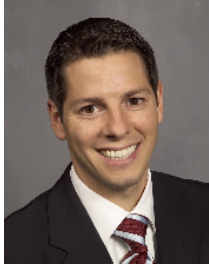


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Outsourcing comes with risks

U.S. service providers bring privacy concerns

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***On the Cutting Edge* - Brian T. D. Bowman**

DOES your business outsource to service providers such as web hosts, marketers or payroll service providers? Outsourcing often increases efficiencies and decreases costs. Yet the risks of outsourcing should not be underestimated. Just ask Citibank.

Recently, the U.S. banking giant was embarrassed when one of its outsourced service providers suffered a data breach.

According to InformationWeek, Citibank was then forced to block all PIN-based transactions for customers in Canada, the U.K. and Russia.

PIPEDA

In Canada, outsourcing can be even trickier due to Canada's new privacy law, the Personal Information Protection and Electronic Documents Act (PIPEDA), which states that businesses are responsible for personal information transferred to third parties.

Businesses are required under PIPEDA to obtain consent from customers to collect, use or disclose their personal information. They're also required to use contracts with service providers to ensure a comparable level of privacy protection when personal information is processed by the service provider.

Many Canadian businesses outsource to U.S.-based service providers, which raises concerns amongst some Canadians regarding the U.S. Patriot Act.

U.S. PATRIOT ACT

The U.S. anti-terrorism law allows the Federal Bureau of Investigation to secretly access records held in the U.S. by service providers and gag such organizations from revealing that the FBI has sought or obtained information.

In light of PIPEDA, Canadian businesses that outsource to U.S.-based service providers face some legal uncertainty and risk.

CIBC

To manage this risk, the Canadian Imperial Bank of Commerce (CIBC) mailed a notice to VISA cardholders back in 2004. The notice amended the CIBC VISA cardholder agreement by requiring customers to provide consent to CIBC for its use of U.S.-based service providers.

A number of CIBC customers launched privacy complaints to the federal privacy commissioner.

The complainants argued that CIBC violated PIPEDA by not allowing customers to opt out of information sharing with U.S.-based service providers. They also argued that CIBC was not adequately providing a comparable level of privacy protection while personal information was being processed by U.S. service providers who are subject to the U.S. Patriot Act.

Fortunately, CIBC was able to withstand the privacy complaints because it had a contract with its U.S.-based service provider that provided guarantees of confidentiality and security of personal information. After the investigation ended in late 2005, the privacy commissioner concluded the bank did not contravene the privacy law.

However, the commissioner acknowledged there are legitimate privacy concerns when information is sent to the U.S.

Most Canadian financial institutions outsource a portion of their operations through U.S. service providers.

The CIBC complaints highlight the need for comprehensive privacy agreements with service providers. They also highlight the complex issues that have arisen as a result of PIPEDA and incompatible laws such as the U.S. Patriot Act.

ALBERTA REPORT

In late February, the Alberta privacy commissioner released a report on the privacy implications of data outsourcing by government bodies. The issues and recommendations set out in the report offer constructive guidance for private-sector businesses that outsource within Canada or to the U.S.

Among other things, the report recommends that government bodies use checklists to ensure that service providers have proper contractual and administrative mechanisms in place for the protection of information.

The privacy commissioner of Canada has gone on record stating that the privacy implications of anti-terrorism laws and outsourcing need to be the focus of continued public debate. As a result, businesses should keep an eye on the debate as it unfolds.

With an eye to privacy

A proper contract with an outsource service provider establishes the expectations and boundaries for permissible collection, use and disclosure of personal information. Essential provisions should address:

- * security safeguards;
- * permitted uses of personal information;
- * confidentiality and non-disclosure;
- * privacy law compliance;
- * subcontracting;
- * data breach notification; and
- * remedies for breach of contract.

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