

## Business

## Are web postings exempt from privacy laws? Clearview AI ruling says no

By David Young



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(February 16, 2021, 8:35 AM EST) -- In a decision released earlier this month, the federal Office of the Privacy Commissioner and its provincial counterparts in Quebec, Alberta and B.C. ruled that Clearview AI's business of scraping the Internet for photographs of individuals to create a database for law enforcement agencies contravenes Canada's privacy laws. At the heart of the decision is the commissioners' determination that photographs available on social media and other online sites do not fall within the privacy laws' exemption for "publicly available information."

The federal privacy law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), and the relevant provincial laws provide an exception for what has been considered a relatively narrow scope of personal information made available in public sources such as the telephone directory and professional directories, as well as publications in which an individual has provided the information — indicating as examples of the latter, magazines, books and newspapers in printed or electronic form. The issue that the commissioners wrestled with was whether the term "publications" should extend to web sites and in particular social media sites.

The issue has great significance — essentially asking the question whether information about private individuals available online, including photographs and other information, should be considered public in a generic sense and therefore outside the protection of the privacy laws.

As a general proposition, personal information available in public spaces is considered protected by privacy law and therefore subject to the rules requiring consent to collection and use unless it falls within an exception to those laws — such as the publicly available information exception — or would be considered outside the scope of those laws as protected by the Charter right to freedom of expression.

The commissioners determined that the exception does not apply to Internet media, citing the examples included in the definition (magazines, books and newspapers) and distinguishing them from Internet postings, in particular social media, which are by their very nature dynamic in content and ultimately controlled by privacy settings or other tools available to individuals.

In the commissioners' view, Clearview's argument that the term "publication" necessarily includes "public blogs, public social media or any other public websites," taken to its natural conclusion, would imply that all publicly accessible content on the Internet is a publication in some form or other. The commissioners state that this would create an extremely broad exemption that would undermine the control individuals may otherwise maintain over their information, and that such control is a fundamental component of privacy protection.

Underlying the commissioners' conclusion is their characterization of the privacy laws as "quasi-constitutional" legislation which by its nature must be given a broad and remedial application and to which any exceptions should be construed narrowly.

There is much debate as to whether the current privacy laws should be considered quasi-constitutional and more specifically, whether privacy should be considered a human right. Commentators who dispute these propositions point to the balancing principle found, for example, in s. 3 of PIPEDA, which indicates that the statutory rules governing personal information should

recognize not only the right of privacy of individuals but also the needs of organizations to collect, use or disclose information for purposes that a reasonable person would consider appropriate in the circumstances. They argue that this balancing dictate together with general rules of statutory interpretation necessarily imply that both the mandatory requirements of the laws as well as the exceptions to them should be given a broad and remedial application.

In addition to finding that the consent exception did not apply, the commissioners concluded that Clearview AI's scraping of photographs from online media for commercial and law enforcement uses did not satisfy the laws' overarching "appropriate purpose" requirement. Put simply, this requirement states that any collection, use or disclosure of personal information under the laws, whether consent is required or not, must be what a reasonable person would find appropriate in the circumstances. This is an overarching — in effect gateway — requirement of the laws.

The commissioners found that the information at issue (facial biometrics) was sensitive and that Clearview AI's mass and indiscriminate scraping of these images from millions of individuals, including children and the subsequent use and disclosure of that information for its own commercial purposes — unrelated to the purposes for which the images were originally posted, and potentially, to the users' detriment and risk such as through prosecution or misidentification — was not an appropriate purpose and therefore failed to meet the laws' basic precondition for acceptability.

Clearview AI did not agree with the commissioners' determination, arguing that its collection of data for law enforcement investigation purposes would be considered by a reasonable person "appropriate, reasonable and legitimate in the circumstances."

Clearview withdrew from its operations in Canada last summer when the commissioners initiated their investigation. It had requested them to suspend their investigation pending their providing guidance respecting artificial intelligence applications, to be completed within a two-year period. The commissioners declined to do so, indicating that Clearview should cease its facial recognition activities in Canada, cease collecting images of Canadians and delete those already in its database. Clearview has ceased activities in Canada but has refused to delete images of Canadians collected through its scraping practices.

The commissioners indicate in their report that if Clearview refuses to comply with their requirements, they will undertake legal remedies to enforce them.

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