SFU

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MEMORANDUM

ATTENTION	Susan Chew, Manager, Bookstore Lynda Williams, Learning Technology Analyst and Manager, Teaching and Learning Centre Keith Fong, IT Applications Architect, IT Services	**DATE**	March 9, 2015
FROM	Ian Forsyth, Coordinator of Information and Privacy	**PAGES**	9
RE:	Protection of privacy compliance when using Pearson Education online learning applications		

Introduction

The Bookstore asked my opinion whether the integration of Pearson Education (the Publisher) online learning applications with SFU's learning management system would comply with the protection of privacy requirements and restrictions under Part 3 of the BC *Freedom of Information and Protection of Privacy Act* (the Act).

I reviewed and considered the following information:

1. *Pearson Education End User License Agreement and Privacy Policy* (v. 10 last updated December 1, 2011) accessed on the Publisher's website February 15, 2015
2. *Pearson Education Privacy Statement* (v. 9 last updated July 1, 2010) accessed on the Publisher's website February 15, 2015
3. *Agreement for Access and Use of Pearson Products* dated December 22, 2014 between SFU and Pearson Education Inc. and its attachments:
    a. *Attachment 1 – Ordering Document*
    b. *Attachment 2 – Additional Terms and Conditions relating to Agreement for Access and Use of Pearson Products*
4. Answers to questions obtained from Pearson Education representatives during a meeting with they and Susan Chew on January 22, 2015 and email messages dated November 17 and December 1, 2014 and January 20 and 22, 2015.
5. Pearson Education's information bulletins:
    a. *MyLab and Mastering for Canvas Plug-in Frequently Asked Questions: Security, Privacy and Performance Issues* (v. 3 dated February 10, 2014)
    b. *FERPA and Pearson Higher Education Online Learning Applications* (dated May 2, 2011)
6. Pearson Education's Registration Video accessed on its website March 6, 2015.

Prior to now:

1. TLC submitted to me for review a completed *External Learning Tool Privacy Assessment Checklist* for one Pearson Education online learning tool (MyFinanceLab). I advised TLC in September 2014 that students' prior written consent would be needed to use this tool because it would collect, store, retain, use and disclose personal information using a service provider.
2. I am not aware that anyone at SFU has previously considered the Publisher's *End User License Agreement* (EULA) and *Privacy Policy* and the implications for SFU's protection of privacy responsibilities under the Act.

Opinion

In my opinion:

1. Use of Pearson Education online learning applications in accordance with the terms and conditions of the:
    a. *Pearson Education End User License Agreement and Privacy Policy,*
    b. *Pearson Education Privacy Statement,* and
    c. *Agreement for Access and Use of Pearson Products,*

    would mean that:
    d. SFU **is complying** with the privacy protection requirements and restrictions under Part 3 of the Act **only when students and instructors register directly with the Publisher, they agree to the latter's EULA and Privacy Policy, AND no personal information passes from the University's system(s) to the Publisher's system** [documents a) and b) above], and
    e. SFU is **NOT complying** with the privacy protection requirements and restrictions under Part 3 of the Act **when the University signs the Agreement with the Publisher because it is accepting the EULA and Privacy Policy, which conflict with SFU's legal obligations under the Act** [document c) above with documents a) and b) forming part of the Agreement].

    See the "Reasons for Opinion" section below for my explanation of these two different situations.
2. SFU may use Pearson Education online learning applications only when:
    a. Instructors and students register directly with the Publisher to use its online learning tools, they accept the Publisher's EULA and Privacy Policy thereby giving consent for the Publisher to collect, store, access, retain, use and disclose their personal information inside or outside Canada, and IT Services can guarantee that no personal information passes from the University's system(s) to the Publisher's system, or
    b. A Privacy Protection Schedule is part of the Agreement signed between SFU and Pearson Education Inc., which requires the latter to follow the same privacy rules as SFU.
3. The above applies to integration of Pearson Education online learning applications with SFU's learning management system at the course level and at the full system level.
4. Effective October 21, 2004, the Act was amended to say that:
    a. "A public body must ensure that personal information in its custody or under its control is stored only in Canada and accessed only in Canada …", and

b. "The [protection of privacy] requirements and restrictions … also apply to … in the case of an employee that is a service provider, all employees and associates of the service provider."

The Bookstore informed me that it has sold students access codes to online learning products since 2006. It is possible that, since this date, SFU's use of Pearson Education online learning applications has been a privacy breach. It would depend on what terms and conditions were contained in the Publisher`s EULA and Privacy Policy since 2006 to the present.

Advice and Recommendation

In the current regulatory environment, SFU has four options:

1. Collect, store and retain personal data on digital storage devices controlled by SFU and located in its Burnaby campus data centre (i.e., personal data is in the custody and under the control of SFU),
2. Contract with a service provider to use its online learning application and collect personal data on behalf of SFU, storing and retaining it on the service provider's digital storage device inside Canada according to the terms and conditions of the Privacy Protection Schedule (i.e., personal data is in the custody of the service provider but remains under the control of SFU),
3. Obtain instructor and student prior consent to collect their personal information indirectly through a service provider who will store, access, protect, retain, use and disclose it, inside or outside Canada, according to the service provider's terms of use and privacy policy (i.e., personal data is exclusively in the custody and under the control of the service provider), or
4. Notify students at the time of course registration that a particular course uses a service provider's platform and the instructor requires students who enroll to register with the service provider and agree to its EULA and Privacy Policy using her or his real name or an alias. The service provider stores, accesses, protects, retains, uses and discloses instructor and student information inside or outside Canada (i.e., personal data is exclusively in the custody and under the control of the service provider). **[Note: this option is Pearson Education's business model]**

I recommend that:

1. You consult with the VP Academic's Office before proceeding further because:
    a. I understand the use of Pearson Education online learning applications was a topic of discussion at a recent Senate meeting, and
    b. There are academic and privacy policy issues that should be decided first.
2. If you proceed, the most practical solution to comply with SFU's legal obligation to protect personal information under its control is option 2 above:
    a. Negotiate an Agreement with Pearson Education that includes the Privacy Protection Schedule (which would need to be amended to fit the circumstances of this case), and
    b. Structure the Agreement to apply university-wide to all Pearson Education online learning applications that may now or in future be integrated with SFU's learning management system, whether at the course level or the full system level.

Thereafter, this arrangement could serve as a model agreement with other publishers of online learning applications.

I do not recommend:

3. Option 3 above because students could refuse SFU consent to collect their personal information indirectly from the Publisher, who would store, access, protect, retain, use and disclose it, inside

or outside Canada, according to the Publisher`s terms of use and privacy policy. Moreover, it would be complicated and burdensome to administer.

4. Option 4 above because:
    a. SFU would compel students enrolled in a course that uses the Publisher`s online learning application to agree to the Publisher`s EULA and Privacy Policy, thereby relinquishing control over how personal information about themselves is stored, accessed, protected, retained, used and disclosed inside or outside Canada,
    b. It would set a policy precedent that is a slippery slope towards additional situations in which more and more personal information is outside the custody and control of SFU in order to avoid the public sector privacy protection standards of the Act, and
    c. The tasks connected with this approach would be complicated and burdensome to administer (see list under "Reasons for Opinion", point B.1.l).

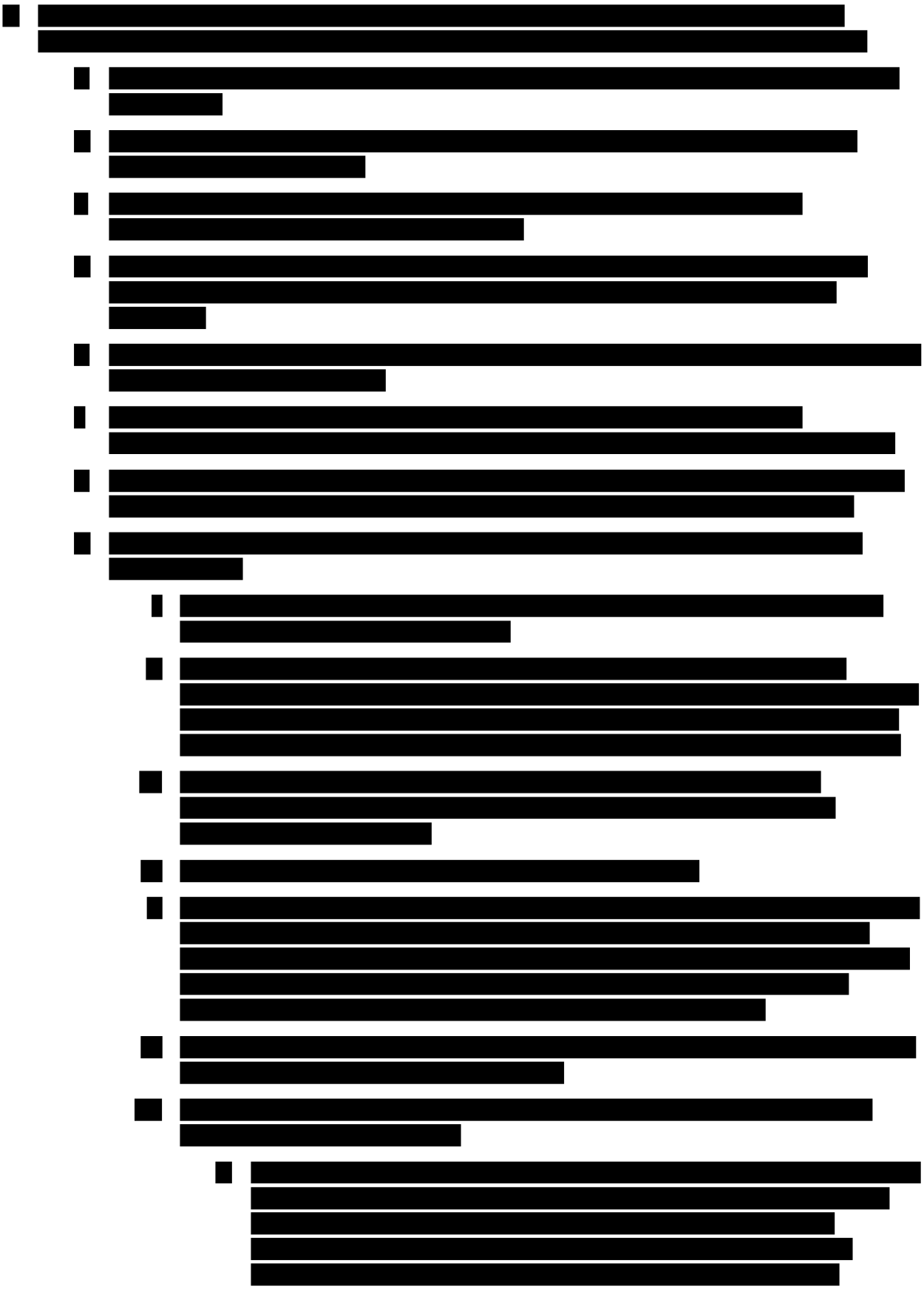
Reasons for Opinion

Facts

A. Relevant provisions and definitions in the Act

1. Relevant provisions are:
    a. Part 1, Sections 1, 2 and 3(1) (first line only)
    b. Part 3, Sections 26, 27, 30, 30.1, 30.4, 30.5, 31, 31.1, 32, 33, 33.2(a) and (c)
    c. Part 6, Section 74.1(1) to (5)
2. Relevant definitions are:
    a. **"public body"** means ... (c) a local public body
    b. **"local public body"** means ... c) an educational body
    c. **"educational body"** means (a) a university as defined in the *University Act* (i.e., SFU)
    d. **"personal information"** means recorded information about an identifiable individual other than contact information
    e. **"contact information"** means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual
    f. **"access"** means, for the purposes of Part 3, disclosure of personal information by the provision of access to personal information
    g. **"unauthorized disclosure of personal information"** means disclosure of, production of or the provision of access to personal information to which this Act applies, if that disclosure, production or access is not authorized by this Act
    h. **"employee"**, in relation to a public body, includes (a) a volunteer, and (b) a service provider
    i. **"service provider"** means a person retained under a contract to perform services for a public body
    j. **"privacy impact assessment"** means an assessment that is conducted by a public body to determine if a current or proposed enactment, system, project, program or activity meets or will meet the requirements of Part 3 of this Act

B. Analysis of the Publisher's business model for providing online learning applications



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C. Privacy implications of SFU contracting with the Publisher to use its online learning applications

Entering a contractual arrangement with the Publisher to use its online learning applications would mean:

1. SFU collects, stores, retains, uses and discloses instructor and students' personal information to operate its academic program and activities, including the information it obtains when using the Publisher's online learning tools and services
2. According to the Act:
    a. This information is under SFU's control,
    b. An employee of SFU includes a service provider, and
    c. A service provider is a person retained under a contract to perform services for SFU
3. The business transaction between SFU (the buyer) and the Publisher (the seller) to purchase the use of educational technology goods and services is a contract. The documentary evidence is the contract signed by the parties
4. The Act says explicitly that protection of privacy requirements and restrictions apply to employees and, in the case of an employee that is a service provider, all employees and associates of the service provider
5. When SFU contracts with a service provider (i.e., the Publisher) to buy educational technology goods and services, which include collecting on its behalf, storing, accessing, retaining, using and/or disclosing instructor and student information under SFU control, the University is obligated by law to ensure that its service provider complies with the same protection of privacy requirements and restrictions that SFU must follow
6. SFU does this using the Privacy Protection Schedule because it addresses all seven privacy rules
7. When there is no Privacy Protection Schedule between SFU and the Publisher, SFU must obtain instructor and students prior written consent to collect indirectly and store their personal information with the Publisher. In this situation, the absence of consent is the absence of authority to collect, store and disclose personal information to the Publisher
8. Unauthorized disclosure is an offense under the Act. Employees, service providers and SFU are liable to investigation and possible fines
9. No public body is permitted to avoid its obligations under the Act by contracting out a service
10. In the current regulatory environment, SFU has four options:
    a. Collect, store and retain personal data on digital storage devices controlled by SFU and located in its Burnaby campus data centre (i.e., personal data is in the custody and under the control of SFU),
    b. Contract with a service provider to collect personal data on behalf of SFU, storing and retaining it on the service provider's digital storage device inside Canada according to the terms of the Privacy Protection Schedule (i.e., personal data is in the custody of the service provider but remains under the control of SFU), or
    c. Obtain instructor and student prior consent to collect their personal information indirectly through a service provider who will store, retain, protect, use and disclose it, inside or outside Canada, according to the service provider's terms of use and privacy policy (i.e., personal data is exclusively in the custody and under the control of the service provider)
    d. Notify students at the time of course registration that a particular course uses a service provider's platform and the instructor requires students who enroll to register with the

service provider and agree to its EULA and Privacy Policy using her or his real name or an alias. The service provider stores, accesses, protects, retains, uses and discloses instructor and student information inside or outside Canada (i.e., personal data is exclusively in the custody and under the control of the service provider) **[Note: this option is Pearson Education's business model]**

SFU

ARCHIVES AND RECORDS MANAGEMENT
Office of the Vice-President Legal Affairs

NOTE TO FILE

FILE TO	FOI004-01 / Privacy Compliance Management / General	**DATE**	April 4, 2015
BY	Ian Forsyth, Coordinator of Information and Privacy	**PAGES**	8
SUBJECT	Protection of privacy compliance when using Pearson Education online learning applications		

Question

Does integration of Pearson Education (the Publisher) online learning applications with a university's learning management system comply with the protection of privacy requirements and restrictions under Part 3 of the BC *Freedom of Information and Protection of Privacy Act* (the Act)?

Introduction

I reviewed and considered the following information:

1. *Pearson Education End User License Agreement and Privacy Policy* (v. 10 last updated December 1, 2011) accessed on the Publisher's website February 15, 2015
2. *Pearson Education Privacy Statement* (v. 9 last updated July 1, 2010) accessed on the Publisher's website February 15, 2015
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4. Answers to questions obtained from Pearson Education representatives during a meeting and through email messages.
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    b. *FERPA and Pearson Higher Education Online Learning Applications* (dated May 2, 2011)
6. Pearson Education's Registration Video accessed on its website March 6, 2015.

Opinion

In my opinion:

1. Use of Pearson Education online learning applications in accordance with the terms and conditions of the:
    a. *Pearson Education End User License Agreement and Privacy Policy,*
    b. *Pearson Education Privacy Statement,* and
    c. *Agreement for Access and Use of Pearson Products,*

would mean that:

d. A university **is complying** with the privacy protection requirements and restrictions under Part 3 of the Act **only when students and instructors register directly with the Publisher, they agree to the latter's EULA and Privacy Policy, AND no personal information passes from the University's system(s) to the Publisher's system** [documents a) and b) above], and

e. A university is **NOT complying** with the privacy protection requirements and restrictions under Part 3 of the Act **when the University signs the Agreement with the Publisher because it is accepting the EULA and Privacy Policy, which conflict with a university's legal obligations under the Act** [document c) above with documents a) and b) forming part of the Agreement].

See the "Reasons for Opinion" section below for my explanation of these two different situations.

2. A university may use Pearson Education online learning applications only when:

   a. Instructors and students register directly with the Publisher to use its online learning tools, they accept the Publisher's EULA and Privacy Policy thereby giving consent for the Publisher to collect, store, access, retain, use and disclose their personal information inside or outside Canada, and IT Services can guarantee that no personal information passes from the University's system(s) to the Publisher's system, or

   b. A Privacy Protection Schedule is part of the Agreement signed between a university and Pearson Education Inc., which requires the latter to follow the same privacy rules as a university.

3. The above applies to integration of Pearson Education online learning applications with a university's learning management system at the course level and at the full system level.

A. *Options*

In the current regulatory environment, a university has four options:

1. Collect, store and retain personal data on digital storage devices controlled by a university and located in its data centre (i.e., personal data is in the custody and under the control of a university),
2. Contract with a service provider to use its online learning application and collect personal data on behalf of a university, storing and retaining it on the service provider's digital storage device inside Canada according to the terms and conditions of the Privacy Protection Schedule (i.e., personal data is in the custody of the service provider but remains under the control of a university),
3. Obtain instructor and student prior consent to collect their personal information indirectly through a service provider who will store, access, protect, retain, use and disclose it, inside or outside Canada, according to the service provider's terms of use and privacy policy (i.e., personal data is exclusively in the custody and under the control of the service provider), or
4. Notify students at the time of course registration that a particular course uses a service provider's platform and the instructor requires students who enroll to register with the service provider and agree to its EULA and Privacy Policy using her or his real name or an alias. The service provider stores, accesses, protects, retains, uses and discloses instructor and student information inside or outside Canada (i.e., personal data is exclusively in the custody and under the control of the service provider). **[Note: this option is Pearson Education's business model]**

B. Review of options

1. There are academic and privacy policy issues that should be decided. For example, the latter option may conflict with the BC Government's current limits on annual increases to *mandatory fees* paid by students.
2. The most practical solution to comply with a university's legal obligation to protect personal information under its control is option 2 above:
    a. Negotiate an Agreement with Pearson Education that includes the Privacy Protection Schedule (which would need to be amended to fit the circumstances of this case), and
    b. Structure the Agreement to apply university-wide to all Pearson Education online learning applications that may now or in future be integrated with a university's learning management system, whether at the course level or the full system level.

    Thereafter, this arrangement could serve as a model agreement with other publishers of online learning applications.
3. Option 3 above is not feasible because students could refuse a university consent to collect their personal information indirectly from the Publisher, who would store, access, protect, retain, use and disclose it, inside or outside Canada, according to the Publisher`s terms of use and privacy policy. Moreover, it would be complicated and burdensome to administer.
4. Option 4 above is not feasible because:
    c. A university would compel students enrolled in a course that uses the Publisher`s online learning application to agree to the Publisher`s EULA and Privacy Policy, thereby relinquishing control over how personal information about themselves is stored, accessed, protected, retained, used and disclosed inside or outside Canada,
    d. It would set a policy precedent that is a slippery slope towards additional situations in which more and more personal information is outside the custody and control of a university in order to avoid the public sector privacy protection standards of the Act, and
    e. The tasks connected with this approach would be complicated and burdensome to administer (see list under "Reasons for Opinion", point B.1.l).

Reasons for Opinion

Facts

A. Relevant provisions and definitions in the Act

1. Effective October 21, 2004, the Act was amended to say that:
    a. "A public body must ensure that personal information in its custody or under its control is stored only in Canada and accessed only in Canada …", and
    b. "The [protection of privacy] requirements and restrictions … also apply to … in the case of an employee that is a service provider, all employees and associates of the service provider."
2. Relevant provisions are:
    a. Part 1, Sections 1, 2 and 3(1) (first line only)
    b. Part 3, Sections 26, 27, 30, 30.1, 30.4, 30.5, 31, 31.1, 32, 33, 33.2(a) and (c)

c. Part 6, Section 74.1(1) to (5)

3. Relevant definitions are:

a. **"public body"** means ... (c) a local public body

b. **"local public body"** means ... c) an educational body

c. **"educational body"** means (a) a university as defined in the *University Act*

d. **"personal information"** means recorded information about an identifiable individual other than contact information

e. **"contact information"** means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual

f. **"access"** means, for the purposes of Part 3, disclosure of personal information by the provision of access to personal information

g. **"unauthorized disclosure of personal information"** means disclosure of, production of or the provision of access to personal information to which this Act applies, if that disclosure, production or access is not authorized by this Act

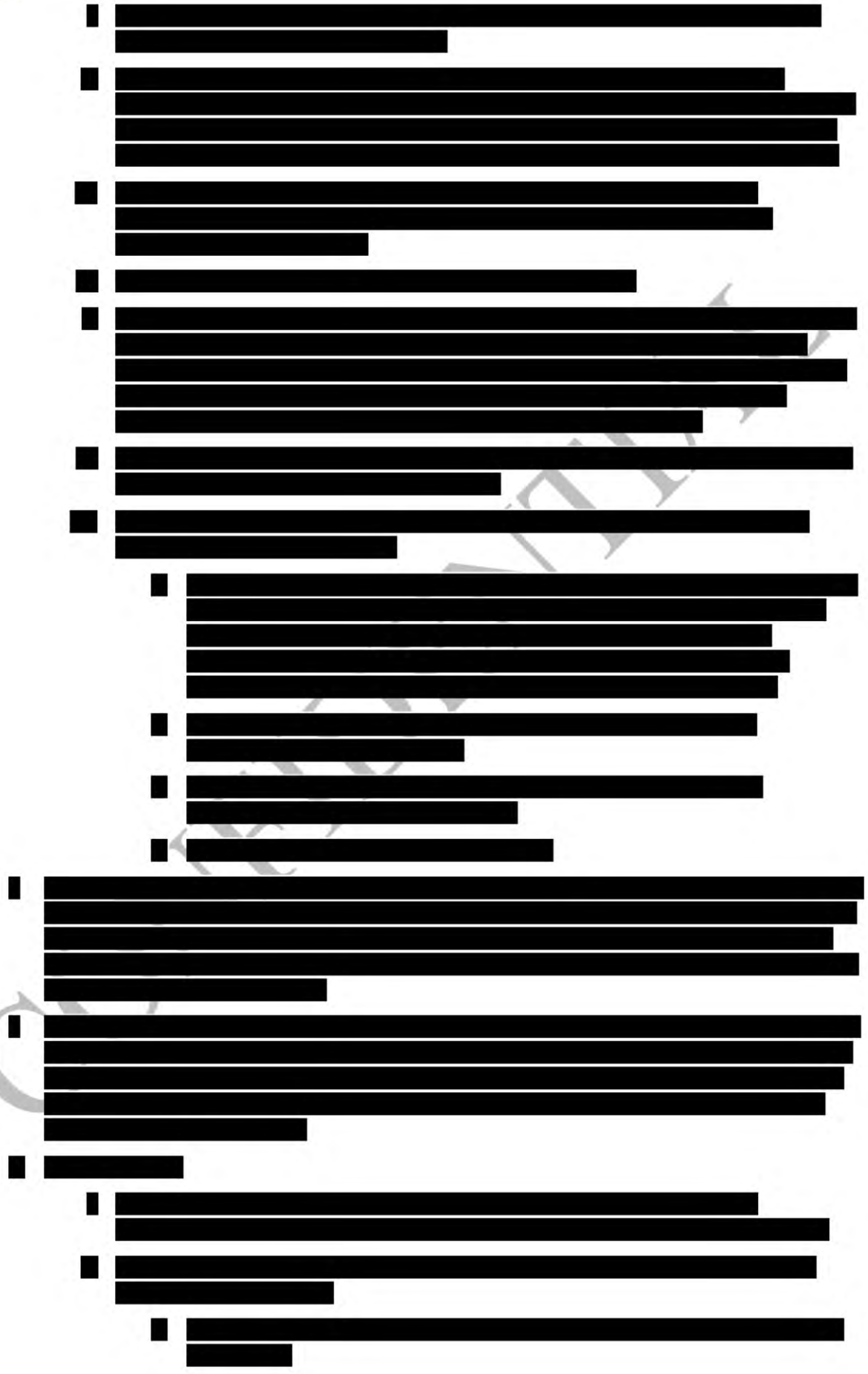
h. **"employee"**, in relation to a public body, includes (a) a volunteer, and (b) a service provider

i. **"service provider"** means a person retained under a contract to perform services for a public body

j. **"privacy impact assessment"** means an assessment that is conducted by a public body to determine if a current or proposed enactment, system, project, program or activity meets or will meet the requirements of Part 3 of this Act

B. Analysis of the Publisher's business model for providing online learning applications

1. [redacted]



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C. Privacy implications of a university contracting with the Publisher to use its online learning applications

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1. A university collects, stores, retains, uses and discloses instructor and students' personal information to operate its academic program and activities, including the information it obtains when using the Publisher's online learning tools and services
2. According to the Act:
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    b. An employee of a university includes a service provider, and
    c. A service provider is a person retained under a contract to perform services for a university
3. The business transaction between a university (the buyer) and the Publisher (the seller) to purchase the use of educational technology goods and services is a contract. The documentary evidence is the contract signed by the parties

4. The Act says explicitly that protection of privacy requirements and restrictions apply to employees and, in the case of an employee that is a service provider, all employees and associates of the service provider
5. When a university contracts with a service provider (i.e., the Publisher) to buy educational technology goods and services, which include collecting on its behalf, storing, accessing, retaining, using and/or disclosing instructor and student information under university control, the university is obligated by law to ensure that its service provider complies with the same protection of privacy requirements and restrictions that a university must follow
6. A university does this using the Privacy Protection Schedule because it addresses all seven privacy rules
7. When there is no Privacy Protection Schedule between a university and the Publisher, the university must obtain instructor and students' prior written consent to collect indirectly and store their personal information with the Publisher. In this situation, the absence of consent is the absence of authority to collect, store and disclose personal information to the Publisher
8. Unauthorized disclosure is an offense under the Act. Employees, service providers and a university are liable to investigation and possible fines
9. No public body is permitted to avoid its obligations under the Act by contracting out a service
10. In the current regulatory environment, a university has four options:
    a. Collect, store and retain personal data on digital storage devices controlled by a university and located in its data centre (i.e., personal data is in the custody and under the control of a university),
    b. Contract with a service provider to collect personal data on behalf of a university, storing and retaining it on the service provider's digital storage device inside Canada according to the terms of the Privacy Protection Schedule (i.e., personal data is in the custody of the service provider but remains under the control of a university), or
    c. Obtain instructor and student prior consent to collect their personal information indirectly through a service provider who will store, retain, protect, use and disclose it, inside or outside Canada, according to the service provider's terms of use and privacy policy (i.e., personal data is exclusively in the custody and under the control of the service provider)
    d. Notify students at the time of course registration that a particular course uses a service provider's platform and the instructor requires students who enroll to register with the service provider and agree to its EULA and Privacy Policy using her or his real name or an alias. The service provider stores, accesses, protects, retains, uses and discloses instructor and student information inside or outside Canada (i.e., personal data is exclusively in the custody and under the control of the service provider) **[Note: this option is Pearson Education's business model]**