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COVID-19 AND COMMERCIAL LANDLORDS: WHAT CAN YOU TELL TENANTS?

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COVID-19 has required all of us to navigate new situations, with little guidance from the past. One particular tension lays between privacy law, which limits the collection, use and disclosure of personal information, and the public desire to have as much information as possible to manage risk.

One issue that faces commercial landlords in particular arises when they learn that someone who works in their tenanted premises has tested positive for COVID-19. Other tenants may clamour for information about the positive case, to assess their risks and calm their employees.

Other issues include what health screening landlords can require of individuals entering their buildings, and what they can require tenants to tell them about employee illness.

This article will cover some privacy basics, and answer some of these common questions.

Privacy Basics

Private sector organizations, such as commercial landlords, are governed by the *Personal Information Protection Act*, S.B.C. 2003, c. 63, often called *PIPA*.

Under *PIPA*, "personal information" is not limited to a person's name. Anything which might identify a person, or permit a person to be identified, counts as personal information. Health information, such as a COVID-19 diagnosis, is considered particularly sensitive.

As a general rule, you may only collect, use or disclose personal information with the consent of the person whose information it is, and only when the collection use or disclosure is "necessary".

Because health information is considered to be particularly sensitive, a high standard of necessity is applied. Also, with so few people are working from offices right now, disclosing any information about where they are working could identify them. That means that, generally, you should disclose as little information as possible.

That obviously presents a difficulty for a commercial landlord.

There are exceptions to the consent requirement. In particular, you can collect, use or disclose information when it is "required or authorized by law". In the COVID context, the *Public Health Act* and Dr. Henry's various orders would permit you to disclose the information only if public health professionals consider it to be necessary.

What Can Landlords Tell Tenants About Positive COVID Test Results?

Commercial landlords who learn about a positive COVID result are in a difficult situation. Tenants, and their employees, likely want as much information as possible in order to assess their risk levels. Tenants may want to know which other tenant had the positive diagnosis or what floor the diagnosed person worked on, and what days and times the person was in the building.

As landlords, however, you are limited in what you can disclose.

You could, potentially, seek the consent of the person with the positive COVID diagnosis to disclose this information. However, that may be challenging since you likely do not have a direct relationship with the individual, and you may place their employer in a position of disclosing information in breach of its privacy obligations.

As a result, your best option is to rely on disclosure without consent where "required or authorized by law".

In the COVID context, for disclosure to be required or authorized by law, public health officials must consider the disclosure to be necessary.

That means that the local health authorities and the BCCDC are your best source for guidance. Contact the BCCDC or your local health authority and follow their advice regarding what information to provide to tenants.

If the BCCDC or your local health authority is of the view that the risk of exposure for others in the building is low enough that you do not need to disclose anything to tenants, follow that advice. For instance, if your property has retail units with direct street access, and a customer to one of those units has tested positive, the risk to staff and customers of other units is likely low. As a result, you should consider not disclosing the positive test to other tenants.

A high rise office building with common elevators presents a higher risk situation. In that context, you likely will have to disclose some information to other tenants who share the elevator bank.

If tenants hear about the positive COVID diagnosis some other way and ask you, reassure them that public

health officials are contacting all the people who are at risk and remind them of all the steps you are taking to keep the building safe through enhanced cleaning or other measures.

If public health officials do recommend that you disclose information about a positive COVID-19 test, disclose the least information possible. Under no circumstances should you disclose the person's name, if you know it. Disclose the floor that the person works on or their employer only if public health officials recommend that you do so. Public health officials may also recommend that you disclose the dates and times during which exposure may have occurred at your building.

What Health Screening Can Landlords Require?

In short, health questionnaires likely comply with *PIPA*, but temperature screening does not.

Under *PIPA*, simply asking a person about their health or scanning their forehead with a thermometer qualifies as "collecting" their personal information. The information does not need to be stored in any way for it to be "collected".

One of the principles underlying *PIPA* is that organizations may not collect any more information than is necessary. "Necessary" in this context is based on what the Public Health Officer, or public health officials, consider necessary to prevent infections and contain the spread of COVID-19.

Many businesses have implemented a health questionnaire, where the customer is asked to confirm that they are not suffering from any COVID symptoms, are not COVID positive, have not been in contact with someone who is COVID positive, and have not travelled outside of Canada in the last 14 days. These questions likely are necessary, as defined by the Public Health Officer.

From a privacy standpoint, landlords are at less risk if this questioning takes place orally rather than in writing. If you do collect this information in writing, make sure to store it securely and destroy it after 30 days.

Temperature checks, however, are likely a breach of *PIPA*, even if the customer agrees. Body temperature is a person's health information, which is considered to be highly sensitive. Taking a temperature reading is also a medical test which is still invasive even if only a forehead reading.

Taking the temperatures of everyone who enters your buildings involves collecting a large amount of very sensitive information. For *PIPA* to allow that collection, it would have to be absolutely necessary. As it currently stands, the medical evidence is that temperature screening may not be effective, because many people may have mild symptoms or be asymptomatic.

What Can Landlords Require Tenants To Tell Them About Employee Illness?

Tenants are also bound by *PIPA* (or, if you have public sector tenants, by the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165). That means that, as employers, they face similar restrictions on what they can disclose to you, as their landlord, about their employees.

Essentially, landlords can require that tenants provide only the least information necessary about employee illness. Tenants should also be taking guidance from the local health authority or the BCCDC. If the tenant has not spoken with your local health authority or the BCCDC, you should recommend that they do so.

As with disclosure to other tenants, whether information is "necessary" depends on the risk of exposure. As a result, it would be reasonable to require tenants in a high rise office building to notify you if one of their employees or a visitor has tested positive, and the dates on which the person was in the building.

You should not require tenants to report possible cases, or illnesses other than COVID.