

BOARD OF FUNERAL SERVICES SPECIAL INSERT

WHAT EVERY FUNERAL DIRECTOR & TRANSFER SERVICE OPERATOR NEEDS TO KNOW ABOUT PRIVACY LEGISLATION

By Richard Steinecke

Over the past few years, there has been a lot of confusion about privacy legislation. Who does it apply to? When is it really coming? How much impact will it have? Busy funeral directors and transfer service operators need to know what privacy legislation means for them. For example, one sleeper issue for many funeral directors and transfer service operators is that there will be their need to explain why and from whom they are collecting personal information about the deceased and their family.

While there remains a fair degree of uncertainty, the outlines of what is going to happen are now becoming clearer.

When Does Privacy Legislation Take Effect?

For almost all funeral directors and transfer service operators, the federal privacy legislation takes effect January 2004. On January 1, 2004, the *Personal Information Protection and Electronic Documents Act* comes fully into force. Ontario has circulated a draft *Privacy of Personal Information Act*, but it is highly unlikely that it will be enacted before January 2004. Funeral directors and transfer service operators covered by the federal privacy legislation need to have their policies and procedures in place by then.

Who Does Privacy Legislation Apply To?

The federal privacy legislation is intended to cover the entire private sector. With very few exceptions, the federal privacy legislation applies to anyone who carries on "commercial activities". That will include most funeral directors and transfer service operators. Even if the government pays for the goods or services, the federal privacy legislation will likely apply. Only funeral directors and transfer service operators employed by a government body or a non-profit agency that does not sell goods or services might be exempt.

The federal privacy legislation applies to any collection, use or disclosure of personal information. "Personal information" means any information about an identifiable individual, including deceased individuals, that relates to their personal characteristics (e.g., gender, age, income, home address or phone number, social insurance number, ethnic background, education, family status), their health (e.g., health history, health conditions, health services received by them) or their activities and views (e.g., dealings with the funeral director or transfer service operator, opinions expressed by an individual, religion, political involvement, a funeral director's or transfer service operator's view or evaluation of an individual). Personal information is to be contrasted with business information (e.g., an individual's business address and telephone number), which is not protected by the federal privacy legislation.

What Has To Be Done?

Each organization must appoint an Information Officer and develop and publish its privacy policy. The Information Officer should be a senior person in the organization. The Information Officer can be an outsider hired by an organization to perform this role, but that may make it more difficult for the organization to develop a privacy policy that fits its office or practice.

The Information Officer is responsible for overseeing an organization's compliance with its privacy obligations. This privacy policy would cover the following issues:

- reviewing the organization's policies and practices for collecting, using and disclosing personal information (including conducting an audit of the current personal information practices of the organization);
- implementing procedures to safeguard personal information;
- ensuring individuals have the right to access and correct any personal information about themselves held by the organization;
- implementing a retention and destruction of information policy;
- training the organization's staff;
- acting as a contact person for inquiries from the public or clients; and
- ensuring there is a process for handling complaints made about the organization's information practices.

Funeral directors and transfer service operators must also make sure that their organization has privacy policies dealing with all of these issues. These policies must be made available to the public. This public access obligation might be met by posting the policy on the organization's website or in its reception area. Alternatively, a copy can be provided to new clients on their first visit and to anyone else upon request. The policies have to be understandable.

Privacy policies apply on an "organizational" level. Often the identity of the organization is obvious because the sole practice, partnership or corporation is well defined. However, where a group of people or entities work together in a loose affiliation, there may be more than one way to define the organization. Funeral directors, transfer service operators and their business associates can then decide who their organization will be. For example, every funeral establishment or transfer service operator can have his or her own privacy policy. Or, a funeral establishment and transfer service chain can join to form a broader organization with one privacy policy covering them all. It just depends on what is most convenient for everyone. Everyone within an organization has to agree to be monitored by the Information Officer. Also organizations will need special consent to disclose personal information outside of the organization.

What Are The Restrictions On The Collection, Use And Disclosure Of Personal Information?

As a general rule, funeral directors and transfer service operators need to obtain informed consent for the collection, use and disclosure of personal information. This consent is distinct from the consent for providing services. Like any consent, it can be obtained in writing, orally or by implied consent. In the traditional circumstance of a funeral director or transfer service operator collecting information directly from the client solely for the purpose of providing services to the client, consent may be implied (at least where the client is the executor or next of kin). However, any departure from this simple approach creates some new obligations for obtaining informed consent. In real life, the simple approach is not usually enough.

Areas in which some change may be required include the following:

- Where the funeral director or transfer service operator collects information about other individuals (e.g., about the client's family members).
- Where the funeral director or transfer service operator collects information about the client from other persons (e.g., from the hospital or coroner, previous funeral directors and transfer service operators for the client, almost any public data base, from family members of the client, from the client's business contacts).
- Where the funeral director or transfer service operator collects information to be shared with others who are also providing services to the client, like clergy, livery services, florists (i.e., a team approach). For example, many clients may not want the cause of death discussed with anyone.
- Where there is the likelihood of an ongoing relationship and the information will be used for ongoing services, especially if this is not obvious to the client (e.g., for prepaid services for a family, aftercare services, contacts with a cemetery or crematorium).
- Where third parties will have access to the information (e.g., for a legal, billing or financing purposes).
- Where the funeral director or transfer service operator will use the information for related purposes (e.g., for billing the client or a third party later).
- Where the funeral director or transfer service operator will use or disclose the information for secondary purposes (e.g., quality control by the organization, regulatory accountability).
- Where the funeral director or transfer service operator might sell the practice or business later on and will need to provide prospective purchasers with access to client information to help the purchaser conduct a due diligence review or to notify consumers of any changes (e.g., notification of purchasers of prepaid contracts of a change of ownership).

In any of these circumstances, the funeral director or transfer service operator should at a minimum explain the purposes for which the information is being collected and obtain some form of consent. Often the consent process can be a brief oral discussion with the client. Giving the client a handout setting out the funeral director's or transfer service operator's usual information practices and checking with the client that he or she understands the handout would often be sufficient. Alternatively, obtaining a written consent at a client's first visit may work in many circumstances. While the Information and

Privacy Commissioner is leery of obtaining blanket consents, it may be that, for the usual private practice, this may be appropriate and sufficient.

There are some exceptions that permit funeral directors and transfer service operators to collect information without consent. The most common example is where the purpose is to investigate a breach of law or contract and obtaining consent would compromise the investigation (e.g., a fraud by a client; helping a client deal with a contractual dispute with a third party). Certain emergency situations (e.g., medical crisis) may permit the collection, use or disclosure of information without consent as well, but that would be rare for a funeral director or transfer service operator.

Funeral directors and transfer service operators are also obliged to collect the least amount of personal information that is consistent with the purposes for which it was collected. For example, collecting an individual's Social Insurance Number is usually not necessary unless there are income tax reasons for doing so (e.g., for prepaid arrangements). One should not routinely collect every family member's home address (unless the client wants something to be sent there or contact will have to be made there). Funeral directors and transfer service operators should not collect financial information about a client who pays the full account in advance, except to the extent necessary for prepaid contracts.

What Kind Of Safeguards Are Needed?

Most funeral directors and transfer service operators are already careful to preserve their client's confidentiality. However, when setting out the safeguard policies in writing, funeral directors and transfer service operators may wish to review some of his or her practices. For example, can people see confidential files or computer screens when walking through the home? Casual discussions with mourners need to have some limits. Is all personal information shredded before being put in the recycling box? The Information and Privacy Commissioner strongly disapproves of sending personal information through regular email over the Internet.

What Are Access And Correction Rights?

A fundamental principle of the federal privacy legislation is that any individual has the right to request and see any personal information funeral directors and transfer service operators hold about them. In fact, funeral directors and transfer service operators are required to help individuals make such a request (e.g., explain the filing system so the person knows what to ask for) and to assist them in understanding the information (e.g., explain abbreviations and technical terms). There are a few exceptions where access can be restricted (e.g., where the disclosure will reveal personal information about another individual or will reveal trade secrets), but these are narrow. Funeral directors and transfer service operators will also have to tell individuals to whom the organization has disclosed the personal information about them.

If the individual believes any of the personal information is wrong, he or she can ask that it be corrected. The organization must correct any information it agrees is wrong. The organization must also notify any third parties who received the wrong information of the correction. Where the client and the organization cannot agree that an error has been made then the organization must record the disagreement and notify any third parties who received the contested information. Disagreements about corrections can be taken to the Information and Privacy Commissioner who may review the situation.

What Should An Internal Complaint System Look Like?

Organizations must also have an internal complaints system to handle concerns about their privacy practices. The internal complaints system should have the following features:

- a designated individual in the organization (perhaps the Information Officer) to receive and ensure the prompt investigation and response to all complaints;
- an easily accessible and simple to use complaints procedure that at a minimum includes:
 - acknowledging receipt of the complaint,
 - investigating it, and
 - providing a decision with reasons;
- a process for the organization to respond appropriately to complaints that are justified including making changes to its privacy policies; and
- notifying the public of external recourses including the funeral director's or transfer service operator's regulatory body and the federal Information and Privacy Commissioner.

Who Ensures Compliance With The Privacy Legislation?

Funeral directors and transfer service operators will be held accountable to both the federal Information and Privacy Commissioner and, to a lesser extent, their own regulatory body, in respect of their compliance with the federal privacy legislation.

The federal Information and Privacy Commissioner has oversight of the federal privacy legislation and functions as an ombudsman. The Commissioner has the following responsibilities:

- investigating complaints about an organization's personal information handling practices including entering the organization's premises and summoning documents and witnesses;
- mediating and conciliating such complaints;
- auditing the personal information handling practices of an organization;
- making a public report of poor personal information practices by an organization;
- seeking remedies for a breach of the federal privacy legislation in the Federal Court of Canada.

Once the Commissioner has issued a report, either the complainant or the Commissioner can then apply to the Federal Court of Canada for one or more of the following remedies:

- an order for the organization to correct its personal information handling practices;
- an order for the organization to publish a notice of corrective action; or
- an award of damages for any humiliation of the complainant.

All indications are that the federal Information and Privacy Commission tends to take an educational rather than a punitive approach to its enforcement activities, particularly where it appears that an honest mistake has been made. However, it is still better to avoid a complaint than to have to deal with one.

Professional regulators may also hold the funeral director or transfer service operator accountable for his or her privacy practices. Where the conduct involves a breach of core professional values, regulators will have an additional reason to take regulatory action. Even where core professional values are not breached, every funeral director or transfer service operator is generally obliged to comply with the law, especially those designed to protect the public or which reflect on the funeral director's or transfer service operator's suitability to be a member of the profession. A significant breach of the federal privacy legislation by a funeral director or transfer service operator may warrant some regulatory action.

Where to Start?

The federal privacy legislation may seem like a lot of work. However, the key is for funeral directors and transfer service operators to develop a privacy policy. A privacy policy provides a process for funeral directors and transfer service operators to review and revise their organization's practices and to obtain the consent from clients in the future. With a few adjustments to existing practices and informed consent from clients, most funeral directors and transfer service operators will be ready for the new privacy era.

Richard Steinecke is with the law firm Steinecke Maciura LeBlanc and practices in the area of professional regulation. Richard Steinecke will be a presenter at a seminar on getting ready for the new privacy legislation on November 7, 2003. The seminar will be held in Toronto and will include a step-by-step workbook that will assist funeral directors, transfer service operators and other professionals in developing and implementing privacy policies. See www.sml-law.com/privacyseminar for registration details.