



Canada, U.S. laws on privacy complex

Wed September 3 2008

On the Cutting Edge / Brian T. D. Bowman

For the last number of years, many Canadian businesses that outsource to U.S.-based service providers have been conducting their activities amidst concern about the privacy risks posed by the U.S.'s anti-terrorism law, the U.S. Patriot Act.

The assistant privacy commissioner of Canada has recently released a finding that should provide comfort to Canadian businesses.

The U.S. Patriot Act allows the Federal Bureau of Investigation to secretly access records held in the United States by service providers and then to gag these organizations from revealing that the FBI has sought or obtained such information.

In Canada, the Personal Information Protection and Electronic Documents Act (PIPEDA) provides that Canadian businesses are responsible for personal information transferred to third parties. Canadian businesses are also required to obtain consent from customers to collect, use or disclose their personal information and to use contracts with service providers to ensure a comparable level of privacy protection when personal information is processed by the service provider.

One vital, yet unanswered question has been whether U.S. service providers can provide Canadians with a "comparable level of privacy protection" when they are bound by the U.S. Patriot Act. If the answer is "no", then Canadian businesses that outsource to the United States may be violating Canadian law. Fortunately, the assistant privacy commissioner's finding helps to answer this question.

In responding to a complaint by the Canadian Internet Policy and Public Interest Clinic against canada.com over its use of a U.S. service provider, the assistant privacy commissioner stated that "the risk of a U.S.-based service provider being ordered to disclose personal information to U.S. authorities is not a risk unique to U.S. organizations. In the national security and anti-terrorism context, Canadian organizations are subject to (and may be just as likely to receive) similar requests of orders to disclose personal information of Canadians to Canadian authorities."

In determining that the complaint against canada.com was not well-founded, the assistant privacy commissioner noted that "[Canadian] organizations that outsource the processing of personal information must provide sufficient notice with respect to the existence of service-

provider arrangements, including notice that any foreign-based service-provider may be required by the applicable laws of that country to disclose personal information in the custody of such service provider to the country's government or agencies."

Canadian businesses can notify individuals of data sharing practices in their privacy policies, e-mail notices and other documentation as may be appropriate in the circumstances.

The assistant privacy commissioner also noted that canada.com has a contract with its U.S. service provider that "provides guarantees of the confidentiality and security of personal information, and it allows for oversight, monitoring and audit of the services being provided."

Canadian businesses must have similar contracts in place, regardless of whether service providers are located in the United States, Canada or elsewhere.

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