



Get Your Company's Privacy Policy in Order Potential Purchasers Will Need to Know

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On the Cutting Edge / Brian T. D. Bowman

Do privacy laws have any impact on mergers and acquisitions? You bet. Yet many businesses do not realize how much privacy laws can affect a transaction until it is too late. And this failing can reduce the bottom line for a vendor.

Imagine this scenario. You start your own business from the ground up. You then work for years to grow it into a successful enterprise. You now turn your attention to a new business venture or maybe even retirement. So you look to sell your business, which by now includes an impressive list of clients.

The good news is that you have finally found a potential purchaser. The bad news is that the purchaser's lawyers want to conduct due diligence investigations of your business including an assessment of your privacy practices. Considering that you have not spent much time getting your privacy house in order, this may pose a problem that will lower the value of your business.

Due diligence investigations typically involve the purchaser, or the purchaser's lawyers, examining the vendor's business in order to better understand and mitigate any risks associated with an anticipated transaction.

Such investigations should be conducted in accordance with an agreement between the vendor and purchaser that sets out the rights and responsibilities of the purchaser with respect to access to the vendor's business records.

Depending on the nature of the business being acquired, the most valuable asset may be the personal information records that the business has collected over the years, including the client list. Individual client names, addresses and purchasing history is all personal information protected by privacy laws. That is why the purchaser will be very interested to learn what rights and responsibilities the vendor has to its own personal information records.

As a lawyer, when I am involved in due diligence investigations on behalf of a purchaser I want to know answers to the following three basic questions.

Firstly, is the vendor in compliance with applicable privacy laws? For example, does the vendor have a privacy officer and privacy policy as well as retention and destruction procedures?

Secondly, has the vendor obtained the consent from individual clients for the collection of their personal information? Do consents obtained contemplate the anticipated transaction?

Thirdly, are there any ongoing or have there been any previously well-founded privacy complaints made against the vendor to the privacy commissioner? If so, what was the nature of these complaints? Has the vendor taken steps to prevent similar complaints from being made in the future?

The answers to these questions could affect whether a merger or acquisition proceeds, the purchase price or the structure of any transaction. Simply put, a business that does not have its privacy house in order is not worth as much as one that does.

Across Canada, privacy laws have been in force for years. When a merger or acquisition is on the horizon, however, the status of a business' privacy compliance efforts becomes vitally important.

Ignore privacy laws at your financial peril. It is not just good business for your existing clients -it is good business for any potential purchaser.

Brian Bowman is a business lawyer at Pitblado LLP with a specialization in privacy, access to information, technology and intellectual property law. He can be reached at 956-3520 or bowman@pitblado.com.