



July 29, 2019

VIA E-MAIL

OPC-CPVPconsult2@priv.gc.ca

Re: Consultation of Transfers for Processing

The Electronic Transactions Association (“**ETA**”) submits these comments in response to Office of the Privacy Commissioner’s (the “**OPC**”) consultation on Transfers for Processing (Reframed) Discussion Document (the “**Consultation Document**”). ETA and its members support privacy protections designed to protect the personally identifiable information of Canadian individuals. However, the ETA and its members are concerned that any reinterpretation of the law in respect of data processing and transborder transfers will have significant negative consequences for businesses and will not offer any meaningful additional privacy protections to individuals. We hope that these comments will assist the OPC in understanding the potential ramifications in a change in its policy position to the FinTech industry.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA’s members include financial institutions, mobile payment service providers, mobile wallet providers and non-bank online lenders that make commercial loans, primarily to small businesses, either directly or in partnership with other lenders. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient and rewarding payment solutions and lending alternatives. ETA member companies value the privacy protections that PIPEDA and other Canadian laws provide to protect the personal information of Canadian end users.

As noted in the Consultation Document, accountability and consent are separate principles under PIPEDA and no one principle excludes the application of the others. Any processing of personal information must comply with all the principles set out in Schedule 1 of PIPEDA. Accordingly, the principle of consent does apply to the transfer of personal information to a third party for processing, including transborder transfers, but a key consideration is whether the transfer constitutes a "disclosure" of information by the accountable organization. However, as outlined in the 2009 Guidelines for processing personal data across borders (“**2009 Policy Position**”), and several decisions from the Office of the Privacy Commissioner of Canada (“**OPC**”), the transfer of personal information to a service provider for processing is a “use” of the personal information by the accountable organization and not a “disclosure” to the service provider. The accountable organization complies with the consent principle by ensuring that it obtains meaningful consent to use the personal information in the manner contemplated, whether that use is carried out by the accountable organization directly and/or by a service provider acting on its behalf.

While it is true that PIPEDA does not clearly differentiate between disclosures and transfers for processing, as a principles-based law, many of PIPEDA's requirements have been left to interpretation by the OPC and the courts. To date, interpretations have recognized that there is a distinction between a transfer of personal information to a service provider who is only permitted to process the personal information in accordance with the instructions of the accountable organization, and not for its own purposes, and an outright disclosure, where the receiving organization uses the information for its own purposes. In the former situation, the transferring organization remains accountable for, and in control of, the personal information processed by the service provider and as such, any processing by the service provider is considered a "use" by the transferring organization. In the latter situation, the disclosing organization is no longer accountable for, or in control of, the personal information that was disclosed to the third party. As such, this is considered a "disclosure". These interpretations strike the right balance between allowing businesses to outsource normal business activities so that they can grow, thrive and innovate, while protecting personal privacy by ensuring that the transferring organization remains accountable for the information.

In our view, there has been no relevant change to PIPEDA that justifies a wholesale reversal of the 2009 Policy Position. Re-interpreting the law now will have significant negative consequences for businesses and will not offer any meaningful additional privacy protections to individuals. Specifically, it is the view of the ETA that the changes proposed by the OPC will have the following ramifications:

1. **Dilute consent and result in consent fatigue.** The Guidelines on Obtaining Meaningful Consent recognize that providing a lengthy privacy notice serves no practical purpose when obtaining informed consent. However, the Guidelines also list a number of key pieces of information that must be brought to the attention of the individual at the time consent is requested. In some cases, this inevitably results in a somewhat lengthy privacy notice, or privacy consent process (for example, where privacy disclosures are provided throughout an onboarding process). Requiring consent for disclosure of personal information to service providers for processing will further increase the length of these privacy disclosures, and thereby reduce the digestibility of this information, resulting in less information being read and understood by the individual.

The ISED Paper recommends that PIPEDA be amended to reduce reliance on consent for processing personal information in connection with standard business processes. This is in part in recognition of the fact that consent puts too much responsibility on the individual to ensure that his or her personal information is handled appropriately, when in fact this responsibility should fall on the accountable organization. The OPC's proposal is in direct conflict with the ISED Paper's proposal and places increased responsibility on the individual to ensure appropriate handling of their personal information.

2. **Create uncertainty and unpredictability for businesses.** In connection with the Government of Canada's Digital Charter, Innovation, Science and Economic Development Canada released a number of proposals to modernize PIPEDA in its paper, *Strengthening Privacy for the Digital Age* ("**ISED Paper**"). One of the perceived shortcomings of PIPEDA identified in the ISED Paper is that PIPEDA's principles-based drafting makes it difficult for organizations to understand what is required of them. Over time, the OPC has released guidance documents, policy positions and investigation reports, that help to clarify PIPEDA's requirements. Organizations should be able to rely on this guidance to


understand their obligations under PIPEDA. If the OPC can reverse its guidance at any time, without any change in the underlying legislation, this will introduce an additional level of uncertainty and unpredictability for businesses that are subject to PIPEDA. As discussed in more detail below, this uncertainty and unpredictability is costly to businesses and may result in businesses not entering, or leaving, the Canadian market.

3. **Reduce interoperability with other jurisdictions.** One of the objectives for the modernization of PIPEDA, as outlined in the ISED Paper, is to ensure interoperability with other jurisdictions, including the United States and the European Union. When every business can instantly operate in the global economy with a simple website, interoperability is crucial to help businesses run smoothly and avoid confusion. Requiring consent for the transfer of personal information to service providers for processing, will create additional interoperability challenges for organizations that are subject to both PIPEDA and the privacy laws of other jurisdictions, such as the GDPR. In particular, under the GDPR consent is relied upon only when there is no other lawful basis to process personal information. Further, consent under the GDPR is only valid if it can be “freely given”, meaning that the individual must have the opportunity to refuse to provide his or her consent. Consent cannot be relied upon under the GDPR in circumstances where the individual must provide his or her consent in order to obtain a product or service. However, the Consultation Document states that with respect to transfers of personal information to service providers for processing, an individual may have no choice but to consent if they wish to receive products or service from a business. If the proposal set forth by the OPC is implemented, businesses will need to develop different onboarding flows for Canada as compared with other jurisdictions.
4. **Have no meaningful impact on accountability.** It is clear from the Consultation Document that the OPC is looking to consent as a means of addressing perceived gaps in PIPEDA as it relates to accountability. However, it is difficult to identify how consent can have any meaningful impact on accountability – as noted in the Consultation Document and as described above, accountability and consent are two distinct requirements under PIPEDA. If the OPC is concerned about how organizations are managing their relationships with third party service providers, it should issue guidance on this topic. For example, the OPC could outline the types of data protection terms that the OPC would expect to see in a services agreement with a service provider and the types of preliminary and ongoing diligence that should be conducted. This type of guidance would be appreciated by businesses and would be much more effective in addressing perceived issues relating to accountability.
5. **Be costly for organizations with no meaningful benefit to consumers.** With the release of the Guidelines for Obtaining Meaningful Consent in May of 2018, which came into effect in January of 2019, organizations spent a great deal of time and money reviewing and revising their consent processes and consent language to ensure that individuals were provided with meaningful information at the time consent was requested. If the position put forward by the OPC is implemented, organizations will again need to review and revise their privacy consent language. This is a costly and time-consuming exercise for businesses, and it is unreasonable to impose these costs on businesses multiple times within such a short time period, particularly when the law itself has not changed and there is no meaningful benefit to consumers. Further, if the proposals set forth in the ISED Paper move forward, including the proposal to reduce reliance on consent for normal business activities and to specify what information must be provided

to the individual at the time consent is requested, organizations will again need to revisit their privacy consent **language** and processes to ensure compliance.

ETA thanks you for the opportunity to submit these comments.

Yours respectfully,

A handwritten signature in black ink that reads "Scott E. Talbott". The signature is written in a cursive style with a large initial 'S' and a distinct 'E'.

Scott Talbott
Senior Vice President
Electronic Transactions Association