

August 6, 2019

Association of Canadian Advertisers
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Toronto, Ontario
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The Office of the Privacy Commissioner of Canada

Re: Consultation on transfers for processing – Reframed discussion document

We are pleased to have this opportunity to participate in the OPC's call for comments on transborder data flows.

Association of Canadian Advertisers

The Association of Canadian advertisers (ACA) is the national industry association for Canadian marketers. A key charge of marketers is to manage their company's most valued asset, its Brand. Brand is based on the trust in the relationship between consumers and the company. Our members' brands include national and regional food and beverage products, financial and telecommunications services, loyalty programs, transportation providers, vehicle manufacturers, utilities, home convenience products manufacturers and major retailers.

Marketers are also significant purchasers of advertising and media services, from organizations in both Canada, the United States, and internationally. ACA's members actively maintain personal information databases of their customers and others interested in their products. They use this information for many diverse purposes, including providing financial services, maintaining warranties or even helping them find new innovative products. In this connection, they may provide such information to media organizations and other services providers for purposes of customer service, market research, analysis, or purchase of media and other services. In addition, ACA members use data processing services both domestically and across borders for a wide range of purposes, including media buying and ad delivery.

Serious Concerns

The ACA has serious concerns with the OPC's proposed changes in its policy position regarding transborder data flows as well as the wider implications the proposed change for data processing and outsourcing arrangements more generally, including domestically. While these concerns include what it perceives to be an unwarranted and inappropriate re-characterization of the nature of information transfers between data collectors and their contracted service providers under PIPEDA, the ACA's primary concern relates to the disruption and potentially negative effects that such a re-characterization would have on the economic vibrancy of the product marketing and development industry sectors in Canada.

PIPEDA's framework for disclosures and third party transfers is an effective regime

As currently understood, PIPEDA's framework for disclosures of personal information between organizations (data collectors), as distinguished from transfers of data between such organizations and their agents or other third party data processing services, is an effective and elegant regime.

A disclosure of information (requiring, as the general rule, consent by the data subjects) transfers the responsibility and risk of compliance from a discloser to the recipient. The result is that following disclosure of the information, the recipient is directly liable for compliance, the discloser is no longer responsible for the information, and the data subjects, having consented to the transfer, can and will look to the recipient to protect the information and comply with the law.

The regime for transfer of information by a data collector to its agent or third party processor is very different. Under section 4.1.3 of PIPEDA's Accountability Principle, the data collector remains responsible for the information transferred and must use contractual or other means to ensure that the third party processor maintains the level of protection that the data collector is liable for. The third party processor is not responsible directly under the law but instead is responsible indirectly through its principal, the data collector. Individuals are not required to consent to this transfer of information since there is no discloser and since they can continue to look to the data collector for protection and compliance with the law.

The OPC's proposed re-characterization is contrary to the intent of the PIPEDA regime

The proposed re-characterization of third party transfers as disclosures requiring consent is contrary to the understood workings of the PIPEDA regime. By proposing to characterize such transfers as disclosures, the OPC's change arguably will shift some or all of the effective risk of compliance to the third party processor (who becomes a recipient, logically now directly responsible for compliance with the law) as well as to the data subject who now must make a reasoned determination as to whether they consent to the transfer.

The OPC proposes, however, to have the original data collector (discloser) continue to be responsible for the data so transferred notwithstanding that the transfer will be characterized as a disclosure. Such continued responsibility for the data once disclosed would be inconsistent with intended operation of the data disclosure rules under PIPEDA, as summarized above. Furthermore it is inconsistent with other Canadian private sector privacy laws and recognized international laws such as the GDPR, which do not treat such transfers as disclosures. In fact, none of those laws rely on a consent requirement for transborder data transfers.

Unworkable burden on both data collectors and data subjects

If adopted, the OPC's proposed change would impose practically unworkable requirements on data collectors – who would be required to not only provide detailed disclosure of proposed third party processing (in accordance with the OPC's *Consent Guidelines*), but also obtain "consent" (and in cases of sensitive information such as financial data, express consent) to such arrangements. Furthermore, such a change would impose significant added burdens on data subjects – to read, understand and decide whether they consent to such arrangements. The required additional disclosure will only lengthen, and make less likely to be read, data collectors' privacy policies with the result that consent, if given, will risk

becoming meaningless. As noted, such a change arguably may result in a diminution of the risk borne by the data collector, transferring at least some of that risk onto the data subject as well as to the third party processor, now a “recipient”.

Transborder implications

As applied to the transborder data transfer framework, several counter-productive implications of the proposed change can be identified. First, in order for “consent” to such a transfer to be meaningful, the full measure of the OPC’s consent guidance must be complied with, including disclosure of “associated risks”. Such risks may be country-specific. For the individual to be informed fully of such risks, they must be made aware of where their data will be stored, the legal landscape of that country, the effectiveness of its policing and that country’s human rights record. Apart from the burden of disclosure that would be required of the data collector, the onus placed on the individual to assess the implications of such transborder transfer is inappropriate. The ACA submits that this requirement stretches PIPEDA’s consent foundation past the breaking point.

A further implication of the proposed change on transborder transfers may be a differential impact between those conducted directly between a data subject and an offshore data collector, on the one hand, and those conducted indirectly through a domestic Canadian data collector. In the latter situation, the Canadian data collector, using the offshore party as third party processor, has an added compliance burden, whereas the offshore data collector (even if it would be subject to PIPEDA – which is likely) has a more simplified compliance burden. The potential result is that Canadian-based entities, whether or not affiliates of the offshore entity, may be eliminated from the data flow.

Impact on innovation and competition – advertising and media industries

The current PIPEDA information disclosure and third party transfer regime is integral to the modern, especially the digital, economy and more specifically the functioning of the Canadian advertising and media industries. A change in the characterization of how personal data is communicated and utilized within the industry would have far-reaching impacts on the industry and its potential for innovation. This industry – like many in today’s marketplace – thrives on the dynamics and complex functionalities available from the innovative use of data. The regime proposed by the OPC would result in an entirely unworkable situation, requiring detailed disclosure of all potential outsourcing relationships as well as obtaining consent before entering into any of these relationships. Under the existing regime, the data subject (individual) knows whom they are interfacing with – the marketer/data collector. Under the OPC’s proposal, the data subject will be faced with making decisions on whether to agree to a myriad of potential service provider relationships. In reality, any new “protection” will be illusory, or meaningless, since it will be unlikely that the data subject realistically can assess the risk and if there is no alternative source of supply for the product or service, will be compelled to agree.

Disturbingly, this would require detailed public disclosure of a marketer’s outsourcing relationships. This disclosure would in turn aid nefarious actors by providing a target list of potential paths to high profile marketers. A target list could be cross-referenced to find providers that span multiple marketers providing a higher reward for hacking effort, placing marketing organizations and their customers at greater risk.

Moreover, adoption of the OPC's proposed re-characterization will favour established multi-national media and other service suppliers to advertisers, disadvantaging smaller, domestic suppliers and innovators. The more complicated compliance systems required to address such stricter new rules for outsourcing and data processing will also likely favour the larger media organizations, who will have the resources needed to enable them. This shift will work against smaller domestic suppliers and will reduce competition, innovation and new industry entrants, to the detriment of purchasers of such services – including ACA's members and other advertisers.

More complicated privacy regimes typically benefit the larger media and ad technology providers due to the scale of their audience, their ability to use data as a component of media currency and their resources available for system sophistication. Advertising spend provides \$11.2 billion¹ of revenue to the Canadian media industry with more than half going to the top four providers. Media concentration is also likely to accelerate under more complicated privacy regimes as data driven media currencies become more sophisticated. This concentration will also handicap smaller regional domestic providers who have neither the scale of audience or the data sophistication, nor the team of lawyers to respond to more complicated privacy laws, in the absence of a coordinated media currency strategy that involves the Competition Bureau and Industry Canada. A coordinated strategy on media currency needs to balance industry's and individual's needs recognizing the role ad-supported media plays in a democracy.

Specific case in point - Impact on digital media accountability

An emerging robust, fair and accountable digital media currency for advertising requires cross-border data transfer at speed, granularity and scale. Ad verification is a critical component of digital media currency; however there are no Canadian ad verification providers that are audited and accredited by the Media Rating Council, the not-for-profit body that examines media metrics internationally. Ad verification aims to ensure marketer's media budgets are not being directed to invalid digital media provided by criminals within the digital media ecosystem. Estimates of losses to this criminal activity range from about \$9 billion to over \$50 billion² globally. In order to perform this function, ad verification providers, in addition to other functions, execute a JavaScript on each and every impression and compare known breached IP addresses and other identifiers with the examined impression. Each of the billions of impressions examined daily in Canada involves a cross-border transfer flow.

Although anti-fraud measures are explicitly allowed under the GDPR³, large digital platforms coincidentally began denying the full implementation of third party ad verification and ad serving technologies when the GDPR went into force. ACA is concerned that the OPC's proposed changes to the current cross-border data transfer framework under PIPEDA would be used by large digital platforms to further inhibit third party digital media verification, again resulting in benefits to the large international platforms to the detriment of domestic media providers.

¹ Global Ad Spending: The eMarketer Forecast for 2018

² Compendium of ad fraud knowledge for media investors, WFA, 2016

³ Recital 47: "The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned"

Summary

The ACA has detailed its specific concerns in the following areas:

- PIPEDA's framework for disclosures and third party transfers is an already effective regime
- The OPC's proposed re-characterization is contrary to the intent of the PIPEDA regime
- This re-characterization will rest an unworkable burden on both data collectors and data subjects
- There will be a resultant impact on innovation and competition to both the advertising and media industries
- There be a further diminishing of digital media accountability

We thank you again for the opportunity to participate in this important discussion. Our aim is simply to avoid the disruption and potentially negative effects that the OPC's unwarranted and inappropriate re-characterization of the nature of information transfers between data collectors and their contracted service providers. Should the OPC move forward with this, ACA wishes to provide further concrete policy input into the process.

However, we also note the OPC has acknowledged the government's announcement of its Digital Charter consultation "includes consideration for amending PIPEDA" as means of addressing the Digital Charter's objective to "drive digital innovation, prepare Canadians for the future of work, and ensure they have trust and confidence in how their data is used." ACA will also be making comments on the future law within that context.



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