NOTEBOOK ON ETHICS, LEGAL ISSUES AND STANDARDS FOR COUNSELLORS & PSYCHOTHERAPISTS

ARE A PSYCHOLOGIST’S ANONYMIZED PEER REVIEW NOTES ABOUT A CLIENT THE PERSONAL INFORMATION OF THAT CLIENT? AN ANSWER FROM THE PRIVACY COMMISSIONER OF CANADA

BY DR. GLENN SHEPPARD
THE PIPEDA

In 2004, I wrote a Notebook in which I introduced members to the Personal Information Protection and Electronics Document Act (PIPEDA) and its implications for counsellors and psychotherapists. This Act has been in effect since January 1, 2004. It... sets out the ground rules for the collection, use and disclosure of personal information in the course of commercial activities... [and] balances an individual’s right to privacy with an organization’s needs for personal information for legitimate business purposes.

The types of personal information covered by the PIPEDA include:

- Age, name, ID numbers, income, ethnic origin or blood type;
- Opinions, evaluations, comments, social status or disciplinary actions;
- Employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or to change jobs)

And it also states that:

Individuals should also be assured that their information will be protected by specific safeguards, including measures such as locked cabinets, computer passwords or encryption.

The provisions of this legislation applies to all professional practitioners working in private practice because of its intended application to all commercial activity in Canada. However, it does not apply to professionals who work in the public domain such as public educational institutions, hospitals and local governments. Of course, they must comply with any relevant provincial legislative statutes and with their ethical code of conduct.

COMPLAINTS TO THE OFFICE OF THE PRIVACY COMMISSIONER OF CANADA

When an individual believes that there is a breach of their privacy or an unwarranted denial of access to their personal information under the PIPEDA, they may complain to the individual or organization that committed the alleged breach or denial. If there is not a satisfactory outcome, a complaint can be made to the Office of the Privacy Commissioner of Canada, which will address any such complaint by adhering to the following guidelines:

Whenever possible, the Office of the Privacy Com-

missioner of Canada seeks to resolve disputes through investigation, persuasion, mediation and conciliation. This approach can be less intimidating to complainants and less costly to business than going through the courts.

In some cases, where a complaint has the potential to be resolved quickly, it is referred to an early resolution officer. The early resolution officer works with both parties to resolve the complaint. In some cases, an issue that would have taken months to resolve through the official complaint investigations process can be resolved in a matter of days.

If a resolution cannot be found, the complaint is then investigated and the Office of the Privacy Commissioner of Canada issues a report of findings.

“The PIPEDA sets out the ground rules for the collection, use and disclosure of personal information [...] and balances an individual’s right to privacy with an organization’s needs for personal information for legitimate business purposes.”

THE RESULTS OF A COMPLAINT MADE TO THE OFFICE OF THE COMMISSIONER BY A CLIENT AGAINST HER PSYCHOLOGIST

A client requested that her psychologist provide her with a copy of her personal psychological record. Upon receipt of her record, the client believed that it was incomplete because information from the psychologist’s consultation with a number of psychologists about the client and her work with her was missing. Apparently, the psychologist had prepared some notes based on her professional work with this client and shared them with these other professionals, referred to as her peers, to inform the consultation, to which they responded. In this case, these notes were labelled as “peer review notes.” The psychologist took the position that the notes from these consultants did not contain information sufficient to identify the client. She claimed that she had reviewed the
notes and had removed any information that might identify her client. In her view, the notes were in this way made anonymous, or in the language of this case, were “anonymized.” So, she declined to provide access to them nor would she name the consultants. The client did not agree and lodged a complaint regarding this disagreement to PIPEDA Office of the Privacy Commission.

In the Assistant Commissioner’s investigation of this client’s complaint, the first determination was whether or not the requested information was personal information “about an identifiable individual.” She expressed the view that, in this case, a broad interpretation of the definition of personal information was warranted. The test for the judgement in this instance was whether or not there was a credible possibility that the information could subsequently be linked back to an identifiable person, namely the client. In a PIPEDA Case Summary of the decision regarding this complaint, the conclusion was stated that such an identification was possible. It is expressed as follows:

The peer review notes were about an identifiable individual because it was possible to link the de-identified data back to the complainant. The conclusion was reached on the basis that both the psychologist and the complainant knew who the notes were about. The notes clearly related to the complainant’s treatment and relationship with the psychologist. They described details of conversations between the individual and her psychologist, including personal information about her that she had shared with the psychologist, and the psychologist’s and her peers’ views about the individual and her conduct. As it was possible to link the psychologist’s peer review notes back to the complainant, they qualified as information about her and was her personal information in keeping with the definition.

Therefore, the decision was taken that the client had a right of access to the peer review notes. In summary, the Assistant Privacy Commissioner issued the following decision:

As the notes in question were her personal information, the complainant had a right to access them. It was recommended that the psychologist provide the complainant with access to the peer review notes. In particular, she determined the access should include:

⇒ The facts that the complainant had provided to her psychologist about herself;
⇒ The interpretation of these facts by her psychologist;
⇒ The views and opinions expressed by the psychologist and her peers about the complainant’s conduct; and
⇒ The names of these peers

With respect to the decision to require the disclosure of the identities of the psychologists who were consulted about the client, the Commissioner’s position is stated as follows:

With respect to the private interest of the patient versus the private interest of the psychologists, the private interest of the individual complainant to obtain access to her personal information contained in the psychologist’s notes was far more compelling than the private interest of the psychologists. The psychologists’ interest to withhold their identity and their views about the complainant appeared to be of little significance. They had been consulted in their capacity as professionals and provided professional advice as they are regularly called upon to do. Providing such advice is part of their professional responsibility, which they are required to carry out as an obligation to their patients and to their professional licensing body.

Having concluded that the complaint in this case was well founded, the Privacy Commissioner filed a notice of application to the Federal Court under Section 15 of the PIPEDA seeking a declaration from the Court that the psychologist comply with the findings as stated above.

The psychologist did not contest the findings in the Court but decided to comply with them. This case was a significant decision under the authority of PIPEDA and it is relevant not only for psychologists but for counsellors and psychotherapists in private practice. For more information on this, please visit the Privacy Commissioner of Canada.