



August 6, 2019

Office of the Privacy Commissioner of Canada
30 Victoria Street
Gatineau, QC K1A 1H3

Sent by email to OPC-CPVPconsult2@priv.gc.ca

Re: Consultation on Transfers for Processing

The Canadian Services Coalition welcomes the opportunity to provide comments to the Office of the Privacy Commissioner (OPC) on its revised consultation document related to data transfers. The Canadian Services Coalition, housed within the Canadian Chamber of Commerce, is the voice of the Canadian services industry on international issues. As a result, we approach this consultation from the perspective of ensuring Canada remains a competitive jurisdiction in the global business landscape.

Canadian businesses can only thrive when they maintain the support of their customers through strong relationships built upon trust and confidence. This reality drives Canadian businesses to ensure that consumers' sensitive personal and private information is protected with the utmost diligence. The Canadian business community engages in forums such as the Organization for Economic Co-operation and Development, International Chamber of Commerce, G7, G20, and Asia-Pacific Economic Cooperation, among others, to develop high standards that strike the appropriate balance on data governance rules.

The role of data collection is crucial for Canada's international business competitiveness. International trade and the supply chains of Canadian businesses increasingly rely on the movement and analysis of data. From the perspective of services companies, the use of supporting technologies such as cloud computing and third-party providers enhances the ability of Canadian companies to compete both domestically and internationally.

Data collection and analysis also enables Canadian companies making physical goods to participate in international trade by reaching customers that were previously out of reach. Small and medium-sized companies, which make up the majority of Canadian companies, also rely on digital technologies to participate in international commerce.

While we recognize the OPC's desire to protect consumer data, the view of our members is that Canada's Personal Information Protection and Electronic Documents Act (PIPEDA) is a strong law that holds organizations accountable. PIPEDA enforces strict limits to data collection, use, and disclosure. This framework ensure that companies must consider the impact on individuals and the sensitivity of their data. Furthermore, the 2009 Guidelines for Processing Personal Data Across Borders has worked well for individuals and businesses, and is consistent with PIPEDA on the *transfer* of personal information for processing, rather than the *disclosure* of personal information for the recipient's own purposes.

Canada as an Outlier

As a, comparatively, small economy, Canada's businesses thrive when our country is able to maintain legal and regulatory alignment with other jurisdictions.

Should the OPC proceed with the proposal that interprets transfer as a disclosure, Canada would be a global outlier. No other jurisdiction in the world requires organizations to give individuals a choice as it pertains to whether their personal information can be processed by a third-party service provider domestically. Requiring express consent to data transfers would be highly disruptive to the services industry. Reading into PIPEDA a right to require organizations to "in-source" or "localize" functions would not be consistent with the Supreme Court of Canada's guidance that an interpretation of PIPEDA must take into account the legitimate interests of businesses.

Substantially similar Canadian laws also do not have this transfer-as-a-disclosure provision. For example, most health privacy laws, including those deemed similar to PIPEDA such as Ontario's Personal Health Information Protection Act (PHIPA), explicitly treat the sharing of information with an agent or service provider as a "use" of information, rather than a "disclosure" to a third party that would require additional consent. Similarly, the Alberta Personal Information Protection Act (PIPA) sets out that an organization which intends to transfer personal information outside of Canada for processing must previously have provided notice to individuals of its policy and procedures addressing such transfer. Should the OPC adopt the opposite interpretation with respect to PIPEDA, organizations may find themselves subject to conflicting rules and obligations.

The impact of requiring consent for the use of service providers in processing data would result in both a disruption to consumers and consent-fatigue. Furthermore, applying these proposed rules risks potentially reducing their access to products they are already receiving if they become over-whelmed and do not provide consent for a service or product already being consumed.

The impact of this chill on the business climate should not be under-estimated. As stated above, Canada's competitiveness as a destination for investment relies in large measure on our ability to align with global standards and reduce the cost of businesses to operate here. These proposed measures will mean increased costs for businesses to maintain duplicative processes and infrastructure, as well as negating the competitive advantages that come with out-sourcing and specialization. It is also important to particularly underscore that this also limits options for SMEs to outsource functions that cannot be done in-house. SMEs make up the majority of Canadian companies and do not have the capacity to easily meet these proposed additional burdens, thereby making them less competitive. Overall, increasing the complexity and cost of doing business in a jurisdiction the size of Canada will ultimately drive away investment and decrease consumer choice.

Canada's Trade Obligations

Our country's free trade agreements are crucial for Canadian businesses to be able to access new markets and customers. Amongst the core elements of our country's most advanced trade agreements are the inclusion of digital trade provisions, including specifically around cross-border data flows.

Article 14.11.2 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) states that "[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person." Article 14.11.3(b) further states that any derogations from this

measure must “not impose restrictions on transfers of information greater than are required to achieve the objective.” Article 19.11 of the Canada-United States-Mexico Agreement (CUSMA) uses similar language.

The new OPC expectations to obtain consent prior to transferring information for processing could be challenged under CPTPP and CUSMA on the basis that a safeguard has been implemented which is greater than necessary for the protection of consumer privacy. However, in the current framework no restrictions are created by the expectation that consumers should be notified that their information may be transferred out of the country for processing. As a result, this raises the real possibility of trade disputes by our FTA partners, which will only create uncertainty for businesses, foreign and domestic, that operate in Canada.

CUSMA Article 19.8 and CPTPP Article 14.8 both acknowledge the important role of personal information protection in enhancing consumer confidence. Both agreements also encourage compatibility in personal information protection regimes, which are reinforced in general cooperation provisions in CUSMA Article 19.14 and CPTPP 14.15. The OPC should work with Global Affairs Canada and our international counterparts in that spirit to ensure alignment in our data protection regimes with major trading partners.

Set against the backdrop of our country’s existing trade commitments, the OPC must also keep abreast of the ongoing work of Global Affairs Canada in digital trade discussions. For example, Canada’s text proposals in the WTO e-commerce discussions closely mirror those of the CUSMA and CPTPP.

Long-Term Certainty

As mentioned above, Canada’s competitiveness as a destination for investment is directly correlated with the certainty of our marketplace framework rules, which includes data governance. The OPC’s consultation document notes that “any amended guidelines we may publish may be short lived if the government, as it appears likely, moves to amend PIPEDA in relation to transborder data flows.”

Therefore, pressing ahead at this juncture only to have to re-adjust to potentially different rules in the near-term is a substantial burden on Canadian businesses from a compliance cost standpoint. Changes of this magnitude must be discussed in the wider context of the federal government’s plans and it would therefore be pre-mature for the OPC to move ahead with changes at this time.

Thank you once again for the opportunity to participate in this consultation. We would be happy to discuss further with you any elements of our submission.

Sincerely,

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