COVID19 – Key Legal Issues For Your Charity or Non-Profit Organization to Consider.
Tuesday, May 5, 2020

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Privacy and Cybersecurity during COVID-19
David Krebs
Agenda

• Privacy considerations for organizations during a pandemic
• Overview - Cyber incidents in Canada
• Risks to business
• I think we’ve been hacked…what happens next?
Personal Information

PIPEDA defines PI as “information about an identifiable individual”.

- excludes business card information.

According to the OPC*, personal information includes any factual or subjective information, recorded or not, about an identifiable individual. This includes:

- Age, name, ID numbers, income, ethnic origin, or blood type;
- Opinions, evaluations, comments, social status, or disciplinary actions;
- Employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or change jobs).
Managing Privacy During COVID-19

- Federal PIPEDA and provincial equivalents may or may not apply – cautious approach is to comply with PIPEDA. Also, common law of privacy applies to both employee and other personal information collected, used or disclosed.


- Overarching view of OPC: "The OPC recognizes that the COVID-19 crisis is a rapidly evolving situation that requires swift and effective responses to address extraordinary public health needs. The right to privacy is not absolute. However, even in these challenging circumstances, government institutions should still ensure that their measures are necessary and proportionate, which means essentially evidence-based, necessary for the specific purpose identified and not overbroad."
OPC Framework

Additional measures impacting privacy must continue to have the following:

• Legal Authority – Consent must be obtained or collection/use/disclosure without consent under specific exception (e.g., required by public authority during pandemic).

• Purpose and Time Limitation: collection for specific purpose and only for specific time related to that purpose – privacy expectation during pandemic may be slightly less but it is not reasonable to "repurpose" that information for other government departments or commercial entities.

• Proportionality.

• Accountability.

• De-identification and other safeguarding measures.

• Vulnerable populations – greater effect on sharing data already more sensitive for some groups.

• Openness – be clear and open about why information is being collected and with whom it will be shared.
Key Takeaways

• Cyber threats are real and are constantly changing – criminals exploiting circumstances of pandemic: fear and increased online traffic and reliance on videoconferencing and communication.

• Cyber Incidents carry a number of operational, reputational, and legal risks.

• Investments in cybersecurity are worth it – preparedness, technology/infrastructure, legal/compliance resources, training, and insurance are tools that should be considered and utilized.

• Think about how you would handle a cyber security attack or a sudden loss of information.

• Incident response is a team-sport – IT security and forensics experts work hand-in-hand with legal counsel, PR, and key management; Communication is key! Breach communication not intuitive.

• Ransomware and (Business Email Compromise) BEC on the rise and changing.
Cyber Incidents in Canada
October 2018-2019

- Over a year, an estimated **28 million** Canadian data records compromised in **680 reported security breaches** reported.

- New breach requirements were added to PIPEDA, and the number of reports by companies and individuals has **surged six-fold**, revealing **new trends** and priorities for the coming year.

Source: OPC Blog
Cyber Attacks – By the Numbers

- Average time to identify and contain a breach: 241 days.
- Breach life-cycle of under 200 days costs $1.2M less than one with over 200 days.
- 67% of costs are in year 1, 22% in year 2, 11% in year 3.
- $187: cost per record during a breach.
- Average cost: $4.4M per data breach (Canada is 4th highest). Lost business: greatest contributor.
- Top industry – financial.
- Average size of breach in Canada – 23,000 records.
Figure 5:
Cost of a data breach by country or region
Measured in US$ millions

- United States: $8.19
- Middle East: $5.97
- Germany: $4.78
- Canada: $4.44
- France: $4.33
- United Kingdom: $3.88
- Japan: $3.75
- Italy: $3.52
- South Korea: $3.30
- South Africa: $3.06
- ASEAN: $2.62
- Scandinavia: $2.30
- Australia: $2.13
- Turkey: $1.86
- India: $1.83
- Brazil: $1.35
Evolving and Increasing Threats

• Number of active malware growing – millions of strains.
• Criminal activity is many times automated.
• Activity can be targeted – they know you and what you’re able to afford
• Attacks exploiting fears and increased online presence surrounding COVID-19 pandemic:
  ▪ Phishing emails (eg claiming to be from WHO)
  ▪ Financial phone scams
  ▪ Collecting personal data (passwords and credentials) phone scams
  ▪ Scam Emails to install malware
  ▪ Fake stores selling fake goods online (eg: PPE)
  ▪ Videoconference hacking
  ▪ Ransomware on APPs claiming to help with tracking
  ▪ Google currently blocking 18M emails per day related to coronavirus scams/phishing emails
  ▪ Hacking telemedicine delivery
How Stolen Information is Abused

- Government documents or benefits fraud (38.7%)
- Other identity theft (21.8%)
- Credit card fraud (17.4%)
- Phone or utilities fraud (12.5%)
- Bank fraud** (8.2%)
- Attempted identity theft (4.8%)
- Employment-related fraud (4.8%)
- Loan fraud (4.4%)
Risks to Businesses & Legal Obligations
Cyber Attacks Risk to Business

- Director and Officer liability.
- Legal liability including litigation.
- Regulator enforcement and investigations.
- Failure to meet key contract terms.
- Economic harm (e.g. loss of confidential information/IP).
- Reputational harm.
- Business interruption.
- Physical harm.
Do You Think You Have Been Hacked?

- Take a deep breath…and do not panic.
- Act swiftly but with purpose.
- Follow your plan
- If you don’t have a plan – contact someone you trust and who has experience.
- Basic Steps:
  - Contain.
  - Assess risk – to operations and to data.
  - Investigate – internal vs external threat; was there data extraction; was there a bad actor.
  - Remediate.
  - Know your legal and contractual obligations – which laws apply? What do contracts say?.
  - Consider communication strategy in light of your "hard" obligations - who are your stakeholders?.
  - Is there risk to individuals or other stakeholders based on the breach?.
  - Implement program to avoid and/or prepare for next incident.
Types of Attacks

- Ransomware.
- BEC.
- Malware.
- Data theft.
- DDOS (Denial of service).
- Phishing, Spoofing, Spear-fishing (Social engineering).
- A combination of the above.
- Straight fraud.
Who to Notify

• Are individuals affected by the breach? What type of harm is possible? Has harm already occurred?
• Your vendors, customers, employees, or other parties?
• Have you notified your board?
• Should you notify the police?
• What do your external contracts say about notification?
• How do you want to be seen in the public eye.
Summary & Wrap-up

• Collect, use, and disclose personal information only pursuant to foundational privacy principles → COVID-19 has changed context but it has not done away with individual privacy rights.

• Have specific oversight of data collected or disclosed during COVID-19.

• Increased fear and collection and willingness to share information related to pandemic a treasure trove for criminals.

• Cyber security is a key and integral part of operations – should be resourced and treated as such.

• Call in the experts – legal, IT, PR – for program development, incidents, and dealing with the aftermath.

• Consider cyber security/privacy/IT issues in vendor contracts, M&A transactions and when advising clients on overall risk exposure.
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Execution of Gift Agreements, Wills and Powers of Attorneys

Darren Lund
Ontario – Execution of Wills

• Execution of wills in Ontario governed by *Succession Law Reform Act* (“SLRA”)
  • Signed by testator (or by someone else in “presence” of testator on behalf of testator) in “presence” of two witnesses.
  • Witnesses must be “present” at the same time, witnesses sign will in “presence” of the testator.
  • Gift in will to witness, spouse of witness, or anyone claiming under the witness is void
  • Strict compliance required.
  • Holograph will exception → *entirely* in testator’s own handwriting.
Ontario – Execution of Powers of Attorney

• Execution of powers of attorney in Ontario governed by Substitute Decisions Act, 1992 (“SDA”).
  • Signed by grantor in “presence” of two witnesses.
  • Witnesses sign will in “presence” of the grantor.
  • Statute includes list of persons who cannot be a witness.
    • Attorney, attorney’s spouse or partner, grantor’s spouse or partner, child of the grantor (including “settled intention” child), person whose property is under guardianship or who has a guardian of the person, a person under 18 years of age.
  • Court can declare power of attorney effective that does not meet formal requirements if in interests of grantor or grantor’s dependants.
Ontario – Problem with Formal Requirements

• Presence interpreted to mean physical presence.
• In time of Covid-19, may pose health risks that cannot be mitigated with protective measures in all cases.
• Testator/grantor may not be able to arrange for qualified witnesses.
• Holograph will not appropriate for complex wills or changes.
• No ability to make a holograph power of attorney.
Ontario - Options Under Existing Statutes

• Delay execution.

• Testator/grantor arranges for qualified witnesses.
  • Lawyer supervises by video conference (preferred) or phone.
  • Lawyer does not supervise (not recommended).

• Physical presence with precautions.
  • Masks and gloves, physical distancing, separate pens, immediate handwashing.

• Holograph wills.
Ontario Emergency Order – April 7, 2020
(O. Reg. 129/20)

• Presence may be satisfied by “audio-visual communication technology”.
  • Any electronic method of communication in which participants able to see, hear and communicate with one another in real time.
• Temporary (for duration of the emergency).
• Prospective (does not grandfather previously executed documents).
• One witness must be lawyer or law clerk.
• Does not permit electronic signatures, just virtual witnessing.
Ontario - Problems with April 7, 2020 Order

• Did not permit execution in counterpart.
• Document must be passed around so that we signatures all appear on same document.
• May require up to 3 videoconferences.
• May not always be able to complete process on same day.
• Risk of lost document.
• Risk of testator/grantor or witness dying before fully executed.
• Cumbersome logistics.
Ontario Emergency Order – April 33, 2020 (Amending O. Reg. 129/20)

• Still temporary and prospective, one witness must be lawyer or law clerk, no electronic signature.

• If audio-visual communication technology is used, document may be signed in counterpart.
  • Each party must sign “complete, identical copy” and they together constitute the document.
  • Document still “identical” if there are “minor, non-substantive differences in format or layout”.

Ontario – Execution in Counterpart

- Does not permit one document with multiple signing pages.
- Documents may become very large.
- Lawyer needs to make arrangements for delivery of complete documents to client or witness (hard copy or e-mail).
- Take precautions to ensure all parties have correct documents.
- Parties must send copies back to lawyer in due course for assembly of fully-constituted document
  - Risk of lost counterpart.
  - May be urgency in case of power of attorney.
British Columbia and Alberta

• Neither BC nor Alberta has implemented changes to the law to permit virtual witnessing or virtual execution of wills, power of attorney.

• Both Provinces are “substantial compliance” jurisdictions.
  • Court may admit to probate a will that does not meet the formal requirements of a valid will if the intention of the testator for it be to the testator’s last will is clear.

• May be the reason that no changes have been implemented.
Saskatchewan

• Emergency regulations enacted to permit execution of wills and powers of attorney with use of electronic means.
• Law Society of Saskatchewan has implemented binding Practice Directives.
• Rules are more detailed than Ontario rules.
Saskatchewan - Wills

• New regulation permits execution using electronic means.
• Two witnesses, one must be SK lawyer, wet signatures required.
• Lawyer or grantor must be subject to quarantine, travel restriction, or public health isolation order.
• Testator and first witness sign first (requires circulating document).
• Lawyer receives document and convenes video conference:
  • Lawyer must do line-by-line comparison to the will lawyer drafted, or read entire will during video conference if lawyer did not draft the will.
  • Testator and first witness acknowledge their signatures, then lawyer signs as second witness.
Saskatchewan – Powers of Attorney

• Existing law permits one witness where witness is a lawyer.
• New regulation permits the lawyer to witness the execution of the power of attorney by electronic means.
• Lawyer or grantor must be subject to quarantine, travel restriction, or public health isolation order.
• Wet signatures required.
Execution of Gift Agreements, Wills and Powers of Attorneys

Troy McEachren
Gift is a contract by which a person, the donor, transfers ownership of the property by gratuitous title to another person, the donee; a dismemberment of the right of ownership, or any other right held by a person, may also be transferred by gift.

Gifts may be *inter vivos* or mortis causa.

La donation est le contrat par lequel une personne, le donateur, transfère la propriété d'un bien à titre gratuit à une autre personne, le donataire; le transfert peut aussi porter sur un démembrement du droit de propriété ou sur tout autre droit dont on est titulaire.

La donation peut être faite entre vifs ou à cause de mort.
The gift of movable or immovable property is made, on pain of absolute nullity, by notarial act en minute, and shall be published.

These rules do not apply where, in the case of the gift of movable property, the consent of the parties is accompanied by delivery and immediate possession of the property.
QC: Gifts/donation – Form/forme

1. Don manuel / Gift with delivery

2. Notarial gift / Donation par acte notarié
QC: 1. Don manuel/Gift with delivery

- Cash / argent
- Cheque / chèque
- Wire transfer / virement bancaire
- Publically listed securities / titres cotés en bourse
- Investment accounts / comptes d'investissement
QC: 2. Notarial gift/donation par acte notarié

• Immovables / immeubles
• Private company shares / Actions de sociétés privés
QC: Notarial acts during the pandemic / Les actes notariés pendant la pandémie

Ministerial Decree 2020-010, March 27, 2020 / Décret ministériel 2020-010, 27 mars 2020

• All parties must be able to see and hear each other / Toutes les parties doivent pouvoir se voir et s'entendre
• All parties must be able to see the act to be signed / Toutes les parties doivent pouvoir voir l'acte à signer
• Each party must be able to sign/express consent using technological means / Chaque partie doit pouvoir signer/exprimer son consentement en utilisant des moyens technologiques
• Microsoft Teams, ConsignO Cloud, E-mail address / adresse électronique
QC: Wills/Testaments – 3 forms / 3 formes (art. 712 CCQ)

1. Notarial/notarié – arts. 716-725 CCQ (see above / voir ci-dessus).
2. Holograph / olographe – art. 726 CCQ.
3. Will before witnesses / testament devants témoins – arts. 727-730.1 CCQ.
QC: 2. Wills/Testaments – Holograph / olographe

• Will written entirely by the testator / Testament entièrement rédigé par le testateur.
• Will signed and dated by the testator / Testament signé et daté par le testateur.
• OK for short wills & small changes / OK pour les testaments courts et les petites modifications.
QC: 3. Wills/Testaments - Will before witnesses / testament devants témoins

- Testator – Two witness / Testateur – deux témoins
- Sign and initial in each other’s presence / Signer et parapher en présence de l'autre
- Physical presence is difficult with social distancing / La présence physique est difficile avec la distanciation sociale
- Barreau du Québec – Guide
- Electronic signature / Signature électronique – arts. 727 & 2827 CCQ
- *Act to establish a legal framework for information technology, CQLR c C-1.1, s. 39 / Loi concernant le cadre juridique des technologies de l'information, RLRQ c C-1.1, art. 39*
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