THE LAWYER'S DAILY

**The Lawyer's Daily** | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

**Sidewalk Labs**

# Sidewalk Labs: What public sector data governance would look like

By **David Young**

David Young

(April 30, 2019, 9:33 AM EDT) -- In my first article on data and Sidewalk Labs, I argued the case for a public sector governance regime for Google's proposed Quayside "innovative urban district" on Toronto's waterfront. The case is premised on the aspect of the proposal that would see significant collection of personal information in public spaces within the district — in effect "filling in the gaps" in the data collected from private spaces, including mobile phones, connected devices and in-home sensors.

What could public sector data governance look like?

Firstly, the private versus public character of the entity collecting the data must be addressed. Secondly, ethical rules for not only the methodologies of collection but also the use and application of the resulting data should be developed. Finally, an oversight framework should be in place, recognizing that ensuring compliance with existing privacy laws, as well as the ethical rules, will be a critical requirement.

Three categories of data likely will be involved: personal (or personally identifiable) data; de-identified data (meaning personal data that has been made non-personally identifiable); and data that was never personally identifiable (such as traffic data, aggregate energy usage, weather data). The privacy issues relate to the first two categories.

Distinctions are made among the main actions involving personal information — collection, use and disclosure. A distinction also is drawn between the collection of data by an entity *for its own purposes* (resulting in custody and control of the data by that entity) and the collection of data *on behalf of another entity*, resulting in the control, and potentially custody, of the data by that other entity — in essence, a form of agency relationship.

Initial control and custody resides with the entity that in the first instance collects the data, or on whose behalf it is collected. The result is that at the collection stage this entity holds a database of personally identifiable information, even though the data may be de-identified for subsequent use. This means that, unless destroyed following de-identification, there will always be a database of personally identifiable information held by the initial collector.

Finally, in order for a public sector entity to collect, or have collected for it, personal information under the governance regime set out in public sector privacy legislation — such as Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA) — there must be statutory authorization for the collection, and notice of that authority and the

purposes of collection given to the individuals involved.

Under this regime, authorization and notice replace the consent requirement. Oversight of such governance regime is provided, for Ontario public sector entities by the Information and Privacy Commissioner (IPC) and, federally by the Office of the Privacy Commissioner (OPC).

While it is possible that to some extent such authority exists under current legislation, the preferable approach is for specific authority to be established. Such authority could take the form of, for example, a regulation under the Waterfront Toronto enabling legislation. The regulation would identify the public sector entity (or entities) authorized to collect the data, or on whose behalf the data will be collected. Candidates include Waterfront Toronto, the City of Toronto (possibly using the facility of the Toronto Public Library as has been suggested), a "Civic Data Trust" (as proposed by Sidewalk Labs), or potentially, a new, purpose-specific, public sector entity.
Data collection by Sidewalk Labs for its own use, even if subsequently turned over to a public sector entity (e.g. a data trust) for management, would not meet the public sector governance criterion. However, data collected including by Sidewalk Labs *on behalf of* a public sector entity, would be considered collected by and under the control of that public sector entity.

Under this scenario, it will be clear that control and potentially custody of the data lies with the public sector entity. Anything that Sidewalk Labs does with the data from the moment it is collected, including the mode of collection, is subject to the control and final approval of the public sector entity.

The ethical rules framework for collection, processing and use of data, or its basic outline, should be established as part of a legislative framework authorizing the data collection. This framework would be imposed on all of the public sector entities, as well as potentially any private sector entities involved. An alternative would be a voluntary code mandated by legislation but developed by stakeholders, having consequences for noncompliance. The rules framework also could be reflected in the internal governance rules for the public sector entities involved, such as a data trust.

Oversight of data collection and use under such a governance framework would be affected by the relevant public sector privacy regulator — in Ontario the IPC — as well as, potentially, by a function-specific oversight body having specialized expertise and tasked with ensuring compliance with the ethical rules framework.

Data collection by a public sector entity will ensure that there is authority for the collection and within that authority, a format to develop a rules framework. It furthermore enables oversight by the privacy regulator responsible for such public sector data governance.

This is the second article in a two-part series.

*David Young is principal at* David Young Law*, a privacy and regulatory counsel practice in Toronto.*

*Photo credit / coolkengzz ISTOCKPHOTO.COM*

*Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at* Richard.Skinulis@lexisnexis.ca *or call 437- 828-6772.*

© 2019, The Lawyer's Daily. All rights reserved.