



October 15, 2008

Elizabeth Denham
Assistant Privacy Commissioner of Canada
112 Kent Street, 3rd Floor
Ottawa, Ontario
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Dear Ms. Denham:

Re: InfoCANADA PIPEDA complaint; Your Files 6100-01786, 6100-01787

Thank you for the opportunity to respond to your preliminary findings in the above-mentioned matter. The following are our comments in response.

The Facts

1. We note that the facts in this case are undisputed. Your factual findings confirm our allegations.

The Issue

2. The issue is properly stated in paragraphs 1 and 4 of your findings, and in the first and third sentences of para.42: i.e., Does infoCANADA's combining of aggregated geo-demographic data with publicly available names, addresses and telephone numbers result in "personal information" the use or disclosure of which requires consent?

3. However, the second sentence of para.42 incorrectly characterizes the issue as "In other words, does the White Pages information lose its consent-free status as a result of the attribution and sorting that infoCANADA performs?" We do not allege that White Pages information loses its "consent-free status" as a result of infoCANADA's practices. Rather, we allege that infoCANADA's consumer lists constitute non-publicly available "personal information" that is subject to the consent requirement. The consumer lists in question are not the same as White Pages information; indeed, they are qualitatively different and it is this difference that lies at the heart of our complaint.

Preliminary Findings

4. You have preliminarily concluded that:

- a) the fact that a person lives in a neighbourhood with certain characteristics does not constitute “personal information” about the individual within the meaning of s.2(1) of PIPEDA; rather, it is information about the neighbourhood (para.59);
- b) the data in question constitutes “publicly available” personal information and is thus exempt from consent requirements under PIPEDA: “infoCANADA [does not change] the status of White Pages information from publicly available personal information to personal information subject to consent requirements”; the data “remains exempt from consent requirements when sold by infoCANADA” (para.60);
- c) the company does not *create* personal information; rather, it merely uses personal information that is publicly available (para.61); and
- d) the company uses the personal information in question for legitimate, appropriate purposes (para.62).

5. While not explicitly cited as reasons for your preliminary conclusions, the following factors are discussed implicitly or explicitly in the report and appear to form part of the basis for the above conclusions:

- a) The accuracy of the data in question;
- b) The difficulty of compiling the data in question;
- c) The widespread nature of the practice in question;
- d) The harm caused by the practice in question.

6. We discuss each of these issues below.

infoCANADA’s consumer lists constitute “personal information” under PIPEDA

7. “Personal information” is defined in s.2(1) of PIPEDA as “information about an identifiable individual...” The definition does not exclude information that is also about an employee, an organization, a neighbourhood, or another group of unidentified people. Indeed, information about an individual is often simultaneously information about others such as employers (e.g., employee evaluations), organizations (school uniforms), properties (property appraisals), physicians (prescriptions) or neighbourhoods (income levels). Just because certain information is about a neighbourhood doesn’t mean that it cannot also constitute information about an identifiable individual.

8. Given the clear and broad definition of “personal information” in PIPEDA, we fail to understand how the fact that a named individual lives in a certain neighbourhood could not be considered “personal information”. It is clearly “information about an identifiable individual”. This is so whether or not the information includes characteristics of the neighborhood; including such additional information in a database or list merely serves to enhance the value - and possibly the sensitivity - of the personal information.

9. Address and telephone number are also “personal information” under the PIPEDA definition, as long as they are (or can be) associated with an individual. Whether or not such personal information is exempt from PIPEDA’s consent requirement is a separate question.

10. The finding that infoCANADA’s consumer lists do not constitute “personal information” implies that there is no significant difference between infoCANADA’s consumer lists and the aggregated non-personalized geo-demographic data on which the lists are based. Clearly, there is a difference: infoCANADA’s lists include individual names, addresses or telephone numbers, and are designed precisely to allow for targeting of *individuals*, not just neighbourhoods.¹

11. It is misleading to describe infoCANADA’s consumer lists as “analogous to walking through a specific neighbourhood where certain general characteristics of the community would be apparent to the observer.” (para.8 of Preliminary Report). This is a fair analogy for the aggregated geo-demographic data sold by Environics or Generation 5; it is not a fair analogy for infoCANADA’s individualized consumer lists. A more apt analogy for infoCANADA would include knocking on each door of that neighbourhood and taking down the name, address and telephone number of the household occupant(s).

12. Furthermore, the preliminary finding that infoCANADA’s consumer lists do not constitute “personal information” is inconsistent with a recent finding of yours (#390) that residential property appraisal documents constitute “personal information” of the property owner under section 2 of the *Act*. In that case, the bank had refused the complainant’s access request for the appraisal on the basis that that the appraisal was information about the property and not about him. You properly found that “since the property was in the complainant’s name, the information relating to the property, including its market value, was his personal information”, to which he had a right of access.

13. We therefore strongly disagree with the first preliminary conclusion, stated in para.4(a) above. The information in question is about *both* the individual and the neighbourhood. Indeed, infoCANADA’s business is *all about* taking neighbourhood-only information and turning it into information about individuals.

infoCANADA’s lists do not constitute “publicly available” information under the Act

14. The second rationale provided in the Preliminary Report is that the information in question (even if “personal”) is publicly available and therefore exempt from consent requirements. The reasoning here is that name, address and telephone number taken from the White Pages qualify as publicly available data exempt from PIPEDA’s consent requirements, and that merely sorting them by geo-demographic characteristic does not change their status under PIPEDA.

¹ The fact that neighbourhood targeting may be just as harmful or discriminatory as individual targeting is beside the point here, albeit deserving of another inquiry. Harm is discussed below.

15. We respectfully disagree. As noted above, the issue is not whether White Pages data “loses its consent-free status” as a result of infoCANADA’s practices, but rather whether the lists sold by infoCANADA constitute “publicly available” data exempt from the consent requirement. It is infoCANADA’s lists, not White Pages listings, that are at issue here.

16. InfoCANADA’s lists include both exempt data (name, address and telephone number) and non-exempt data (geo-demographic characteristics). Although not necessarily “personal information” when in its raw form supplied to infoCANADA, geo-demographic data becomes “personal information” once linked to an individual. The product of this linkage is neither publicly available in the ordinary sense of the word nor specified as such under PIPEDA so as to be exempt from consent requirements. Rather, it is a new, proprietary dataset of names associated with geo-demographic characteristics.

infoCANADA creates and sells personal information that is not publicly available

17. The Preliminary Finding states, in para.61, that “the company does not *create* personal information; rather, it uses personal information that is publicly available.” This finding is mistaken on a number of counts. First, it confuses two separate issues: (a) whether the data in question constitutes “personal information”, and (b) whether it qualifies as exempt publicly available data under the Act.

18. Second, this finding ignores the fact that infoCANADA sells personal information in the form of proprietary consumer lists, which lists clearly have value and are *not* otherwise publicly available.

19. Third, the finding is based in part on the notion that infoCANADA merely “filters” or “sorts” otherwise public data by geo-demographic characteristic, and therefore does not “create” any new personal information that would be subject to the consent requirement under PIPEDA. This notion is false.

20. Whether infoCANADA’s practices are characterized as “sorting”, “filtering”, “merging”, “categorizing”, “creating”, or something else is largely a matter of semantics. Clearly, infoCANADA is taking at least two different sources of data and combining them to create a qualitatively different data set that clearly constitutes “personal information” under the Act and that is not otherwise publicly available.

21. infoCANADA’s collection practices are not at issue. What is at issue here are infoCANADA’s use and sale of the personalized data, without consent.

22. It is important to consider the practice from two equally valid perspectives:

- a) enhancing White Pages data with geo-demographic data, and
- b) enhancing geo-demographic data with personal information from the White Pages.

23. The Preliminary Finding considers only the first perspective, treating infoCANADA's end product as simply a variant of White Pages data. It ignores the equally valid perspective which starts with aggregated geo-demographic data and adds in the White Pages data.

24. Looking at the practice from this perspective, infoCANADA takes non-personal information (geo-demographics) and turns it into personal information by linking it with named individuals. This personalization of otherwise non-personal data permits infoCANADA's customers to engage in individualized marketing or other practices, using data such as assumed ethnicity, age, gender, and income. Many Canadians consider such targeted marketing to be invasive of their privacy. (See more on potential harms, below).

25. The Preliminary Finding also confuses the common practice of using of telephone directory listings to enhance existing subscriber lists, with infoCANADA's use of geo-demographic data to enhance telephone directory listings. In particular, para.17 of the Preliminary Report notes that infoCANADA provides list enhancement services to businesses: "For example, infoCANADA may add telephone numbers to the lists of subscribers provided by a customer who is a magazine publisher."

26. The two are qualitatively different. Using exempt White Pages data to add publicly available telephone numbers to an existing subscriber list is permitted under PIPEDA without consent. This enhancement does not add anything other than specified publicly available data to an existing list of names. Nor does it personalize otherwise non-personal data.

27. In contrast, enhancing telephone directory listings by adding geo-demographics adds *non-publicly available data* to existing lists of individuals. This is completely different from the example provided above. While individuals clearly have privacy interests in their listed telephone numbers, PIPEDA deems such interests to be minimal. In contrast, one's estimated age, income, gender, ethnicity, and home ownership status are recognized by PIPEDA as worthy of protection given the privacy interests attached to them.

The accuracy of the information is immaterial

28. Under PIPEDA, information need not be accurate in order to constitute "personal information" or to benefit from statutory protections. This approach recognizes that the use and disclosure of inaccurate information about individuals can in fact be more damaging than use and disclosure of accurate information.

29. The Privacy Commissioner has herself recognized the privacy threats from collection, use and disclosure of inaccurate information:

Given the modern ability of so-called "infomediaries" to correlate information from numerous disparate sources and the multiplicity of organizations that use such data brokers, personal information – *whether it be accurate or inaccurate* – can make its way into a series of

other databases accessible to others without authorization, which can have deeply harmful effects.”²

30. The Privacy Commissioner has also acknowledged, in her objections to Google *Streetview*³, the way in which increasingly sophisticated technologies can be expected to improve the quality and accuracy of information gathered, such that even where the information gathered is initially of poor quality, over time it becomes far more accurate and thus privacy invasive.

31. Accordingly, the level of accuracy of infoCANADA’s consumer lists should not be at issue in this case. Marketplace *perceptions* of list accuracy and use of the lists in question may be relevant to an assessment of harm caused by infoCANADA’s practices, but it does not bear on the issue of whether the information in question is “personal information” or whether its use and disclosure requires consent.

32. Yet, the Preliminary Report contains an extensive discussion of the accuracy of infoCANADA’s lists (paras.49-57), noting that the level of accuracy varies widely depending on “selects”, that “under worst-case assumptions, the accuracy of the income attribute...can be quite high”, and that the information is “unlikely to be highly accurate with respect to each individual on the list”.

33. It is not clear how these findings factor into the ultimate conclusions reached. The fact that they appear in the Report, however, suggests that they are considered somehow relevant to the analyses of whether infoCANADA’s lists constitute “personal information” and, if they do, whether their compilation, use or disclosure by infoCANADA requires consent. For the reasons set out above, the level of accuracy of infoCANADA’s lists is not relevant to these findings and should therefore form no part of the findings other than tangentially with respect to potential harms.

The difficulty of compilation is irrelevant

34. Paragraphs 50-57 of the Preliminary Findings also discuss at some length the ease with which anyone can gather, through internet searches or other public sources, the kind of information sold by infoCANADA. For example, paragraph 50 states: “Our results suggest that, with minimal internet-search skill, it is quite easy to gather some basic information about individuals if their names and addresses are known...However, there are limitations to what can be ascertained.” Para. 54 states: “Because it is relatively easy to gather basic information – gender, ethnicity, religious origin, dwelling type – about individuals who are listed in the White Pages, it is difficult to make the case for attribute disclosure. Some of the aggregate information can be easily obtained from other public sources, albeit for a fee. The key pieces of information that are not easy to obtain through public sources are income, marital status and whether the individual has children.”

² As amicus curiae in *Accusearch v. Federal Trade Commission*, online: Office of the Privacy Commissioner of Canada <http://www.privcom.gc.ca/leg_c/08-8003_e.asp>.

³ <http://www.privcom.gc.ca/media/nr-c/2007/an_070911_e.asp>

35. This discussion clearly suggests that the OPC considers the ease with which infoCANADA's lists can be compiled as relevant to its determinations of whether (a) the information constitutes "personal information", and (b) if so, whether infoCANADA's compilation, use and/or disclosure of the personal data requires consent. We submit that it is not relevant to these determinations.

36. First, personal information is personal information, regardless of how easy it is to compile.

37. Second, the fact that certain personal information is easy to compile from publicly available sources does not render it "publicly available" information exempt from consent requirements under the Act. Indeed, if the information in question were so easily available, infoCANADA would not have the successful business it has.

38. Third, treating ease of compilation as a relevant factor in this case allows technology, not humans, to determine the limits of our privacy. Such an approach flies in the face of PIPEDA, the aim of which is to establish limits to data collection, use and disclosure for the purpose of protecting individual privacy, while recognizing "the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances" (s.3). What a reasonable person would consider appropriate in the circumstances is, and should be, based not on what is technologically possible, but rather on what is desirable in society that values human dignity, autonomy and freedom.

39. In any case, the discussion in para.13 of infoCANADA's proprietary models for attributing characteristics to individuals, and methods of enhancing and updating its consumer lists, demonstrates that infoCANADA's list compilation involves sophisticated methods of data analysis, well beyond the capabilities of an ordinary person. The mere fact that infoCANADA can make a business of compiling and selling these lists is evidence of the fact that the data have value based on their difficulty of compilation.

The fact that a practice is widespread does not render legal

40. While not cited as a reason for the preliminary conclusion, the fact that "the filtering of such information through non-personal data sources is a standard, widespread practice in the marketing industry" is mentioned in para.35 of the Preliminary Report. We submit that the prevalence of a given practice does not make it PIPEDA compliant.

41. It is quite possible that many other databrokers are violating PIPEDA through their list enhancement or other practices. However, this particular complaint focuses on only one company's practices. Those practices should be assessed under PIPEDA regardless of how widespread they are in the marketing industry.

infoCANADA may be circumventing Statistics Canada privacy protections

42. Paragraphs 23-31 describe Statistics Canada's policies designed to protect the privacy of individual Canadians when selling aggregated census data. Statistics Canada ("SC")

goes to great lengths, described in paras.24-25, to ensure that inferences cannot be made about individuals within a group the demographic data of which it sells.

43. Licensees of SC must agree “not to merge or link the computer files with any other databases, for commercial sales, in such a fashion that it gives the appearance of the licensee receiving, or having access to, information about any identifiable individual, family, household, organization, or business held by SC.”

44. It would appear that infoCANADA’s practices fly in the face of SC’s policies, which seem to be designed to prevent exactly the kind of inferences that infoCANADA is making and selling for commercial gain.

45. In para.45 of the Preliminary Report, it is noted that infoCANADA no longer acquires census data directly from Statistics Canada, but rather purchases it from other vendors such as Environics and Generation 5. We wonder whether this change has anything to do with the apparent conflict between infoCANADA’s practices and SC’s policies.

Harm is relevant but not determinative

46. While not explicitly relied upon, the notion of harm is implicit in the preliminary findings, especially in the conclusion that “the use of such publicly available information by infoCANADA does not violate the reasonable person test as described in section 5(3)”.

47. Harm is not required for a finding of non-compliance with PIPEDA. Nevertheless, it is a factor in considering, under subs.5(3), whether a reasonable person would consider the practice in question to be appropriate in the circumstances.⁴

48. infoCANADA’s practices, on the surface, appear to be relatively harmless insofar as they involve the compilation and sale of consumer lists for target marketing purposes. However, as the Privacy Commissioner has acknowledged (see above), such practices can have “deeply harmful effects”.

49. This is especially so if the information in question is used for other purposes such as employment, insurance, or proactive law enforcement investigations without the individual’s knowledge - and especially given that the information is not 100% accurate. It is well known, for example, that the US Dept. of Homeland Security has been gathering personal information from commercial databases in order to construct and enhance its terrorist watch lists of hundreds of thousands of individuals, the vast majority of which are no doubt innocent, law-abiding citizens.⁵

⁴ Harm is also relevant to damages from a PIPEDA violation, of course.

⁵ See, for example, Jeff Jonas and Jim Harper, “Effective Counter-Terrorism and the Limited Role of Predictive Modelling” (Cato Institute, Dec.2006), online at <http://www.cato.org/pub_display.php?pub_id=6784>

50. Statistics Canada policy of aggregating its demographic data in such a way as to minimize the potential for re-identification or accurate inferences of individual or household attributes is proof that there is potential harm to individuals from the collection, use or disclosure of demographic data by household.

51. Indeed, infoCANADA itself implicitly admits that there is a problem with releasing data specific to the individual, when it requires that its customers “not imply to an individual that any specific information is known about that individual” (para.18, Preliminary Report).

Conclusion

52. For all these reasons, we submit that the Preliminary Findings are deeply flawed and should be reconsidered.

53. Thank you once again for the opportunity to comment at this stage of the investigation.

Yours truly,

Original signed

Philippa Lawson