

STUDENT INFORMATION AND PRIVACY – HOT ISSUES AND MORE
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What's new and developing?

-Update presentation

-Here's what's new

- Bill 168 (as discussed has a disclosure duty)
- IPC health and safety disclosure document (as discussed, deals with discretionary disclosures)
- Court dialogue on lawful access (as discussed, may affect your ability to disclose in response to police requests)
- Court dialogue about civil claims for privacy breach

-Civil claims for breach of privacy

- Courts have always been hesitant to protect privacy
- Greatest experience is with the *Charter* – section 8 protection is very narrow
- Hinges on “reasonable expectation of privacy” – balancing built right in
- Tort has traditionally been rejected
- May be starting to change
 - Survive summary judgment – *Somwar* credit check case, Jan Wong “maid for a month” case
 - Don't have a particularly authoritative history now on whether the tort is valid or what its parameters are
 - But it has become a relevant consideration

Hey... He took my picture!

People taking pictures of others and posting it without their consent

-Common

- Recall that Cho at VT took pictures of other students in the classroom

-Discuss what the parameters of that rule might be given that most times taking and publicizing pictures is lawful, valid activity and even activity in which the public has an interest

-Here is an example that you might need to deal with

The law

- Taking a picture in public is not illegal
- Capturing an individual's image is not illegal
- Regarding the tort – it is likely based on violation of a reasonable expectation of privacy (how courts conceive of privacy)
- But courts have generally not stopped people from communicating information about things that happen in public on the basis of privacy protection

But...

-Many academics would say that capturing information even though it is available to the public is wrong.... Courts ought to protect

-The tort of intimidation is a broad fit if the motive is to coerce

- threat to commit an unlawful act
- for a coercive purpose
- unlawful act requirement may limit application

-Also consider tort of public nuisance

- detrimental affect on the public interest in health, safety, morality, comfort or convenience
- nuisance – unreasonable interference with the public interest

-*Criminal Code* prohibits watching and besetting

- Section 264(2)(c)
- Form of criminal harassment
- Watching ordinary meaning
- Besetting ordinary meaning – includes harass
- Must be evidence objective capable of demonstrating intent to harass or generate fear
- Victim has to know he/she is a target

So...

- There may be legitimate boundaries where picture taking involves an improper motive

- Motive is hard to prove... but might come from how the pictures are being used

- We deal with this more and more in picketing context

- Read you from a demand letter (made anonymous) we sent recently

[READ DEMAND]

So we wanted you to think about this

- Maybe you don't care

- Maybe this is an aspect of civility that you want to promote through soft means

- Or maybe you want to intervene and enforce rules against this type of conduct

If you take last approach must be very sensitive to the nuanced parameters of what is and isn't legitimate

I want all my information please

- Most of you are FOI clients

- But I wanted to introduce a common scenario that arises in your dialogue with some students

- It is the all personal information access request

- Totally legitimate request under FOI legislation

- Not frivolous or vexatious (on its own) but can be very onerous to administer

- Want to introduce an alternative to manual field collection of physical copies

- Encourage you to think about electronic collection, processing, review and production

First some FOI basics about fees

- user pay system

- if the costs more than \$25 you are required to provide an estimate

- can require a deposit for estimates greater than \$100
- fee schedule allows for very minimal cost recovery for PI access requests
- can't bill for search time
- can bill for preparing a record
- can bill for invoiced costs at a 100%

Think about all e-mail requests

- the all e-mails request is very onerous
- physical production involves many, many duplicates
- manual review
- end up missing e-mails
- get in disputes about hat
- not the best practice in document production today, but very common

-first things first.... always

1. Warn the individual (in writing if warranted) about the scope of the request and give options to narrow (e.g. nothing we've sent or received from you, date range, custodian...)
2. Always develop an estimate and issue an interim decision

-consider a processing alternative

1. Extract e-mail accounts (extract e-mail accounts for custodians)
 2. Vendor "process" e-mails
 - date range culling
 - de-duplication
 - keyword, Boolean or other search
 3. Review for exceptions online hosted environment
 4. Produce electronically
- don't have to do it, but can give an estimate before proceeding (vendor's letter)

-advantages/positives

- search will almost always be more defensible
- full cost recovery of invoiced costs
- way less manual review time
- less time in appeal
- IPC has endorsed in at least one case

-negatives

- custodians may resist (note e-mail privacy disputes)
- produce more (but is this a legitimate consideration given purpose of Act?)
- Will the IPC balk at high costs shifted at 100%?

-so think about it... makes sense