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Time to amend the personal information act

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On the Cutting Edge/Brian T. D. Bowman

WILL 2007 be the year that Parliament amends the Personal Information Protection and Electronic Documents Act (PIPEDA)?

Whether you are an individual seeking greater privacy protections or work for an organization that needs more business-friendly privacy rules, all Canadians have a stake in any amendments.

Should the law be amended? Most Canadians certainly think so.

An EKOS survey released by the federal Privacy Commissioner last year finds that "nearly 90 per cent of Canadians believe that existing legislation on the protection of personal information should be updated regularly to keep pace with technological advances".

The survey also reveals that two-thirds of Canadians have concerns about the future, agreeing that the protection of personal information will be "one of the most important issues facing our country in the next 10 years".

Parliament is in the midst of a mandatory review of PIPEDA, which began last year. And considering that it has been in force since 2001, the timing is right for Parliament to review the law.

Since PIPEDA was introduced, several provinces have adopted their own laws that have been deemed to be "substantially similar" to PIPEDA's privacy standards. And technological advances and business practices have evolved considerably in recent years.

So, if PIPEDA is to be amended, what should be changed?

Some groups have argued that Parliament should increase the powers of the Privacy Commissioner. Some have lobbied for changes requiring organizations to notify individuals if their personal information has been lost or stolen by identity thieves.

While there are many issues and possible amendments that could occur, one of the biggest issues facing Parliament relates to cross border transfers of information.

The reality is that many Canadian businesses regularly outsource data processing to other companies. Some of this outsourcing results in the transfer of personal information to organizations outside Canada, often to the United States.

PIPEDA contains general rules requiring organizations holding information or outsourcing it to ensure its protection, but does not contain any rule specifically directed at the protection of information transferred outside of Canada.

The Privacy Commissioner claims that the "belief in the pervasiveness of the transfer of personal information across borders, and related concern, are up slightly from the previous year". As a result, the EKOS survey illustrates that "Canadians attribute high importance to being notified of the transfer of personal information across borders" and "four in five place high importance on the requirement that consent be obtained".

But is the answer simply to notify or obtain consent from Canadians every time their information is being transferred outside of Canada? Is this practical and would it have the desired effect of actually enhancing privacy? I'm not convinced it would.

I recently addressed this issue when I appeared on behalf of the Canadian Bar Association's National Privacy and Access Law Section before the House of Commons standing committee on access to information, privacy and ethics as part of Parliament's review of PIPEDA.

The CBA section analyzed a number of options for a notification or consent requirement and concluded that if consideration is to be given to amending PIPEDA to implement a notice or consent requirement to cross-border transfers of information that a careful assessment should be made of the advantages and disadvantages of such an approach.

The CBA section, however, recommended that PIPEDA should be amended to include additional requirements in contracts between Canadian and foreign organizations to enhance security and ensure conformity to Canadian law.

Regardless of how Parliament assesses this issue and others related to PIPEDA, 2007 will likely be the year that the law is amended. Let's hope it's for the better.

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