

Meaningful Consent

Panel Discussion

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Achieving Meaningful Consent in the Digital Age- Perspective of the Federal Regulator

Sarah Speevak

Legal Counsel

Office of the Privacy Commissioner of Canada

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Relevant PIPEDA Provisions



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- ❖ The Personal Information Protection and Electronic Documents Act (PIPEDA) is considered a consent-based model
- ❖ Subsections 7(1), (2) and (3) of PIPEDA require the knowledge and consent of the individual to collect, use and disclose personal information, unless one of the narrow exemptions applies.
- ❖ Bill S-4 introduced some new exceptions for disclosure without consent: 7(3)(d.1)- (e.2)

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❖ 4.3 Principle 3 - Consent

❖ The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

❖ Sub-principles 4.3.1, 4.3.2, 4.3.3, 4.3.4, 4.3.5, 4.3.6, 4.3.7, and 4.3.8

❖ S-4 created a New Section 6.1-Valid Consent:

For the purposes of clause 4.3 of Schedule 1, the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting.

Consent under the Federal *Privacy Act*



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- ❖ What is the role of consent under the *Privacy Act*?
- ❖ Consent is not required for collection:
 - ❖ Section 4: No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution.
 - ❖ See also section 5 (preference for direct collection)
- ❖ Use and disclosure without consent if for same purpose as collection or *consistent use* or a s. 8(2) exemption applies
 - ❖ Ex. ss. 8(2)(b): ...for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure



Express Consent

- ❖ **Express consent** is the strongest form of consent
 - ❖ Proactive step by the individual to communicate consent in writing or orally
 - ❖ Obtained by: signature, checkoff box, affirmative confirmation (telephone, in person) [see *Englander v. Telus Communications Inc.*, 2004 FCA 387 , para 60]
- ❖ **Opt-in consent** is a form of express consent
 - ❖ Requires individual to take positive action to demonstrate consent, such as completing a check box
 - ❖ Organization's default is lack of consent



Opt-Out Consent

- ❖ Reflects individual's right to withdraw consent (PIPEDA Principle 4.3.8)
- ❖ Organization's default is consent
- ❖ Burden is transferred to individuals to expressly indicate their lack of consent
- ❖ OPC has permitted opt-out consent under limited conditions
- ❖ Ex. Online behavioral advertising; PIPEDA Case Summary #2003-207 and #2003-192



Implied Consent

- ❖ Consent that can be inferred from the surrounding circumstances
- ❖ May be based on an affirmative action by the individual, but is not express
- ❖ 4.3.4 and 4.3.5: sensitivity and reasonable expectations
- ❖ Hardest form of consent to define
- ❖ Different contexts: dispute resolution, employment



Implied Consent – Deemed Consent?

- ❖ *Royal Bank of Canada v. Trang*, [2016] 2 SCR 412
 - ❖ Individuals were taken to have implicitly consented to the eventual disclosure of their mortgage discharge statement by their mortgagee bank to a third party judgment creditor
 - ❖ Individuals did not respond to contact attempts, did not participate in litigation concerning the disclosure
 - ❖ Supreme Court found they implicitly consented at the time they entered into the mortgage
 - ❖ *RBC v Trang* is arguably **deemed consent**

Consent Consultation



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- ❖ May 2016 discussion paper
- ❖ 51 written submissions received; stakeholder roundtables and focus groups
- ❖ On September 21, 2017: results of our consultation in our 2016-17 Annual Report to Parliament: Report on Consent
- ❖ In the fall of 2017 we asked for feedback on two draft guidance documents:
 - ❖ Obtaining meaningful online consent
 - ❖ Inappropriate data practices – interpretation and application of ss. 5(3)
- ❖ Next steps

Resources:



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- ❖ Interpretation Bulletin: Form of Consent (2014) :
https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_07_consent/ (revised version coming soon)
- ❖ The *Digital Privacy Act*: Summary of key changes to the *Personal Information Protection and Electronic Documents Act* : www.priv.gc.ca/media/2431/02_05_d_63_s4_e.pdf
- ❖ Guidelines on Privacy and Online Behavioural Advertising:
www.priv.gc.ca/en/privacy-topics/advertising-and-marketing/behaviouraltargeted-advertising/gl_ba_1112/
- ❖ OPC's discussion paper exploring potential enhancements to consent under the *Personal Information Protection and Electronic Documents Act* (May 2016):
www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/consent_201605/
- ❖ Submissions received for the consultation on consent:
<https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-consent-under-pipeda/submissions-received-for-the-consultation-on-consent/>
- ❖ Draft guidelines: Obtaining meaningful online consent:
https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-consent-under-pipeda/gl_moc_201709/
- ❖ Draft guidance: Inappropriate data practices – interpretation and application of subsection 5(3):
<https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-consent->

Consent Standards



- **Consent Receipt Standard v1.1**
- **Consent Management Solutions Working Group**

Questions & Discussion

Legal vs. “Normative” consent

How do you describe the difference between ‘consent’ as described in privacy laws and ‘consent’ as a normal person would use it in conversations about the web? Or are they the same thing?

Governance of consent

Who should be accountable for ensuring that meaningful consent is or has been obtained? Are regulators too much of a ‘blunt instrument’ to manage this?

The Biggest Lie: I have read and agree

Research has repeatedly shown that very few people read so-called privacy policies (pet peeve - they are privacy notices). Can consent based on that method of notice be described as knowledgeable?

If not consent, then what?

If consent is imperfect, what is the better alternative (other than just handing the keys to the private sector on a promise to fairly balance our privacy interests against the benefits of innovation)?

Privacy Paradoxes

One of the privacy paradoxes that people talk about is that while people claim to desire privacy, their practices do not appear to be privacy protective. Is it reasonable to say ‘browser beware’ and assume consent for whatever purpose you want when people visit your web site.

Feelings of adequacy

There was a GDPR panel yesterday related to whether or not Canadian privacy laws would be deemed ‘adequate’ under the GDPR. Do you think that the PIPEDA principle of consent is ‘adequate’ compared to the GDPR?