



**Yes of No: Finding Your Way Through
the Maze of Consent**

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Topics to be Addressed

1. Thesis today: the Power of Consent
2. When and what form of consent required
3. Diverse purposes and demands
4. How to draft the ideal consent
5. Is consent voluntary?
6. Balancing of interests

Thesis: the Power of Consent

- Privacy rights versus business needs
- Individuals have always had the right to be left alone
- Businesses need personal information to operate
- Who controls the proper balance of these rights and needs
- The individual holds the power through his consent
- There is opportunity to model a consent to respond to this balance

When and What Form

- Consent is always required unless there is an exemption
- Express/manifest
- Enlightened/informed
- Implied/opt out
- Precise

Elements of the Consent

- Need to describe:
 - activity – use, collection and disclosure
 - identification of other parties
 - what information is the subject of the consent
 - purpose
- Duration – how long is the consent valid
- Application – precisely what does the consent apply to?

Identification of other Parties

- These are third parties who are involved in the collection, use and disclosure of the personal information for the stated purpose:
 - service providers (outsourced processing)
 - doctors, hospitals
 - reinsurers
 - investigators

What Personal Information

- All personal information we can collect?
- Must be necessary for the carrying out of the stated purpose
- Limited to what is necessary for the purpose
- Appropriate

Stated Purpose

- Stated purpose is the most important part of the consent
- Purpose must be described clearly, precisely
- Appropriate
- Related to the subject matter
- Present and future

Cases

- Consent too broad – OPC Summary #368
 - collection of information too extensive for the purposes
- Clearly explain the purpose – OPC Summary #369
 - bank teller inquired as to reasons for a withdrawal, but in attempting to collect that information, did not explain the purpose for the collection
- Consent to collection and explanation of purpose – OPC Summary #384 and #387
 - need to notify customers that telephone call will be taped and explain the purpose

Cases (con't)

- Consent required before disclosure – OPC Summary #383
 - unambiguous express consent required
- Collection of personal information without reasonable purpose – Alberta PIPA Case Summary P2007-CS-004
- Disclosure of too much information – Alberta PIPA Case Summary P2007-CS-003

How to Draft the Ideal Express Consent

- Describe:
 - what you are going to do with the information
 - with whom
 - why
 - when
 - how long

Implied Consent

- When is it appropriate:
 - non-sensitive information
 - purpose considered to be obvious to a reasonable person
 - information is collected by the organization for that purpose
 - reasonable to expect the individual would consent if asked to
 - limit use and collection to the purpose for which the personal information was collected

Voluntary Consent

- Illegal to force an individual to consent
- Not required to provide a product or service in the absence of consent
- Cannot require an individual to consent to a purpose beyond the original purpose for which the information was provided
- Legal capacity to provide consent:
 - individual, trustee, parent, POA, legal guardian
- Ability to withdraw consent

Challenges

- Faced with diverse demands from third parties:
 - employers
 - police
 - advisors/benefits consultants
 - CRA
 - family services
 - union representatives
 - contractors

Balancing of Interests

- While the vehicle is the “form”, the purpose is the impetus
- Individual interests:
 - to control the collection, use and disclosure of his personal information
- Business interests:
 - to collect, use and disclose the individual’s personal information

Balancing Interests (con't)

- We can accomplish this through a properly drafted consent :
 - describes the personal information
 - states how it will be used and shared
 - describes appropriate reasonable purpose for its collection

The Power of Consent

- Represents the authority of the individual as to how his/her personal information can be collected, used or disclosed
- Belongs to the individual or legally authorized representative
- Our opportunity – to accommodate the balancing of business interests and the fundamental right to privacy of the individual through a properly drafted CONSENT