

VACCINE POLICY AND PRIVACY LEGISLATION FAQ

Some members have been circulating questions and statements about how privacy legislation may affect the TDSB Vaccine policies. This FAQ is designed to address those questions and correct any misunderstandings or misinformation about the relevant legislation.

1) *PIPEDA does not apply*

PIPEDA stands for the *Personal Information Protection and Electronic Documents Act*. It is a Federal statute of Canada, meaning it only applies to federally regulated businesses and organizations. Where it does apply, it regulates private sector organizations' collection and use of personal information during the course of commercial activities.

PIPEDA does apply to provincially regulated businesses in some circumstances, but it *does not apply to employment* outside of the federal jurisdiction.

PIPEDA does not apply to the School Board, or to your employment, including the School Board's vaccine policies, or any other use or collection of personal or medical information by the School Board.

2) *PHIPA does not apply*

PHIPA stands for the *Personal Health Information Protection Act*. It is an Ontario statute that does apply to organizations operating within provincial jurisdictions.

PHIPA applies to "health information custodians", which is a term that is defined in the Act as a health care practitioner (including doctors and nurses and other regulated health professions). It also applies to service providers regulated by the *Home Care and Community Services Act, 1994*.

PHIPA does not apply to employers at large. It does not apply to the collection of health related information by the School Board. This includes when the School Board requires medical certificates and other documentation concerning illness, disability, accommodation, etc., and it does not apply to the collection of vaccination status information by the School Board.

PHIPA has no application to the School Board's vaccination policies.

3) *MFIPPA does not prohibit the collection of health information by an employer*

MFIPPA stands for the *Municipal Freedom of Information and Protection of Privacy Act*. It is an Ontario statute that applies to municipalities and some broader public sector organizations, including School Boards.

MFIPPA does regulate the collection and use of personal information, which may include health related information.

MFIPPA *does not apply* to information about labour and employment matters. Accordingly, MFIPPA has no application to the School Board's vaccination policies.

4) *The Occupational Health and Safety Act*

The *Occupational Health and Safety Act* is a provincial statute which applies to all provincially regulated employers in Ontario, including the School Board.

The purpose of the Act is to promote and protect employee safety. It explicitly requires employers to take every reasonable measure for protection of employee safety. This arguably requires them to screen for COVID-19 and even impose vaccination policies.

The Act empowers inspectors and other to collect and share medical information about employees in some circumstances. Where this happens, the Act places some restrictions on employers' rights to obtain that medical information about employees without their consent. It does not, however, prohibit employers from obtaining such information with employees' consent, and it does not prohibit them from requiring employees to provide the information as a condition of continued employment or access to a workplace.

The School Board's current policy requires employees to disclose their vaccination status. Employees who choose not to do so will have certain consequences, ranging from testing requirements to possibly suspension or termination of employment, but the information is not obtained without their consent. This provision of the Act does not affect the School Board's vaccination policies.

The Act also provides that employees cannot be required to participate in medical surveillance programs established by regulations under the Act without their consent. This provision does not apply to the collection of medical information, including vaccination status, that is prescribed by other laws, or by employer policies. It does not apply to orders and directions of the Chief Medical Officer, and it does not apply to the School Board's vaccination policies because they are not prescribed by regulations made under the *Occupational Health and Safety Act*.

In short, the *Occupational Health and Safety Act* does not prohibit the School Board's vaccination policies, and it may arguably require the School Board to have such policies for the protection of employees.

5) *The Genetic Non-Discrimination Act does not apply*

The *Genetic Non-Discrimination Act* is a federal statute that applies throughout Canada. It prohibits compulsory genetic testing. The Act defines genetic testing as a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis.

The Act does not regulate or prohibit vaccination policies, or compulsory vaccination.

The Act regulates genetic testing of humans. It does not regulate the genetic testing of other organisms. There are some COVID-19 tests, such as PCR tests, that examine the RNA of viruses. They do not test the DNA or RNA of the human hosts.

When the Act was passed, it included amendments to the *Canada Labour Code*, which applies only to federally regulated workplaces. The *Code* does not apply to provincially regulated workplaces, such as the School Board. There was a constitutional challenge to the Supreme Court in which the Court found that the Act was not intended to affect employment conditions in provincially regulated workplaces.

Finally, while the Act does not regulate testing of the DNA or RNA of viruses, it is also significant that the testing required by the School Board's current policy is not PCR testing. The Act does not regulate or prohibit other types of testing.

In short, the *Genetic Non-Discrimination Act* has no application to the School Board's vaccination policies.

6) *The Human Rights Code*

The *Human Rights Code* is a provincial statute that applies to provincially regulated employers in Ontario. It prohibits discrimination on the basis of certain prohibited grounds of discrimination that are set out in the legislation, including disability and creed.

The *Human Rights Code* does not apply to personal choices or preferences. An employer is not required to accommodate personal choices, and a policy that discriminates on that basis is not prohibited by the *Code*.

If an employer makes a rule or policy that discriminates against employees on the basis of disability or another prohibited ground, they are required to accommodate the employee to the point of undue hardship. This could include finding alternate duties or work locations for the employee, but it does not mean that employees are entitled to refuse to comply with policies. If a desired accommodation imposes an undue hardship on an employer, it is not required, and the employee may be terminated or placed on leave.

The Ontario Human Rights Commission has determined that medical testing to determine fitness to safely perform work, or protect people receiving services or living in congregate housing, may be permissible under the *Code* if the testing is shown to be effective and necessary in circumstances such as a pandemic. It also observes that employers have obligations under the *Occupational Health and Safety Act* to protect other employees, and this may require testing or other measures.

In the case of COVID-19, there is considerable evidence that testing is an effective tool for controlling community spread. There is also considerable evidence that vaccination significantly reduces the risk of serious illness and spread of the disease.

The School Board's current vaccination policies are required by law, as they have been specifically directed by the Chief Medical Officer. Accordingly, in applying the undue hardship test, there is no doubt that the School Board cannot exempt employees from this policy without undue hardship.

In short, the *Human Rights Code* likely does not prohibit the School Board's vaccination policies.

7) *The Constitution does not apply*

Canada's Constitution governs all laws in Canada, including provincial ones, and government action. It divides authority between the federal and provincial jurisdiction, and it places restrictions on governments' ability to limit specified individual rights and freedoms. These restrictions are found in the *Charter of Rights and Freedoms*.

The *Charter* protects rights like freedom of speech and religion, freedom of association, and freedom from unreasonable search and seizure. It protects security of the person, as well. You also have rights under the *Charter* and the *Human Rights Code* to a workplace free from discrimination on specific grounds, like disability or religion, but this does not guarantee a right to choose not to be vaccinated for other reasons.

There is no constitutional right to a specific job or pay.

All constitutional and statutory rights are limited, and even prohibited discrimination may be permitted if it is necessary for compliance with other laws or for the safety of other employees or students. The *Charter* rights are not absolute, and they are subject to limits that can be demonstrably justified.

The bottom line is that you may have a right to refuse to be vaccinated, or to be tested for COVID-19, but the Constitution does not give you a right to continued employment if you do so. Presently, there is no compulsory vaccination, or even testing: you have a right to refuse both, but you do not have a right to do that and to continue to participate in some social activities, including working at the School Board.