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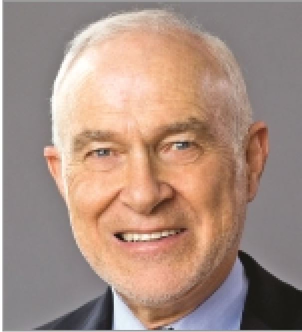
Business

Bill C-11's model for non-personal information is incomplete

By **David Young**



David Young

(May 13, 2021, 1:58 PM EDT) -- Bill C-11, the federal government's proposed legislation to enact a new private sector privacy law — the *Consumer Privacy Protection Act* (CPPA) — includes, significantly, provisions enabling the use and disclosure of de-identified personal information. Such provisions are very appropriate in a law that seeks to enhance and modernize privacy protections as well as to encourage innovation.

However, Bill C-11's approach to facilitating de-identification is incomplete and, if not adjusted, likely will lead to confusion for stakeholders, thereby compromising the government's stated goals for the legislation. Establishing an alternative model to the consented use of personal information is understood to be essential for not only scientific research and statistical analysis purposes but more broadly, for machine learning, innovation and, potentially, diverse "socially beneficial purposes."

In a world where obtaining valid, meaningful consent to diverse potential uses of personal information is becoming increasingly difficult and algorithmic models arguably function without consent, alternatives to existing privacy idioms of consent are ripe for reconsideration. Bill C-11 attempts to address these issues partly through expanding the approach of the current law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), of a consent requirement attached to a "laundry list" of exceptions, including for situations where consent is either not practical or not needed. However, it then seeks to respond further by enabling non-consented uses for specified purposes through the mechanism of de-identification.

Bill C-11 retains PIPEDA's general rule of application to "personal information" — meaning information about an identifiable individual — and should, by this definition, retain its non-application to de-identified, or non-personal, information. To address the open question of what is "de-identified information," the bill seeks to provide a definition which by its terms should be understood to describe information that is outside of the law. Unfortunately, the bill confuses the issue by then providing specified permitted uses for such de-identified information, leading to the conclusion that the law continues to apply to such information at least in some respects.

The conclusion that Bill C-11 is intended to continue to apply to de-identified information is supported by comments made by officials in the federal Department of Innovation, Science and Economic Development (ISED) in briefings subsequent to introduction of the bill.

The difficulty with this interpretation of the bill is that it is not clear whether the intended application is to *all* de-identified information — meaning to include information that by any objective standard would be considered "non-personal" — or only to information that does not meet this high standard. Supporting the latter interpretation is the argument that since it reasonably can be expected that such information may (and in certain circumstances will) be reidentified it should be governed by the rules applicable to personal information generally. Without clarification, the arguable conclusion is that the bill is intended to apply to both categories.

Reference may be had to the EU's *General Data Protection Regulation* (GDPR), Quebec's proposed Bill 64 and the recently adopted *California Consumer Privacy Act* (CCPA) for how this dichotomy has been addressed elsewhere. All these laws or proposed laws specify a category of non-personal

information to which the law does not apply. The GDPR and Bill 64 call this category “anonymous” or “anonymized” information and then provide for a category of non-personal information that is, either expressly or impliedly, subject to their privacy rules, which they call “pseudonymized” or “de-identified” information.

The CCPA’s term for information outside the law is “de-identified” information,” which is confusing because this is the same term used in the CPPA and in Bill 64 for information either potentially or actually subject to the law.

An important caveat to the exclusion of appropriately anonymized information from the privacy law is that if the anonymity of the information is not protected it will again become subject to the law. This possibility is reflected in the CCPA’s definition of de-identified information as well as in the CPPA’s treatment of de-identified information. Both regimes stipulate that an organization seeking to use such information (and benefit from whatever exclusion from the law’s application is thus provided) must apply technical safeguards and procedures to prevent the information from being reidentified. In reality, whether or not this stipulation is made in the law expressly, if a user of anonymized information fails to protect its non-personal character with the result that the information becomes identifiable, then the information *does become subject to the law* with full privacy protection.

Understanding this context, an argument could be made that personal information and non-personal information are really just two ends of a spectrum — one of which is full identifiability and the other “irreversible” non-identifiability.

To properly provide a framework for non-personal information that has clarity for stakeholders as well as alignment with evolving international and Canadian norms, the CPPA should make provision for both ends of this spectrum: a limited category of non-personal information that will be subject to its generally applicable rules, and a provision for non-personal information outside of its rules.

A corollary to this more complete model for addressing non-personal information is a requirement for organizations intending to anonymize any personal information to notify individuals of this intention and the uses which they plan for the data and, if any new uses are planned, provide a further notice. This requirement is important because, appropriately, the statutory model permits de-identification or anonymization without consent. However it also must provide that, with limited exceptions, an individual can object to such uses.

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