls, but it is still possible that citizens or patients will attend at a public bodies' front door or reception area. The question arises, can those public bodies ask questions about receipt of a vaccination for COVID-19? Secondly can public bodies insist on seeing the vaccination certificate? If a public body decides to ask the citizen or patient whether they had a vaccination, then many of the questions raised above would apply. Of course public bodies considering this issue should think about obtaining legal advice.

### **17. Can a health trustee ask whether patients or employees received a vaccination for COVID-19?**

Health trustees are subject to HIPA. That Act contains principles similar to FOIP and LA FOIP when it comes to collection, use, protection or disclosure of information (in this case personal health information). Many of the questions posed and answered above will apply to health trustees.

### **Conclusion**

The principles are simple: establish the purpose and authority, collect the least amount of information to meet the purpose, share it only with those who need-to-know, store it, keep it secure and destroy it when no longer needed. This is good advice whether a business, non profit, employer or health trustee is subject to privacy legislation or not.

The Information Commissioner's Office in Great Britain has issued a document regarding "[work testing - guidance for employers](#)". Although British legislation is different from the legislation in Saskatchewan, the principles set out are good ones and may have some application to public bodies and health trustees in Saskatchewan.

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### **Additional Resources**

UK Information Commissioner Office:  
[Data protection and coronavirus – advice for organizations](#)  
[Data protection and coronavirus – six data protection steps for organizations](#)  
[Health, social care organisations and coronavirus – what you need to know](#)

Alberta Office of the Information and Privacy Commissioner:  
[Pandemic FAQ: Customer Lists](#)

British Columbia Office of the information and Privacy Commissioner:  
[Collecting Personal Information at Food and Drink establishments, gatherings, and events during COVID-19](#)

Ontario Office of the Information and Privacy Commissioner:  
[COVID Alert and Your Privacy](#)