



Tuesday, August 6, 2019

Mr. Daniel Therrien  
Privacy Commissioner of Canada  
30 Victoria Street,  
Gatineau, Quebec  
K1A 1H3

**Re: Interactive Advertising Bureau of Canada -  
Submission to the Office of the Privacy Commissioner of Canada Consultation on Transfers  
for Processing**

Dear Commissioner:

1. The Interactive Advertising Bureau of Canada ("IAB Canada") is pleased to submit the following comments to the Office of the Privacy Commissioner of Canada ("OPC") as part of its consultation on transfers of personal information for processing (the "Consultation").
2. In brief, IAB Canada respectfully disagrees with the OPC's legal position that consent is required under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA" and the "Act") for transfers of personal information to third party service providers. In this submission, we set out the basis for our views in this regard, and provide details on how it would be almost impossible to operationally implement a consent requirement for transfers for processing that complies with Section 6.1 and Principle 4.1.3 of PIPEDA and in a manner consistent with the expectations of your Office's Guidelines for Obtaining Meaningful Consent ("OPC Consent Guidelines"). We also provide comments and recommendations for the consultation process.
3. IAB Canada will be providing comments regarding potential amendments to PIPEDA on the issue of transfers to service providers (and other related issues) as part of the Minister of Innovation, Science and Economic Development's ("ISED") recently-initiated

statutory review consultation. IAB Canada will provide a copy of its submission to the OPC at such time.

### **About IAB Canada**

4. Established in 1997, IAB Canada is a not-for-profit association exclusively dedicated to the development and promotion of the rapidly growing digital marketing and advertising sector in Canada.
5. IAB Canada represents over 250 of Canada's most well-known and respected stakeholders in the digital advertising and marketing sector, including advertisers, advertising agencies, media companies, digital media publishers and platforms, social media platforms, adtech providers and platforms, data companies, mobile and video game marketers and developers, measurement companies, service providers, educational institutions, and government associations operating within the space. Our members include numerous small and medium sized enterprises.
6. Companies in the digital advertising and marketing sector offer a wide range of highly innovative products and services, including valuable service offerings to individual Canadians. This sector is intensely competitive, and the long-term success of our members is fundamentally predicated on their ability to continually design, develop, offer, and improve valuable digital products and services.
7. Our members include numerous small and medium sized enterprises and represent an estimated 80% of the estimated \$7.7+ billion industry in Canada. IAB Canada has a long history of creating programs that are designed to promote the responsible growth of the online advertising industry in Canada. Notably, IAB Canada was the founding member of the self-regulatory Ad Choices Program developed to enable industry compliance within the PIPEDA framework.
8. IAB Canada is the only organization fully dedicated to the development and promotion of digital/interactive advertising in Canada delivering:
  - globally accepted digital ad standards;
  - advocacy for the Canadian digital advertising industry to the Canadian government;
  - trained human capital, through globally standardized courses, certification and custom workshops;
  - original Canadian digital marketing research;
  - and
  - information to the industry and enhanced communication between members.

## A. Legal Analysis

9. As noted above, IAB Canada respectfully disagrees with the OPC's legal position that consent is required under PIPEDA for transfers of personal information to third-party service providers. Simply put, based on a plain reading of the Act and established principles of statutory interpretation, the OPC's reinterpretation of the application and interplay between PIPEDA's consent and accountability requirements as regards personal data transfers for processing is legally incorrect.
10. As a matter of statutory interpretation, any analysis of a particular PIPEDA requirement must begin and appropriately take into account (i) the purpose and objects of the Act, as well as (ii) its overall structure and coherence.

A brief description of each of these features of PIPEDA is set out below.

### (i) Purpose and Objects of PIPEDA

11. The purpose of PIPEDA, as set out in section 3, is "to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances".
12. As such, PIPEDA's statutory framework expressly recognizes the balancing of interests that is required for innovation to take hold in today's digital economy. The statute sets out rules for organizations to protect the privacy of individuals, but does so with an express recognition of the need for organizations to process personal information in a rapidly evolving data environment.
13. As stated by the Federal Court of Appeal,

*"There are ... two competing interests within the purpose of the PIPED Act: an individual's right to privacy on the one hand, and the commercial need for access to personal information on the other. However, there is also an express recognition, by the use of the words "reasonable purpose,"*

*“appropriate” and “in the circumstances” (repeated in subsection 5(3)), that the right of privacy is not absolute.”*

...

*“All of this to say that, even though Part 1 and Schedule 1 of the Act purport to protect the right of privacy, they also purport to facilitate the collection, use and disclosure of personal information by the private sector. In interpreting this legislation, the Court must strike a balance between two competing interests. . . [F]lexibility, common sense and pragmatism will best guide the Court. (our emphasis).<sup>1</sup>*

14. Canadians benefit from the value offered by the vast array of innovative service and product offerings, and the increasingly tailored and personalized nature of such offerings. This is particularly the case in the online and mobile space, where the availability of an explosive volume of products, services, and features has been fueled by stunning innovation and the economic model of the digital advertising and marketing ecosystem.
15. In the course of the design, development, offering, marketing and advertising of these products and services, organizations need to collect, use, analyze and otherwise process certain personal information. In the course of doing so, similar to all other industry sectors, organizations in the digital advertising ecosystem routinely engage third-party service providers to process personal information on their behalf for such purposes. Indeed, the processing of personal information has become an inherent part of innovation and the exchange of value, and service provider arrangements are standard and fundamental means through which organizations efficiently and cost-effectively provide value.
16. While PIPEDA came into force in 2001, the balancing of interests within PIPEDA’s purpose clause continues to be wholly relevant today and provides the prism through which the Act’s consent and other requirements must be interpreted and applied.

(ii) Overall Structure and Coherence

17. A powerful feature of PIPEDA is its accountability model. Under PIPEDA’s accountability principle, organizations are responsible for personal information in their custody and control<sup>2</sup> and organizations must implement policies and procedures designed to ensure compliance with the Act’s rules that govern the entire life cycle of the organization’s personal information processing.<sup>3</sup>

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<sup>1</sup> *Englander v Telus Communications Inc.*, 2004 FCA 387 at para 46.

<sup>2</sup> PIPEDA, Principle 4.1

<sup>3</sup> PIPEDA, Principle 4.1.4

18. PIPEDA's accountability model holds organizations responsible for their personal information practices, and does so in a non-prescriptive form that affords organizations with the flexibility to tailor, adapt, and refine their privacy programs in a practical manner that is suitable to their sector, size and evolving commercial needs.
19. Principle 4.1.3 specifically contemplates transfers of personal information to third parties for processing provided there are contractual or other means in place "to provide a comparative level of protection" of the data in the custody of the third party. Critically, Principle 4.1.3, combined with Principle 4.1 is grounded on the conditions that the personal information in question remains under the control of the transferring organization and that the personal information will be processed by the third-party service provider for the same purposes for which individuals originally consented.
20. There is no suggestion in Principle 4.1.3 nor any reference to the consent principle that would invite an additional consent requirement, provided the above conditions are met. As a matter of basic statutory interpretation, if Parliament intended for consent to be required for transfers to third-party processors, Principle 4.1.3 would have expressly stated as much, given the fundamental implications of any such requirement. Notably, the only two Canadian privacy laws that require consent for transfers of data to third-party service providers have done so explicitly, and even then, only when such providers are located outside of Canada.<sup>4</sup>
21. The OPC's proposed reinterpretation of Principle 4.1.3 effectively "reads in" a consent requirement that is simply not there either expressly or impliedly. This legal analysis is wholly inconsistent with the overall purpose and intent of Principle 4.1.3, which is to hold organizations responsible for their day-to-day operations in a non-prescriptive manner, and it otherwise fails to take into account PIPEDA's express "balancing of interests" objectives. As long as control remains within the transferring organization and the purpose remains the same, it should make no difference, legally or conceptually, whether organizations choose operationally to conduct the processing activity in-house or have it done by an external contractor or by a third-party service provider.
22. Moreover, the OPC's reinterpretation of Principle 4.1.3 as requiring specific consent for transfers of personal information to third-party service providers is undermined by the highly adverse (if not absurd) operational impact of any such requirement. As the Federal Court of Appeal has stated, "common sense and pragmatism" are guiding principles to be taken into account when interpreting PIPEDA. Yet, as will be further explained below, in many instances it will be almost impossible to operationally implement a consent

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<sup>4</sup> [Freedom of Information and Protection of Privacy Act](#), RSBC 1996, c 165 [BC FIPPA] and [Freedom of Information and Protection of Privacy Act](#), SNS 1993, c 5 [NS FIPPA]

requirement for transfers for processing in a manner that complies with Section 6.1 and Principle 4.1.3 of PIPEDA and is consistent with the OPC Consent Guidelines.

23. The OPC's proposed reinterpretation is also completely at odds with (and further undermined by) the approach of provincial private sector<sup>5</sup> and health sector privacy statutes<sup>6</sup>; that have been deemed to be "substantially similar" to PIPEDA by order in council.
24. None of the above-referenced statutes require consent for transfers to third-party service providers (as long as the transferring organization remains in control of the personal information in question and the purpose remains the same). It stands to reason therefore, that PIPEDA cannot now be reinterpreted as being different from its substantially similar counterparts, particularly on a matter of such importance.
25. Finally, IAB Canada strongly maintains that a reinterpretation of PIPEDA that would require consent for outsourcing of data processing functions—including outside Canada—is inconsistent with the spirit and intent of Canada's international trade commitments. A requirement for consent for transfers to processors across borders would effectively amount to a data localization requirement. Contrary to the OPC's publicly stated position, we believe this requirement could potentially violate Canada's obligations to support international trade under several existing and new agreements, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-United States-Mexico Agreement (CUSMA), and would not be justified under any valid exception.

## **B. Severe Adverse Operational Impact of Imposing a Consent Requirement for Transfers of Personal Information to Service Providers**

26. In the respectful view of IAB Canada members, obtaining consent from individuals prior to transferring their personal information to third parties for legitimate and routine processing purposes originally consented to would be sheerly impracticable, if not impossible, to operationalize. This is particularly so in the digital advertising and marketing sector, which likely relies on a greater number of service provider arrangements compared with other industry sectors.

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<sup>5</sup> [Personal Information Protection Act](#), SA 2003, c P-6.5 [Alberta]; [Personal Information Protection Act](#), SBC 2003, c. 63 [BC]; [An Act respecting the protection of personal information in the private sector](#), CQLR, c P-39.1 [Quebec]

<sup>6</sup> [Personal Health Information Protection Act](#), 2004, SO 2004, c 3, Sch A [Ontario]; [Personal Health Information Privacy and Access Act](#), SNB 2009, c P-7.05 [New Brunswick]; [Personal Health Information Act](#), SNL 2008, c P-7.01 [Newfoundland and Labrador]; [Personal Health Information Act](#), SNS 2010, c 41 [Nova Scotia].

27. IAB Canada members could have, at any one time, as many as several thousand active third-party service provider arrangements in place, a large proportion of which will legitimately require access to some personal information. In addition to the standard types of service provider arrangements that are standard for companies in any sector, IAB Canada members routinely enter into a broad range of service provider arrangements unique to the digital advertising and marketing sector. These arrangements often involve independent contractors, small, medium and large-scale service providers in Canada, the US and abroad. And it is very common for such service providers to further enter into sub-contracting arrangements with third parties to render such services.

28. The types of digital advertising and marketing arrangements entered into by IAB members include:

- Website/app analytics providers
- E-Commerce and payment processing platforms
- Contact relationship management
- Tag manager and deployment
- Digital ad delivery, reporting and verification services
- Email service provider solutions
- Digital ad measurement and related analytics services
- Feedback & survey platforms
- Social Login/Sharing Services
- Loyalty program solutions
- Content management services
- Social marketing management platforms
- Social publishing platforms
- Social promotion platforms
- Content optimization services
- Data management platforms
- Social referral platforms
- Online Video Platforms
- Translation service providers
- Recommendation engine providers
- Real-time messaging/offer engines
- Privacy management
- Sales automation
- Predictive marketing platforms
- Cross-platform user verification
- Engagement metrics providers

29. Ironically, imposing a consent requirement containing a detailed listing of all third-party service providers, a description of their purposes and the location of their services or

servers, in extreme cases would add dozens of pages to each consent notice, resulting in the complete opposite effect intended by the OPC Consent Guidelines. This would only overload and overwhelm users, instead of seizing their minds and focusing them on the most important, concise and actionable information they need in order to make informed choices. It would needlessly generate notice fatigue, frustrating users by continuously requiring them to click "I agree" given the sheer impossibility of digesting the information and their inability to discern what is truly the most important. To comply with a consent requirement for transfers to service providers, a consent process would have to also include transfers by service providers to sub-contractors, which is completely impracticable and in no way reasonably expected by any end-user.

30. It is important to emphasize that such consent notices would be bombarding individuals from all sectors. The reality is that outsourcing and service provider arrangements have largely become common practice driven by competitive pressures to reduce costs and derive benefit from specialized expertise and economies of scale. All PIPEDA-regulated organizations, well beyond IAB Canada members and spanning all sectors and industries, would be subject to this reinterpretation of Principle 4.1.3. The sheer number of consent notices about third-party service arrangements that individuals would receive by countless number of organizations - small, medium and large - across all major economic sectors in Canada, is completely mind-boggling.
31. Imposing a consent requirement is vastly different and more demanding than providing users with notice in accordance with PIPEDA's transparency obligations. Applying the OPC Consent Guidelines in a way that was intended to make consent truly meaningful, would require bringing to individuals' attention such information right up front, on a real-time basis, prior to them making their decision. And unless and until they do so, the service or product requiring the processing activity in question could not be provided to them without contravening PIPEDA. This will invariably anger consumers who increasingly demand timely (nearly instantaneous) service. In this regard, a consent requirement is wholly unlike a notification requirement that serves to provide information in a readily accessible privacy statement or other user-flow notice to which individuals can refer at a time of their choosing.
32. Furthermore, these processing activities can literally span millions of transactions in a fraction of a second. Such processing could not reasonably be held up, pending consent of individuals (let alone express consent) without completely obstructing the user experience, impeding innovation and nullifying the social and economic benefits of the internet.
33. A steady flow of these service provider arrangements (let alone sub-contracting arrangements) regularly come up for amendment, renewal, and/or expiry, necessitating yet more consent notices on an almost daily basis, potentially further confounding users who, far from feeling empowered and in greater control of their personal information,

will most likely grow increasingly frustrated and annoyed. On the IAB Canada member side, entire new processes would have to be developed and implemented for flagging each time such a new consent notice is required and recording and managing these on an ongoing basis.

34. Moreover, even imposing an implied consent requirement still requires organizations to provide meaningful opportunity to withdraw their consent (i.e. opt-out). A requirement for express or implied consent will necessitate the creation of consent management processes to accommodate individuals who prefer not to have their personal information sent to any given provider (and, presumably, their sub-contractors), but who in practical reality could not be otherwise accommodated either. The only solution in the vast majority of cases would be to deny them of the service they were originally seeking, as there would be no reasonable alternative for extricating individuals from many standard business processing activities that have become sector-wide. As individuals realize their limited options, this may require resubscribing them with new consent. These consent management processes currently do not exist for third-party service provider arrangements, and the costs of designing and implementing them would not only be inconvenient or merely costly, but absolutely crippling for the industry.
35. Finally, IAB Canada members are deeply concerned about the commercially sensitive information they would be forced to withhold for legitimate, competitive and confidentiality reasons. Should regulators and individuals come to expect complete disclosure in all cases as part of a consent notice, there is a risk that the industry may get needlessly caught up in endless, protracted debates about what additional information must be disclosed and at what specific level of detail.

### **C. Procedural issues**

36. In IAB Canada's respectful view, this consultation process is giving rise to significant concerns (including considerable uncertainty) for many organizations across our sector. Understanding the importance of this consultation process and its ultimate result, IAB Canada and its members respectfully request the OPC to consider the following recommendations for the remainder of this process. We specifically recommend that your Office:
  - enhance transparency of the consultation process by providing all stakeholders (and the greater public) with access to all of the submissions that have been sent to, and considered by, the OPC as part of its deliberations;
  - facilitate a two-way process whereby a significant cross-section of affected stakeholders can participate in meaningful, constructive, in-person dialogue with the Commissioner to be able to explain their positions in more detail than written

submissions can allow, and conversely, better understand the reasoning behind the OPC's significant change in its own interpretation;

- confirm in clear and certain terms what is the OPC's current position on the requirement for consent for transfers of data to third-party processors - both within and outside Canada; simply put, in the context of the next investigation that gives rise to this issue prior to the consultation process being completed and/or PIPEDA before reformed, will the Commissioner will require consent or not?;
- clarify for stakeholders precisely which other existing guidance documents risk being changed as a result of a change in interpretation of Principle 4.1.3 and more precisely what other issues hang in the balance, and provide all stakeholders with the opportunity to review and comment on any draft revisions to such guidance; and,
- rapidly draw this consultation process to its conclusion in order to restore stability and provide certainty among IAB Canada members, and more broadly, all actors that play a vital role in Canada's digital economy, as well as consumers themselves.

#### **D. Conclusion**

37. In conclusion, we respectfully submit that as regards the Commissioner's future-oriented questions about how PIPEDA should be amended to address transfers of data for processing - both within and outside Canada - these are best left for the soon-to-be-elected government to consider, and for Parliamentarians to decide. As noted in the introduction to this submission, it is the intention of IAB Canada to provide the Minister of ISED with comments on their current consultation regarding PIPEDA review, and we would be pleased to provide the OPC with a copy of same.

38. Throughout this submission, IAB Canada has attempted to demonstrate the likely severe adverse impacts that the proposed reinterpretation of Principle 4.1.3 of PIPEDA will have on our sector. However, this consultation process has surfaced much larger and fundamentally important issues that will need to be resolved as part of a broader, more coordinated and more coherent, multi-stakeholder public policy debate about the kind of privacy protection regime that is right for Canada today, almost two decades since the original adoption of PIPEDA. Consideration will likewise have to be given to equally

important policy imperatives that will allow Canada to participate, compete and thrive as a leader on the global economic stage which, in turn, will allow for technological progress and innovation to take hold, and for all Canadians to reap the attendant social and economic benefits.

39. On behalf of IAB Canada, and all of its members, we thank you for the opportunity to provide comments and we look forward to receiving timely communication back from the OPC on this matter.

Sincerely,

A handwritten signature in black ink that reads "Sonia Carreno". The script is cursive and fluid.

Sonia Carreno  
President, IAB Canada