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Comments on the *OPC's Draft Consultation Report*
submitted by Avner Levin*

Introduction

I am pleased to offer to the Office of the Privacy Commissioner my thoughts on a couple of the issues raised in the OPC's 2010 Consultations draft report. My comments are limited to those issues for which the OPC requested further feedback, and on which I can suggest an opinion based on our research at the Privacy Institute. I am honoured to have participated in the consultation process earlier this year. I hope my comments will be of use to the OPC in formulating the final report.

Online Identity Management

The premise that the OPC should adopt on online identity management is simple – Canadians should be able to manage their identity online precisely as they manage their real identity. As the sociologist Goffman noted more than 60 years ago, we all present different aspects of our lives – personas – to different audiences – our colleagues, our friends, our family etc. As our own work, supported by the Contributions Program, and the work of others such as Hoofnagle and boyd has shown, we are currently experiencing great difficulties in behaving the same way online. A variety of terms have been given to these difficulties – collapsed contexts, blurred boundaries, online privacy expectations not met. The end result is the same – online social media is preventing, and will continue to prevent, Canadians from managing their identity online in the way they wish.

The consultations and the draft report suggest that meaningful online identity management may be achieved by working a combination of several approaches – for example new technological tools supported by regulatory oversight. However, it is not at all clear to me that technology can fix what it has broken. In fact, OPC's experience with Facebook is revealing. Online social media changes technologically at a very rapid pace, and even the best regulatory effort struggles to keep up and remain relevant.

OPC should therefore consider other approaches. The most promising, in my opinion, would be an approach that would provide OPC with additional enforcement powers, such as order-making powers, including the ability to levy fines for non-compliance with PIPEDA. Outside of PIPEDA, other legal tools should be considered, such as private legal

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action, and a legal regime that would impose liability on online social networks for harm created by online privacy breaches, similar to the copyright liability regime that exists in the US. In light of recent federal court decisions and the extra-ordinarily high hurdles that they place in the way of a plaintiff attempting to collect privacy-related damages the time for such additional legal tools has probably come.

None of my suggestions will materialize in the near future. However, I would include them or refer to them in some form in the final report, in the hopes that they would be adopted by OPC as it prepares for the upcoming PIPEDA review.

Consent

As Kerr and Austin have stated in their work, and as is supported by our work on workplace privacy, the notion of concept is ill-suited to the dynamic, changing online landscape, and indeed to many long term commercial relationships (of which the employment relationship is one). It is understandably difficult to move away from a concept that has long been the linchpin of data protection regimes around the world. However, legislation such as the provincial legislation of Alberta and British Columbia requires that commercial data management be reasonable, in the absence of any consent requirement. Reasonable data management protects the dignity and reputation of the individual. Moreover, emphasizing reasonable management places the burden on corporations to act in a responsible manner even in cases where they have appeared to obtain the consent of their customers to handle their personal information.

Yet another reason to move away from the concept of consent, as was heard at the consultations, and more recently at Privacy: Generations, is that the emphasis placed on consent by regulators has come at the expense of other important data protection principles, most notably the limitation principle. Indeed, it could be said that the limitation principle, as it applies to all stages in the data life cycle, has been neglected by data protection commissioners, and that enforcing compliance with the limitation principle will turn the consent that individuals currently provide routinely into a more meaningful agreement.

As with the notion of online identity management I am somewhat sceptical that technological measures to enhance consent (e.g., more granular consent, or repeated requests for consent throughout a commercial relationship) will succeed. And where economic incentives once supported data minimization (i.e., when data storage was expensive), that is no longer the case. These joint factors create an urgent need for regulators to play a more active role, and for OPC specifically to turn its attention, whether in response to complaints or through audits, to the enforcement of the limitation principles found in PIPEDA. I would include the contemplation of such future direction in the final version of the report.

Online Social Networks and "Commercial Activity"

Although the draft does not mention this issue, I would like to briefly address it, or more accurately its absence, in my comments. OPC has adopted (in its Facebook findings) a narrow interpretation of the scope of personal information collected in the course of commercial activity as far as online social networks (OSNs) are concerned. For example, information posted by individuals about other individuals is considered by OPC to be part of the socializing that occurs on OSNs (and no doubt it is) but not part of the commercial activity that OSNs conduct.

Behavioural advertising, and the related issues I addressed above of online identity management and the efficacy of consent, all depend on the amount of personal information available on OSNs (and more generally the internet). Moving to a broader understanding of personal information collected in the course of commercial activity, as covering all personal information retained by a corporation, regardless of its source, would therefore allow OPC to bring more OSN practices under the direct scrutiny of PIPEDA as currently written. I would urge OPC to refer to the question of what constitutes personal information collected in the course of OSN commercial activity in the final version of the report.

Conclusion

As is well known, the recommendations of Parliament, and government's decision to amend PIPEDA following its first review, have yet to be implemented. The final version of the consultation report should serve as the foundation on which OPC will formulate its position on the issues that will be discussed during PIPEDA's second review.

My comments above indicate that in my opinion the time has come to revise PIPEDA significantly, given that PIPEDA has not yet been amended. I hope the final version of the report will demonstrate that it is difficult to protect the privacy of Canadians from online tracking, profiling and targeting with PIPEDA as it exists, and as it is interpreted by OPC. That would subsequently allow OPC to abandon the position that PIPEDA offers adequate tools to deal with current issues, and allow OPC to call for legislative changes in order to address the technological changes that have occurred since PIPEDA was conceived in the mid-90s.