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Buying or selling a business requires due diligence

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

DO you think that you might ever sell your business? Then you should read this column.

There has been much confusion in the business community over the privacy rules that regulate the flow of personal information in the course of certain business transactions, such as pre-sale due diligence investigations. That is because the Personal Information Protection and Electronic Documents Act (PIPEDA) does not have any specific provisions to deal with due diligence.

Due diligence investigations are an essential part of modern business transactions. Such investigations involve disclosing to potential purchasers of a business key information about the vendor, such as customer lists and other personal information records. Before spending thousands of dollars on a business, purchasers understandably want to see the number and type of customers in detail.

Yet, PIPEDA generally requires that consent be obtained from customers for the disclosure of their personal information. Requiring consent from customers for due diligence, however, is impractical and may deter possible purchasers. In some circumstances, it may also be illegal because doing so could violate securities laws or confidentiality obligations.

Fortunately, the law also allows businesses to manage personal information for purposes that a reasonable person would consider appropriate in the circumstances. So, the big question is whether due diligence disclosures are "reasonable."

A recent finding by the Privacy Commissioner of Canada has helped to clarify things.

The Privacy Commissioner investigated a complaint from a dentist's patient who became concerned after being presented with a consent form that acknowledged the possibility of his personal medical information being disclosed to potential buyers of the dentist's practice.

The Privacy Commissioner determined that it was reasonable for possible purchasers to evaluate patient records solely to evaluate the dentist's practice.

In her finding, the Commissioner inferred that the dentist would enter into a privacy agreement with potential purchasers, which would properly safeguard the data.

She also noted that dentists are subject to "numerous regulations concerning privacy." Without other findings from the Commissioner or guidance from the courts on this point, it is uncertain whether a business not covered by "numerous regulations concerning privacy" can disclose personal information in the course of due diligence investigations.

It is also unclear whether businesses are required to obtain express consent from customers for due diligence or if implied consent is sufficient -- the argument being that customers "know" that a business must be sold.

PIPEDA does not apply in other provinces such as Alberta, B.C. and Quebec, which each have their own "substantially similar" provincial privacy laws that supersede PIPEDA. The Alberta privacy law has business transaction provisions that clarify for businesses what the rules are for due diligence investigations. Until Manitoba and other provinces enact their own provincial privacy laws, PIPEDA remains the law of the land.

In the meantime, if you are considering selling your business, you would be well-advised to consider the privacy implications of due diligence investigations and take active steps to comply with PIPEDA.

Active steps to comply with the privacy rules include entering privacy agreements with possible purchasers, and updating privacy policies and customer consent notices to contemplate the sale of your business. You should also determine whether other rules -- such as securities laws -- will impact the transaction.

There are many things to consider when selling a business. Hopefully, respecting the privacy of your customers and complying with the law won't be lost in the transaction.

Do's and don'ts

In order to comply with privacy rules in the sale of a business, vendors should:

- * Enter privacy agreements with potential purchasers;
- * Update privacy policies and customer consent notices; and
- * Determine other legal requirements.

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