



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

285 McLeod Street, Suite 200, Ottawa, ON K2P 1A1

August 6, 2021

Manager of Access and Privacy Strategy and Policy Unit
Ministry of Government and Consumer Services
Enterprise Recordkeeping, Access and Privacy Branch
134 Ian Macdonald Boulevard
Toronto, Ontario
M7A 2C5

VIA E-Mail ONLY to access.privacy@ontario.ca

Dear Sir or Madam:

**Re: Public Consultation – Modernizing Privacy in Ontario
Comments of the Public Interest Advocacy Centre**

Please find attached three documents:

- 1) Comments of the Public Interest Advocacy Centre on the above-noted consultation;
- 2) PIAC's comments from the 2020 Ontario "Consultations to Strengthen Privacy Protections of Personal Data;" and
- 3) PIAC's comments from the Information and Privacy Commissioner of Ontario's "Strategic Priority Setting Consultation."

We trust the enclosed to be in order, but if you require anything further, please contact me at 613-562-4002 ext. 122 or by email at: ysai@piac.ca

Yours truly,

Yuka Sai
Staff Lawyer

Attach.

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PUBLIC INTEREST ADVOCACY CENTRE
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SUBMISSION OF THE PUBLIC INTEREST ADVOCACY CENTRE ("PIAC")

TO:

Public Consultation – Modernizing Privacy in Ontario

Provincial Privacy Reform: A Path to Disorder?

6 August 2021

Introduction

1. The Public Interest Advocacy Centre (“PIAC”) is pleased to provide comments to the Ministry of Government and Consumer Services’ (“MGCS”) public consultation on Modernizing Privacy in Ontario (“Consultation”). The Consultation seeks comments on the MGCS’ proposals to update and strengthen Ontario’s legislative privacy framework. PIAC has long advocated for stronger privacy protections in both the public and private sector. PIAC is intervening on behalf of all Canadian consumers, including Ontarians.
2. Despite the provincial scope of the Consultation, PIAC supports the creation of a stronger federal privacy framework, including an improved *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). Fragmented, incongruent provincial and federal regimes will only create compliance issues in practice. PIAC acknowledges that certain reforms have been proposed in the federal Bill C-11, *The Digital Charter Implementation Act*, but asserts that this proposed law does more harm than good in its attempt to modernize the federal privacy regime.

I. PIAC does not recommend the implementation of a made-in-Ontario privacy law.

3. PIAC is strongly opposed to a fragmented privacy regime in which each province adopts their own private sector privacy laws. PIAC has already discussed this position in detail in our submission to the previous Ontario consultation, “Consultations to Strengthen Privacy Protections of Personal Data,” launched on August 13, 2020, and closed on October 15, 2020. For reference, PIAC’s 2020 submission is attached to our submission for this present Consultation. We stand by our position today. To summarize:
 - PIAC maintains that current privacy laws are sorely outdated due to rapidly evolving digital technology and the rising value of data – both in individual and aggregate form - in the global economy. Most personal information, especially those collected, used, and disclosed digitally, now crosses provincial or even national borders. If data collected in Ontario, where privacy protections are stronger, are eventually used and disclosed outside of Ontario, the issue is whether other provincial laws or the federal framework can provide the same protections.
 - PIAC noted not only the substantive differences, but also differences in scope and enforcement between federal and the existing provincial private sector privacy statutes. An additional made-in-Ontario private sector privacy statute would make future harmonization more difficult. A rushed approach to strengthening privacy protections, in which privacy laws are updated as quickly as possible wherever and whenever political initiative arises, is actually detrimental to Canadians.

- The best approach to privacy reform in Canada is to push forward a single federal regime that is GDPR-compliant, and that prioritizes individual privacy over commercial interests. A fragmented national privacy regime is not only detrimental to individual consumers, but to businesses themselves. While provincial and territorial initiative is admirable considering the federal government’s continuing struggle to advance productive reform, abandoning a harmonized approach to privacy creates additional complications, including privacy gamesmanship, increased compliance burden and confusion, deterred international trade, and increased regulatory burden for both federal and provincial regulators.
4. Rather than pressing forward with new provincial legislation, Ontario should focus on strengthening the province’s privacy regime under its existing framework, to better leverage the IPC’s existing mandate to address current weaknesses in key priority areas. There is undoubtedly a great deal of work to be done. PIAC directs the MGCS to, firstly, our October 2020 submission which specifically called for **private sector employment privacy reform** (which is not done at the federal level and is a lacuna in Ontarians’ privacy protection) and also our attached submission from the IPC’s “Strategic Priority Setting Consultation,” which concluded in January of this year. To reiterate, some specific recommendations for improving provincial operations include:
- **Improving transparency in digital service delivery:** Adopt a privacy-first approach to government digital service delivery; incorporate contractual transparency to the greatest extent in industry partnerships.
 - **Defining responsible use of data for good:** Acknowledge and resolve any contradictions between what is “innovative” and what is “socially beneficial;” focus on developing privacy-first practice guidelines for internal use of de-identification processes.
 - **Improving access and privacy rights of youth:** Develop guidelines and programs supporting digital literacy for parents and children of all ages; work with the Ministry of Education and school boards to review and better understand virtual educational tools and platforms.

II. PIAC recommends that the Ontario government refrain from taking direction from the reform approach in Bill C-11.

5. PIAC is encouraged that the MGCS’ White Paper has at least indicated some reservations about Bill C-11, which are shared by the federal Privacy Commissioner. However, some of the Paper’s proposals to strengthen privacy protections are still aligned with the problematic aspects of Bill C-11, particularly the new consent exemptions. PIAC is concerned that this gradual erosion of individual knowledge and consent rights may be a resigned reaction to the intentional and increasing complexity of commercial data practices.
6. For instance, to combat presumed “consent fatigue,” the Paper proposes exceptions to consent similar to those in C-11. Firstly, we question the depth of empirical evidence for this effect, especially if the consent mechanism is appropriately designed and user-centric. However, even accepting that the Paper validates this bald assertion and that this effect, even if it exists, is

sufficient to justify changes to the consent rights of consumers, the Paper goes too far, we think, in considering allowing organizations to rely on implied consent under certain circumstances. PIAC considers that the consent exemption for activities preventing “commercial risk” is far too broad, as “commercial risk” could constitute virtually anything. The consent exemption for “any other prescribed” activity also weakens limitations on the scope of exemptions.

7. The proposed Ontario framework has removed Bill C-11’s exemption for business activities “in the course of which obtaining the individual’s consent would be impracticable because the organization does not have a direct relationship with the individual.” This is admirable but problematic in practice, because businesses would then simply favour an alternate jurisdiction that allows businesses to dispense with consent on the basis of convenience.
8. In Bill C-11, PIAC took issue with the new provision that organizations may “use an individual’s personal information without their knowledge or consent to de-identify the information.” In other words, individuals will never know, and can never consent, that their personal information is being further processed for other uses, even though this data could directly and indirectly impact individuals. The White Paper seems to adopt this exact approach.
9. The Paper also layers in the concept of “anonymized information,” which is different from “de-identified information” in that the former is information that has been altered irreversibly, therefore privacy laws do not apply. The latter can be re-identified with the use of additional information, therefore the Paper proposes extending certain privacy requirements to de-identified information. Confusion arises as Bill C-11 defines de-identification as an irreversible process. Implementing these inconsistent regimes creates serious complications such as those described above, particularly as businesses are incentivized to process de-identified data in more permissive regimes.

Conclusion

10. Compared to the federal discourse around Bill C-11, the Ontario government seems to be more conscious about the potential harms of being too laissez-faire with commercially-targeted reforms in privacy rights and principles. The fact that the MGCS has acknowledged this concern is encouraging, but even if Ontario reforms its own privacy regime to be more protective than the federal regime, the interoperability complications may neutralize any intended benefits.
11. For the time being, PIAC therefore opposes reforming Ontario privacy legislation at a comprehensive level. However, Ontario’s privacy strategy can still be strengthened without resorting to major legislative change. Improved employment-based privacy rules, practice guidelines, productive research and discourse, updated public resources and education, and increased scrutiny of data practices in both the public and private sectors would better prepare Ontario to adapt and respond to future federal reforms.

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