

A Year of Privacy Law**It's a wrap: 2019 an eventful year in privacy law**

By David Young



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(December 12, 2019, 1:15 PM EST) -- We look back to the never dull and at times high drama of another year in the life of Canadian privacy law.

In April, the Office of the Privacy Commissioner (OPC) released its Report of Findings regarding the 2017 Equifax data breach.

Hackers had gained access to the systems of Equifax through a software vulnerability, accessing credit files for more than 143 million individuals worldwide, including approximately 19,000 Canadians. While Equifax had become aware of the breach in July 2017, not until September did it make any public announcement and only in October did it send letters notifying the affected Canadians.

The OPC determined that Equifax had failed to provide adequate safeguards, in contravention of the *Personal Information Protection and Electronic Documents Act* (PIPEDA), and it had failed to obtain the consent of individuals to the transfer of their data from Equifax Canada data to Equifax U.S., which it determined was a *disclosure* by Equifax Canada, not a *use* by a processor as previously thought.

Coming out of the Equifax case, the OPC's new view was that all transfers of personal information to a processor constituted disclosures requiring individual user consent, including across borders. This was a dramatic departure from the OPC's previous interpretation of the law and if confirmed would have entailed significant changes in privacy practices and organizations' relationships with service providers.

The OPC undertook a consultation to assess stakeholder opinion. It received 87 submissions in response to its consultation — possibly a record — predominantly all taking issue with the proposed new treatment. At the end of September, the OPC announced no change — that a transfer for processing will continue to be considered a use, not a disclosure, and will not require consent, pending possible future legislative change.

PIPEDA reform

On May 21 the federal government announced Canada's Digital Charter, its digital strategy for fostering innovation. Within the umbrella of the Charter, Innovation, Science and Economic Development Canada published a white paper outlining proposals for modernizing PIPEDA, under three main headings: consent and transparency, responsible innovation and enforcement and oversight.

Discussions with stakeholders responding to the proposals, including in-person meetings, commenced in August and, with a brief interlude for the election, continue. The result likely will be a more formal consultation paper setting out concrete proposals and time frames, expected in the new year.

Privacy for political parties

In the context of the federal election, some changes in the laws governing the protection of privacy by political parties came into effect on July 1. Specifically, amendments to the *Canada Elections Act* under Bill C-76, the *Elections Modernization Act*, required parties to have privacy policies that address key information collection and use practices.

The Bill C-76 amendments were almost universally criticized as an inadequate response to electoral integrity in the digital universe. By contrast, the parliamentary Standing Committee on Access to Information, Privacy and Ethics had recommended comprehensive privacy protection legislation for political parties.

In response to a complaint that a local federal NDP riding association had obtained personal e-mail addresses without consent, the B.C. Information and Privacy Commissioner undertook an investigation. On Aug. 28, preliminary to conducting the investigation, he issued a ruling that the province's private sector privacy law, the *Personal Information Protection Act* (PIPA), applies to riding associations of federal political parties. The commissioner based his reasoning in part because Ottawa's rules respecting parties are so limited that there is no conflict with B.C. applying its own comprehensive privacy rules.

The ruling will have implications beyond the province's borders. It means that B.C.'s PIPA, which is equivalent to PIPEDA, may extend to federal political parties, with implications for voters across the country.

AggregateIQ

On Nov. 26, the B.C. and federal commissioners released their joint Investigation Report into the activities of AggregateIQ, a Victoria-based data research firm that assisted Cambridge Analytica in targeting potential voters in the U.K. Brexit referendum and the U.S. 2016 presidential election. The commissioner determined that in receiving individuals' profile information used for targeting purposes, AggregateIQ failed to ensure proper consent.

One of the unexpected messages from this decision is the imposition of responsibility on B.C. service providers to confirm the adequacy of consent, particularly with respect to information collected in foreign jurisdictions. This point arises from the wording of the PIPA provision respecting processors, which differs from other Canadian privacy laws. The B.C. commissioner has read this wording to mean that the processor must ensure that consent obtained on initial collection of the information complies with PIPA's rules, even if the information is collected in a foreign jurisdiction.

Sidewalk Labs

As we know, Sidewalk Labs, the Google subsidiary, has proposed a digital information neighbourhood on Toronto's waterfront reflecting dynamic activities and interactions within the area, with the goal of addressing energy and economic efficiencies, quality of life and sustainability. Essential to the proposal is the collection of personal data, both public and private.

Serious concerns have been raised regarding this pervasive data collection and the future use of that data. Sidewalk Labs' proposal was for the data collection to be conducted by it, with a "Civic Data Trust" regime to provide rules guidance and to manage the data.

In October, Waterfront Toronto, the responsible public sector agency, and Sidewalk Labs agreed to realign certain "threshold issues," including the data collection. As a result, Waterfront Toronto will lead all privacy and digital governance matters and Sidewalk Labs will not pursue the civic data trust concept.

While touted as resolving the privacy concerns with the project, this agreement again failed to provide clarity as to ultimate ownership and control over the data. The issues agreement states that it will be resolved using prevailing public/private partnership models, whatever that means.

In November, Sidewalk Labs issued a Digital Innovation Appendix that provides further information. This document identifies which activities are projected to be under public sector

oversight, such as mobility management (e.g. parking), and those to be overseen by the private sector (such as building climate controls). It can be surmised that the data oversight responsibility may determine control — in other words, ownership — of the data.

OPC's annual report

To wrap up the year, on Dec. 10, the federal privacy commissioner released his 2018-2019 Annual Report. In it, the commissioner sets out, in much greater detail than we have seen before, his view as to what Canada's privacy laws — PIPEDA as well as the *Privacy Act* (the public sector law) — should look like. In essence, they should mirror the approach of the EU's General Data Protection Regulation and establish a rights-based approach. The "self-regulatory approach" of PIPEDA (the commissioner's words), based on Fair Information Practices should be replaced by a more proactive role for enforcement.

The OPC's report also contains the results of its year-long investigation into Statistics Canada's collection of customer information from financial institutions. The OPC concluded that this collection is permitted but recommended greater transparency and additional rules to guide the necessity of such collections.

Finally, the commissioner noted that in the past year PIPEDA's new data breach reporting rules resulted in a fivefold increase in reports to the OPC. However, 33 per cent it deemed unnecessary as not meeting the threshold of "real risk of significant harm."

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